

Integration of Telecommunications Markets in Australia and New Zealand: International Trade Law Implications of Bilateral Regulation of International Mobile Roaming

I. Introduction

1. The Australian and New Zealand Productivity Commissions' Discussion Draft *Strengthening Trans-Tasman Economic Relations* (September 2012) takes note on page 117 of the *Draft Report on Trans-Tasman Roaming* by the Australian Department of Broadband, Communications and the Digital Economy and the New Zealand Ministry of Business, Innovation & Employment (August 2012) ('**DBCDE Draft Report**'). This submission addresses that aspect of the Productivity Commissions' Discussion Draft. The Productivity Commissions should be aware of the international trade law implications of certain proposals canvassed in the DBCDE Draft Report. Analysis of broader questions regarding integration of the telecommunications service markets of Australia and New Zealand is contained in my previous co-authored work.¹
2. Option 4 in the DBCDE Draft Report for the pursuit of 'coordinated action' by the governments of Australia and New Zealand includes the possibility of Australia imposing **legislative price caps** at the wholesale level (pages 60, 70). This would involve the Australian government restricting the wholesale charges that Australian mobile network operators impose on foreign mobile network operators for providing mobile telecommunications services to individual subscribers of the foreign operators when they visit Australia. If this system of wholesale price capping applied with respect to New Zealand operators only (for example, pursuant to a bilateral agreement with New Zealand), it could raise concerns under international trade law.
3. Australia's obligations under international trade law include those set out in the agreements of the World Trade Organization ('**WTO**'), and those contained in Australia's preferential trade agreements.² This submission focuses on WTO law; Australia's preferential trade agreements encompass similar principles and contain many provisions mirroring WTO rules. Within the context of WTO law, this submission focuses on the primary potential violation stemming from legislative price caps imposed on a discriminatory basis (that is, to benefit New Zealand operators alone), namely the potential violation of the most-favoured nation ('**MFN**') treatment obligation in the WTO's General Agreement on Trade in Services ('**GATS**').

¹ Tania Voon and Andrew Mitchell, 'Achieving a Common Market for Telecommunications Services in Australia and New Zealand' (2007) 26 *Australian Year Book of International Law* 149.

² Singapore–Australia Free Trade Agreement, signed 17 February 2003, 2257 UNTS 103 (entered into force 28 July 2003) ch 10; Australia–United States Free Trade Agreement, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 12; Thailand–Australia Free Trade Agreement, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) art 807; Australia–Chile Free Trade Agreement, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) ch 11; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ch 8 Annex on Telecommunications.

II. Conclusions

4. This submission concludes that:
 - a. regulatory capping of wholesale charges for roaming falls within the **scope** of GATS;
 - b. Australian measures to cap wholesale roaming charges, and any bilateral agreement to engage in such capping, must therefore comply with Australia's GATS obligations;
 - c. capping of wholesale roaming charges applied by Australian telecommunications service suppliers to New Zealand suppliers alone entails a prima facie violation of Australia's MFN obligation in **GATS Article II:1**;
 - d. such a violation is unlikely to be exempted as a measure necessary to secure compliance with other WTO-consistent laws or regulations under **GATS Article XIV(c)**; and
 - e. such a violation could fall within the exception for agreements liberalising trade in services in **GATS Article V**. It is more likely to do so if the wholesale roaming caps are introduced pursuant to an amendment to the *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement* ('**Protocol**')³ rather than a free-standing agreement between Australia and New Zealand or their regulators.

III. Wholesale Price Capping Falls within GATS

5. An agreement between Australia and New Zealand to cap wholesale prices, along with associated Australian measures regulating roaming, would be likely to fall within the scope of GATS and would therefore need to comply with Australia's GATS obligations.
6. Australia has made significant national treatment and market access commitments in respect of basic telecommunications services (including voice telephone and data transmission services) under all modes of supply, and it has listed no relevant limitations regarding roaming nor any telecommunications-specific exemption from the MFN treatment obligation. Australia has specifically listed 'Digital Cellular services' and 'Mobile Data services' in the 'other' category of its GATS Schedule, meaning that its GATS commitments extend to these services.⁴
7. GATS applies to 'measures by Members affecting trade in services'.⁵ An agreement between Australia and New Zealand to cap wholesale prices, and regulations or requirements issued by Australia or Australian government bodies or agencies pursuant to that agreement, would be Australian measures that affect⁶ trade in telecommunications services because they would impact on foreign telecommunications service suppliers (in particular New Zealand suppliers, and potentially others) operating within or outside Australia.

³ Signed 18 August 1988, [1988] ATS 20 (entered into force 1 January 1989).

⁴ WTO Trade in Services, *Australia – Schedule of Specific Commitments: Supplement 3*, GATS/SC/6/Suppl.3 (11 April 1997) 3-4; WTO, *Australia – Final List of Article II (MFN) Exemptions*, GATS/EL/6 (15 April 1994).

⁵ GATS, Art I:1.

⁶ The Appellate Body has interpreted 'measures ... affecting trade in services' broadly: see, eg, *EC – Bananas III*, [220].

8. GATS defines ‘trade in services’ as the supply of a service by one of four ‘modes’.⁷ The most relevant mode of supply for the roaming regulation contemplated (that is, the mode under which WTO concerns might arise) is **mode 1** (cross-border supply).
9. At the **retail** level (that is, within the retail market relevant to New Zealand roamers as identified on page 8 of the DBCDE Draft Report), a New Zealand network operator supplies roaming services across the border to its own subscribers when they travel to Australia. Without an agreement between the Zealand operator and its subscribers (and an agreement between the New Zealand operator and an Australian operator), those subscribers would be unable to use their New Zealand-based service and number in Australia. Moreover, the New Zealand subscribers pay the New Zealand operator (not the Australian operator) for the use of their New Zealand service in Australia (with the Australian operator billing the New Zealand operator). Although cross-border services would typically be provided by a supplier of one WTO Member to a consumer of another WTO Member in the second Member’s territory, mode 1 (unlike mode 2) does not prescribe the nationality or origin of the service consumer, or (unlike modes 3 and 4) the nationality or origin of the service supplier.⁸ Accordingly, the services supplied by the New Zealand operator in this context can properly be characterised as mode 1, even though the supplier and the consumer would both be from New Zealand.⁹
10. The New Zealand operator incurs (wholesale) charges levied by an Australian operator in the course of supplying retail services to its consumer across the border in Australia, and in order to enable it to do so. A key issue that arises in relation to Australia’s **MFN** obligations, as discussed further below, is whether an agreement with New Zealand to cap wholesale prices—or Australia’s consequential roaming regulations or requirements—would entail treating New Zealand operators better than operators from other WTO Members when these foreign services suppliers provide cross-border roaming services (under mode 1) to their own subscribers visiting Australia. This potential MFN problem arises regardless of whether New Zealand operators are required by New Zealand law or regulation to ‘pass through’ the wholesale price savings to their customers. Regardless of whether the savings are passed on, as discussed further below, the New Zealand operators would benefit from a wholesale price cap while operators from other WTO Members would not.

⁷ GATS, Art I:2.

⁸ This interpretation is analogous to that of the Panel in *US – Mexico Telecoms*, which found that the fact that the reference to mode 1 supply in GATS Article I:2(a) does not specify the location of the supplier means that that location is not directly relevant to the definition of cross-border supply: Panel Report, *US – Mexico Telecoms*, [7.30]-[7.32]. See also WTO, Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS): Adopted by the Council for Trade in Services on 23 March 2001, S/L/92* (28 March 2001) [26], [28]; GATT Group of Negotiations on Services, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, MTN.GNS/W/164 (3 September 1993) 7-8.

⁹ See WTO, Council for Trade in Services, *International Mobile Roaming: Possible Implications for GATS – Note by the Secretariat, S/C/W/337* (13 July 2011) 3.

IV. Discriminatory Price Capping Entails a Prima Facie MFN Breach

11. **GATS Article II:1** provides:

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

12. GATS Article II:2 notes that Members may maintain **MFN exemptions** as listed in their negotiated list of MFN exemptions, but Australia has no MFN exemption relevant to the proposed agreement with New Zealand or associated price capping. GATS Article II:3 provides an exception for advantages provided to ‘adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed’, but this exception is similarly inapplicable on its terms to roaming between Australia and New Zealand.
13. Two key questions that arise in applying Article II:1 to the roaming agreement contemplated and consequential Australian regulations or requirements are: (i) whether the services provided by (for example) a United States operator to its subscribers visiting Australia are ‘like’ those provided by a New Zealand operator to its subscribers visiting Australia, or whether these two operators are ‘like’ service suppliers in this context; and (ii) if the relevant services and/or service suppliers are like, whether, in imposing a cap on wholesale roaming rates applied by Australian operators to New Zealand operators, Australia would be according ‘treatment ... **less favourable**’ to the United States operator and its services than to the New Zealand operator and its services.
14. **Like service suppliers** would generally include suppliers that supply like services, which in turn may be identified on the basis of factors developed in the context of the General Agreement on Tariffs and Trade 1994 (**GATT 1994**), such as the nature of the service, the classification of the service, the end-use of the service, and consumer preferences in relation to the service.¹⁰ However, in relation to the contemplated Australia – New Zealand agreement and roaming regulations, it may not be necessary to examine these factors in order to determine whether New Zealand suppliers would be regarded as ‘like’ suppliers of other WTO Members. If the relevant Australian measure distinguished between suppliers purely and explicitly on the basis of origin (that is, imposing a cap on wholesale roaming rates applied by Australian suppliers to New Zealand suppliers without imposing a cap on rates applied to suppliers from other WTO Members), and as suppliers from New Zealand and other WTO Members in this context would be the same in all material respects apart from origin, a WTO Panel is likely to conclude that the New Zealand suppliers are like the suppliers of other WTO Members for the purpose of

¹⁰ Panel Report, *Canada – Autos*, [10.248], [10.285], [10.289]; Panel Report, *EC – Bananas III (Ecuador)*, [7.322]. See also Mireille Cossy, ‘Some thoughts on the concept of “likeness” in the GATS’, in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge: Cambridge University Press, 2008) 327, 332-339.

GATS Article II:1. Panels have used similar reasoning in the context of GATT 1994 and GATS Article XVII:1 (national treatment).¹¹

15. The treatment of a United States supplier in this context appears **less favourable** than the treatment of a New Zealand supplier. Although the Australian supplier might have some discretion in determining the wholesale roaming rates it applies to each supplier, its discretion would be limited in respect of the New Zealand supplier. Thus, even though the Australian supplier could choose at any given time to apply the same rates to New Zealand suppliers and suppliers of other WTO Members, New Zealand suppliers would be assured of a maximum rate whereas suppliers of other WTO Members would not. The agreement between Australia and New Zealand, and any Australian regulations capping wholesale roaming charges on a discriminatory basis, would therefore modify the '**conditions of competition**' in the Australian market to the detriment of those other like service suppliers.¹² The more favourable treatment accorded to New Zealand suppliers would not be accorded **immediately and unconditionally** to like service suppliers of other WTO Members because, in order to benefit from a cap on wholesale roaming rates for its suppliers, the relevant WTO Member would first need to reach an agreement with Australia. This condition and the resulting differential or discriminatory treatment would be based on the origin of the supplier, contrary to GATS Article II:1.¹³
16. In the different context of the national treatment obligation regarding trade in goods, the Appellate Body has suggested that likeness is about the '**competitive relationship**' between products.¹⁴ In providing roaming services, the United States and New Zealand suppliers might not presently be competing for subscribers in the Australian market (in the sense that a subscriber to the United States supplier visiting Australia could not generally choose to obtain roaming services from the New Zealand supplier instead). However, this factor does not undermine the conclusion in relation to likeness (or less favourable treatment). To the extent that roaming services become progressively unbundled from other mobile telecommunications services in the future (so that consumers may seek an alternative provider to allow them to roam using their existing number), all suppliers could compete to provide these services. Moreover, the Appellate Body has previously indicated that the MFN obligation under GATT 1994 provides a more appropriate comparator for the MFN obligation under GATS than does the national treatment obligation under GATT 1994.¹⁵ The MFN obligation under GATT Article I:1 applies to exports as well as imports (eg precluding higher export charges for products destined for one WTO Member than for like products destined for any other country). In that context, too, the like products in question are unlikely to be in direct competition either in the Australian market or in the export market. This suggests that, at least in relation to the MFN obligation, products may be like and subject to less favourable treatment contrary to WTO rules even if they do not directly compete.

¹¹ Panel Report, *China – Publications and Audiovisual Products*, [7.975]-[7.976], referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, [6.164]-[6.167] and Panel Report, *Argentina – Hides and Leather*, [11.168]-[11.169].

¹² Cf Appellate Body Report, *US – Clove Cigarettes*, [179] (concerning GATT 1994, Art III:4), [180] (concerning Agreement on Technical Barriers to Trade ('TBT Agreement'), Art 2.1).

¹³ Cf Panel Report, *Canada – Autos*, [10.29] (concerning GATT 1994, Art I:1).

¹⁴ Appellate Body Report, *US – Clove Cigarettes*, [111] (concerning GATT 1994, Art III:4 and TBT Agreement, Art 2.1).

¹⁵ Appellate Body Report, *EC – Bananas III*, [231].

17. In any case, the United States and New Zealand suppliers in the roaming example may still be competing for subscribers on a broader global scale or in other markets. The agreement and associated regulations would also specifically affect their '**competitive opportunities**'¹⁶ in Australia, including their ability to attract their subscribers to their roaming services. As a result of the Australian measures, roaming charges imposed on United States operators (and indirectly on United States consumers, unless the operators absorb the charges) could remain high. United States subscribers might therefore be more likely to switch to a prepaid SIM card or some other method of communicating rather than using the United States supplier's roaming service. The New Zealand supplier would not face this choice between absorbing the charges and losing subscribers.
18. This conclusion that an Australia – New Zealand agreement and associated Australian regulations or requirements for discriminatory wholesale price capping would be likely to breach the MFN obligation in GATS Article II:1 is consistent with the following statement of the **WTO Secretariat** in concluding its 2011 study on roaming:

[B]ilateral and regional arrangements among governments on international roaming to mutually reduce rates would not normally require operators to offer such reductions to third parties. Such arrangements could therefore risk placing the governments at odds with the GATS MFN obligation ...¹⁷

V. The Exception Under GATS Article XIV(c) Is Unlikely to Apply

19. Article XIV of GATS contains **general exceptions**. The Article explains that, subject to certain stringent conditions, 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member' of certain measures. Thus, the prima facie MFN violation discussed above could be avoided if the relevant Australian measure falls within Article XIV. However, although Article XIV(c) might be relevant, it is unlikely to apply in the circumstances.
20. Article XIV(c) provides a limited exception for measures:
- necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
- (i) the prevention of deceptive and fraudulent practices ...
21. The Appellate Body has indicated that '**laws or regulations**' in the corresponding provision of GATT 1994 (Article XX(d)) refers to domestic laws or regulations,¹⁸ so a bilateral agreement between Australia and New Zealand could not in itself provide a justification for Australian measures imposing a discriminatory cap on wholesale roaming rates.
22. If wholesale roaming rates currently imposed by Australian suppliers are contrary to Australian laws or regulations (eg consumer or competition laws), then arguably a bilateral agreement

¹⁶ See, eg, Appellate Body Report, *China – Publications and Audiovisual Products*, [305]; Appellate Body Report, *Korea – Beef*, [147] (both concerning GATT 1994, Art III:4); Appellate Body Report, *US – Clove Cigarettes*, [224] (concerning TBT Agreement, Art 2.1).

¹⁷ Council for Trade in Services, *International Mobile Roaming: Possible Implications for GATS – Note by the Secretariat*, S/C/W/337 (13 July 2011) [24].

¹⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, [69].

and associated requirements could be said to encourage compliance with those laws. However, even if Australia could overcome the difficulty of establishing that a cap on wholesale roaming rates was ‘**necessary**’ within the meaning of Article XIV(c), it would be unlikely to satisfy the requirements of the ‘**chapeau**’ (or opening paragraph) of Article XIV. In particular, the discriminatory cap would likely be regarded as ‘a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail’, contrary to the chapeau. The Appellate Body has made clear in the GATT context that discrimination may be regarded as justifiable under the chapeau to GATT Article XX only where the discrimination promotes an objective recognised in one of the sub-paragraphs of GATT Article XX (and specifically, the objective under which the measure is claimed to be justified).¹⁹ According to that reasoning, in order to meet the chapeau requirements, the *discrimination* in this instance would have to further the objective of consumer protection or prevention of anti-competitive conduct pursuant to Article XIV(c), rather than the unrelated objective of implementing a reciprocal roaming arrangement with New Zealand.

VI. The Exception Under GATS Article V May Not Apply

23. Article V:1 specifies, subject to certain conditions: ‘This Agreement **shall not prevent** any of its Members from being a party to or entering into an **agreement liberalizing trade in services** between or among the parties to such an agreement ...’. The agreement must have ‘**substantial sectoral coverage**’²⁰ (‘in terms of number of sectors, volume of trade affected and modes of supply’)²¹ and must provide for ‘the **absence or elimination of substantially all discrimination, in the sense of Article XVII**, between or among the parties’, in those sectors, through ‘(i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures’.²² In addition, the agreement must ‘be designed to facilitate trade between the parties’ and must not ‘**raise the overall level of barriers to trade in services**’ in the relevant sectors in respect of any other WTO Member.²³ Article V most obviously exempts measures that would otherwise breach the MFN obligation in GATS Article II:1.²⁴
24. A free-standing agreement between Australia and New Zealand or their agencies to impose legislative caps on wholesale roaming charges would not meet the requirements set out in Article V:1 as an ‘agreement liberalizing trade in services’ because of its narrow focus. However, the Protocol may well constitute such an agreement already. The Protocol was already in force when the WTO was created and GATS came into effect. Australia notified the

¹⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, [227]-[228].

²⁰ GATS, Art V:1(a).

²¹ GATS, n 1 to Art V:1(a).

²² GATS, Art V:1(b).

²³ GATS, Art V:4.

²⁴ See Panel Report, *Canada – Autos*, [10.271].

Protocol to the Services Council,²⁵ and the Committee on Regional Trade Agreements considered it in 1997.²⁶

25. The Committee did not formally approve the Protocol, and even if it did so this approval would not be binding on a WTO Panel or the Appellate Body in the event of a dispute. Nevertheless, it is worth noting that at that time Australia and New Zealand regarded the Protocol as having **substantial sectoral coverage** (as required by Article V:1(a)) and as not involving the raising of barriers to third parties, at least in relation to telecommunications (as required by Article V:4).²⁷ The parties' contention regarding the sectoral coverage of the Protocol is strengthened by the fact that the Protocol adopts a 'negative list' approach—applying to all service sectors unless otherwise specified—and with only a relatively small number of sectors currently excluded.
26. The reference to Article XVII in the conditions contained in Article V:1(b) means that the focus is on **eliminating discrimination contrary to the national treatment obligation**, ie according less favourable treatment to services or service suppliers of any other WTO Member than to the relevant Member's own like services or service suppliers. The Protocol lacks a telecommunications-specific chapter as found in some of Australia's other preferential trade agreements.²⁸ Nevertheless, the fact that telecommunications is now fully covered by the general provisions of the Protocol, and in particular by the national treatment obligation in Article 5, means that it arguably satisfies the requirements of Article V:1(b).
27. Accordingly, the Protocol as it stands is likely to fall within the exception in Article V:1. The next question is whether an amendment or extension to the Protocol to provide for wholesale roaming caps would similarly be covered by the exception. The jurisprudence on both GATS Article V:1 and the corresponding provision in GATT 1994 (Article XXIV:5) is extremely limited. However, the Appellate Body has indicated that, as Article XXIV:5 specifies that 'the provisions of this Agreement shall not prevent ... the *formation* of a customs union',²⁹ this exception applies only: (i) 'if the measure is introduced upon the formation of a customs union' (the **timing requirement**); and (ii) 'to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed' (the **necessity requirement**).³⁰ In *Turkey – Textiles*, the Appellate Body had to consider whether Turkey and the European Communities could have formed a customs union meeting the conditions of GATT Article XXIV if Turkey had not imposed quantitative restrictions on certain Indian imports. The Appellate Body found that the parties could have formed the customs union with reasonable alternative

²⁵ WTO, Council for Trade in Services, *Australia New Zealand Closer Economic Relations Trade Agreement: Joint Communication from Australia and New Zealand, S/C/N/7* (22 November 1995).

²⁶ WTO, Committee on Regional Trade Agreements, *Examination of the Protocol on Trade in Services of the Australia – New Zealand Closer Economic Relations Trade Agreement: Note on the Meeting of 3 November 1997, WT/REG40/M/1* (4 December 1997).

²⁷ WTO, Committee on Regional Trade Agreements, *Examination of the Protocol on Trade in Services of the Australia – New Zealand Closer Economic Relations Trade Agreement: Note on the Meeting of 3 November 1997, WT/REG40/M/1* (4 December 1997) [16], [20].

²⁸ See generally Voon and Mitchell, above n 1.

²⁹ Emphasis added.

³⁰ Appellate Body Report, *Turkey – Textiles*, [46] (see also [58]).

measures (specifically, a 'system of certificates of origin') in place of the quantitative restrictions. Accordingly, the necessity requirement was not met.³¹

28. The **timing requirement** is arguably inapplicable in the context of GATS Article V:1, because that provision refers to both entering into and *being a party to* an agreement liberalising trade in services. The **necessity requirement** in the GATT context arguably applies only to measures that increase restrictions on *external trade*, ie trade with WTO Members not party to the agreement liberalising trade in services, and not to measures that eliminate restrictions on *internal trade*, ie trade between the parties to such an agreement.³² In the GATS context, although the distinction between internal and external trade restrictions is blurred, the cap in question can be seen as reducing or limiting a barrier (wholesale charges) to trade between Australia and New Zealand, namely trade through the supply of retail services from New Zealand suppliers to their subscribers travelling to Australia. A WTO Panel might therefore feel inclined not to follow the Appellate Body's invocation of the necessity requirement.
29. If the necessity requirement did apply, WTO Panels and the Appellate Body would be likely to look beyond the mere form of the agreement in assessing whether it falls within Article V:1.³³ Thus, the mere fact that the roaming agreement would be formally an extension or amendment to the Protocol, between the same parties as the Protocol, and concerning services covered by the Protocol would be insufficient to demonstrate that Australia could not be a party to the Protocol if the roaming agreement was not permitted under Article V:1. Moreover, even if the timing requirement did not apply, the fact that Australia and New Zealand have already formed the Protocol (arguably in accordance with the requirements of Article V:1(a) and V:1(b)) and have been able to continue to be parties to the Protocol in the absence of a roaming agreement suggests that the roaming agreement is not necessary for the Protocol to continue. In addition, a roaming agreement with New Zealand might not further the objective of reducing or eliminating discrimination against New Zealand services or service suppliers as required by Article V:1(b). One might contend that New Zealand suppliers paying wholesale roaming charges to Australian suppliers for international roaming are discriminated against compared to Australian suppliers paying termination charges to Australian suppliers for domestic roaming, but this is an inexact comparison, since termination is but one component of roaming services. In any case, an extension to the Protocol that added an agreement to impose caps on roaming charges imposed by wholesale suppliers and associated Australian regulations might not benefit from the exception in Article V:1, even if the Protocol as it currently stands falls within that exception.
30. In contrast, the addition of a **new telecommunications-specific chapter** (including a roaming measure) to the Protocol would be more likely to be regarded as necessary pursuant to Article V:1, because it would grant New Zealand and New Zealand suppliers additional benefits that

³¹ Appellate Body Report, *Turkey – Textiles*, [62]-[63].

³² See Nicolas Lockhart and Andrew Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and Its Limits' in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, 2005) 217, 226-228; Panel Report, *US – Line Pipe*, [7.148], n 137.

³³ See Panel Report, *Canada – Autos*, [10.268]-[10.269].

are currently available on a discriminatory basis to certain other countries only.³⁴ This conclusion would be enhanced by Article V:2, which states:

In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

31. In order to continue to benefit from the exception in GATS Article V:1, the Protocol as amended could not, in respect of WTO Members other than Australia and New Zealand, 'raise the **overall level of barriers to trade in services** within the respective sectors or subsectors compared to the level applicable prior to such an agreement', as this would be contrary to GATS Article V:4. In view of the words 'within the respective sectors or subsectors', the assessment of the barriers to trade before and after the roaming agreement would be likely to take place at the level of the specific service relevant to roaming, eg mobile telecommunications services, rather than at the level of telecommunications services in general. In view of the word 'overall', the assessment might take into account barriers imposed by either Australia or New Zealand on the supply of such services by suppliers from other WTO Members pursuant to any of the modes of supply.
32. Whether the Protocol as amended would result in an overall increase in barriers in Australia and New Zealand to mobile telecommunications services from other WTO Members could depend on: (i) the extent to which other WTO Members have benefited from the Protocol because of its promotion of increased liberalisation of telecommunications; (ii) the proportion of mobile telecommunications services trade that is represented by roaming; and (iii) the way Australian suppliers react to the agreement.
33. A discriminatory cap could negatively impact the telecommunications service suppliers of other Members and constitute a barrier to their trade in services by distorting Australian suppliers' pricing considerations. Australia might therefore wish to consider placing restrictions on Australian suppliers in order to prevent '**waterbedding**', whereby Australian suppliers increase wholesale roaming rates applied to suppliers of other WTO Members in order to offset the diminution in rates applied to New Zealand suppliers. However, the ability of Australian suppliers to engage in such conduct is constrained by factors such as competition between Australian suppliers for roaming traffic, and the likely responses of foreign suppliers (who may in turn increase their wholesale roaming rates with respect to the offending Australian suppliers). In any case, Australia could argue that GATS Article V:4 focuses on the level of trade barriers rather than difficulties faced in practice,³⁵ and hence that the assessment of the level of trade barriers before and after the amendment to the Protocol cannot depend on how individual Australian suppliers choose to set their wholesale roaming rates for non-New Zealand suppliers. (Although the GATT context is not entirely comparable, by way of example, an assessment of trade restrictions before and after the formation of a customs union pursuant to the corresponding provision in GATT Article XXIV:5(a) would

³⁴ See above n 2.

³⁵ Cf Thomas Cottier and Martín Molinuevo, 'Article V GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäggle (eds), *Max Planck Commentaries on World Trade Law – WTO: Trade in Services* (Leiden: Martinus Nijhoff, 2008) 125, 144 (distinguishing between 'applicable' and 'applied' barriers).

examine the tariffs applied to imports rather than sales levels or prices paid for those imports.³⁶⁾

³⁶ GATT 1994, Art XXIV:5(a); *Understanding on the Interpretation of Article XXIV of the GATT 1994*, which forms part of GATT 1994 pursuant to paragraph 1(c)(iv) of the language incorporating GATT 1994 into the Marrakesh Agreement Establishing the WTO.