

**SIXTH GNLU**  
**INTERNATIONAL LAW MOOT COURT COMPETITION 2014**

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**IN THE WORLD TRADE ORGANIZATION PANEL**



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**RANDORNZK: MEASURES AFFECTING THE ONLINE GAMING INDUSTRY**

**WT/DSxxx**

**RODERLAM**

(COMPLAINANT)

v.

**RANDORNZK**

(RESPONDENT)

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**MEMORANDUM ON BEHALF OF RESPONDENT**

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## LIST OF ABBREVIATIONS

¶	Paragraph
Art.	Article
Annex	Annexure
AB/R	Appellate Body Report
BISD	Basic Instrument and Selected Documents
CPC	United Nations Central Product Classification
DSU	Dispute Settlement Understanding
EC	European Communities
ECU	Ecuador
ed.	Edition
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNS	Group of Negotiations
HS	Harmonized System Classification
<i>Ibid</i>	<i>Ibidem</i>
ICJ	International Court of Justice
JIEL	Journal on International Economic Law
JWT	Journal on World Trade
MTN	Multilateral Trade Negotiations
Pg.	Page
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
VCLT	Vienna Convention on Law of Treaties

Vol.	Volume
Ver.	Version
WTO	World Trade Organization
<i>WT/DS</i>	World Trade/Dispute Settlement

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## **STATEMENT OF FACTS**

### **The Parties**

Roderlam is a developed island country located in North America. Roderlam has a highly developed software industry and a well developed banking sector. The currency of Roderlam is Roda. Drastord is a developing country in an advanced stage of development, located in Africa. Randornzk is a developed country located in Southeast Asia. 75% of the population follows the religion Timor.

### **Gaming industry in Randornzk**

*GenX Gaming Inc (GenX)* is one of the biggest developers of videogames in Randornzk. As of date, *GenX* embeds the software of its games on Blue-Ray disks. *Mystical Assassins* is one of the games produced by *GenX*. *Mystical Assassins* is inspired by the character of Raga. Raga is considered to be the last prophet by followers of the Timor religion. Raga is considered to have fought a fifteen year war against the Devil himself. As per Timor mythology, after his victory in the fifteen year war, Raga encouraged his followers to give up violence and concentrate on economic pursuits. In 2022, the government of Randornzk enacted a ban on *Mindless Assassins*. This ban was overturned by the Randornzk Supreme Court which gave a novel interpretation to the fundamental right of "freedom of religion" guaranteed in the Constitution of Randornzk. It accordingly held that considering the undeniable link between *Mystical Assassins* and Timor mythology, a ban unreasonably interfered with the freedom of religion of the Timor people.

### **Gaming industry in Roderlam**

Kiwi Incorporated (Kiwi) is a developer, publisher and distributor of video games based in Siliconia, Roderlam. Kiwi has invested heavily in virtual gaming since 2010. The essence of virtual gaming is that users should not feel, even for a second that they are actually playing a game. In January, 2022 Kiwi launched two games that is *Roderlam Gangsters* and *Agency Z* which were fully compatible with Reality GP. *Roderlam Gangsters* is a multiplayer game which allows players to form part of a virtual street gang. The gang members can coordinate amongst themselves for various "hits". The winner is the team which either controls the entire town or failing that has the highest amount of money. *Agency Z* is also a multiplayer game. In this game, players can choose to be members of an elite spy agency called *Agency Z* who find themselves behind enemy lines. It allows players to engage in a fight with an

adversary, with or without guns. Furthermore, it allows players to use one interrogation technique called sleep deprivation to get useful information. In 2023, Kiwi started making available Roderlam Gangsters and Agency Z to international users including the users located in Randornzk. It also started exporting Reality GP to various countries from the manufacturing unit in Drastord including to Randornzk.

### **Ban on the import of Reality GP**

By the end of 2023, various non-governmental organizations in Randornzk became highly critical of Kiwi, which in their opinion made money by developing an “affinity for violence” in impressionable minds. In January, 2024, the Randornzk Government set up a three Member Committee to investigate the psychological effect of Reality GP. The committee was of the considered opinion that the combined effect of Reality GP and the Kiwi games – Roderlam Gangsters and Agency Z is complete desensitization towards violence. So, Randornzk enacted a ban on the import on Reality GP.

### **RBB Policy Directive 2024**

In June, 2024, concerned with the high level of online financial fraud, the RBB issued the *RBB Policy Directive 2024* to ensure and maintain quality control of all online transactions. It provided that, all online merchant sites against which more than five complaints are filed in a year shall have to file a compliance report with the RBB Directive. Such filing shall be followed by a mandatory physical inspection by RBB to ensure that the highest data protection standards are enforced by the company.

Since this physical inspection cannot be carried out outside Randornzk, any transaction on an online merchant site located outside Randornzk shall not be allowed unless a specific warning is issued to the user.

### **Panel Establishment**

On February, 2025, Roderlam and Drastord requested consultations with Randornzk under the WTO Dispute Settlement Understanding (DSU). The consultations with Roderlam were unsuccessful. In the meeting of the Dispute Settlement Body, Roderlam requested for the establishment of a Panel. Randornzk did not object to this request. The DSB established a panel on August, 2025. The WTO Director General composed the Panel on September, 2025.

## MEASURE OF ISSUES

### **I. THE ACT OF BANNING THE IMPORT OF REALITY GP DOES NOT VIOLATE ARTICLE XVI OF GATS**

- A. RANDORNZK COMPLIES WITH ARTICLE XVI: 1 OF GATS
  - i. Randornzk has not committed to grant full market access in the relevant services sector
  - ii. Randornzk accords no less favourable treatment than that provided for in its respective schedule
- B. RANDORNZK COMPLIES WITH ARTICLE XVI: 2 OF GATS
  - i. Randornzk has not committed to grant full market access in the relevant services sector
  - ii. The measures adopted by Randornzk are not expressed in terms of designated numerical units in the form of quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test

### **II. THE BAN ON THE IMPORT OF REALITY GP DOES NOT VIOLATE ARTICLE XVII OF GATS**

- A. RANDORNZK HAS NOT UNDERTAKEN NATIONAL TREATMENT COMMITMENT FOR VIRTUAL GAMING SERVICES IN ITS SCHEDULE OF SPECIFIC COMMITMENTS
- B. THERE ARE NO LIKE DOMESTIC SERVICES/SERVICE SUPPLIERS
  - i. Characteristics of Services are different
  - ii. End-uses are distinct
  - iii. Consumer Preferences are disparate
  - iv. Product Classification is contrasting
  - v. Health Risks involved are unlike
- C. THE MEASURE BY RANDORNZK DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO FOREIGN SERVICES/SUPPLIERS THAN THAT GRANTED TO LIKE DOMESTIC SERVICES/SUPPLIERS
  - i. No competition exists between Kiwi and GenX

- ii. The ban on the import of Reality GP does not modify the conditions of competition in the favour of domestic suppliers

### **III. RANDORNZK THROUGH THE RBB POLICY DIRECTIVE 2024 HAS NOT VIOLATED ITS OBLIGATIONS UNDER GATS**

- A. RANDORNZK THROUGH THE RBB POLICY DIRECTIVE VIOLATED ARTICLE VI OF GATS
  - i. Article VI: 1 of GATS is not applicable
  - ii. Arguendo, the Directive is not an administration of the measure
- B. RANDORNZK THROUGH THE DIRECTIVE DID NOT VIOLATE ARTICLE XI OF GATS
  - i. Article XI of GATS is not applicable to Randornzk
  - ii. Arguendo, Article XI of GATS is not violated
- C. RANDORNZK THROUGH THE DIRECTIVE DID NOT VIOLATE ITS OBLIGATIONS UNDER ARTICLE XVI OF GATS
  - i. Randornzk has not committed to grant market access in the relevant services sector and mode of supply
  - ii. The measure by Randornzk did not accord for less favourable treatment than that provided for in its schedule
  - iii. Randornzk through the Directive did not violate its obligations under Article XVI: 2 of GATS

### **IV. RANDORNZK IS JUSTIFIED FOR ENACTING THE BAN ON THE IMPORT OF REALITY GP AND ISSUING THE DIRECTIVE UNDER ARTICLE XIV OF GATS**

- A. RANDORNZK BY ENACTING A BAN ON THE IMPORT OF REALITY GP IS JUSTIFIED UNDER ARTICLE XIV OF GATS
  - i. Randornzk is justified to enact the ban on the import of Reality GP under Article XIV (a) of GATS
  - ii. Randornzk is justified in enacting the ban on the import of Reality GP under Article XIV: b of GATS
- B. RANDORNZK IS JUSTIFIED IN ISSUING THE DIRECTIVE UNDER XIV: A OF GATS
  - i. Randornzk's Directive is included in the definition of the term public order
  - ii. Randornzk's Directive is in consonance with the necessity test

## **SUMMARY OF PLEADINGS**

### **Argument I**

The ban on the import of Reality GP by Randornzk has not violated Article XVI of GATS. Randornzk did not violate Article XVI of GATS for two reasons.

- Firstly, the ban does not violate the GATS Schedule as Randornzk has not enlisted the sub-sector of On-line gaming in its Schedule. Therefore, it did not undertake any commitments. *Arguendo*, Randornzk's commitment for the relevant sector and the relevant mode of supply are unbound, thereby permitting Randornzk to maintain measures inconsistent with the market access obligation.
- Secondly, the measures adopted by Randornzk does not result in any designated monopolies, exclusive economic supplier, numerical quota and economic needs test. So, the measure is not covered by Article XVI of GATS.

### **Argument II**

The act of banning the import of Reality GP by Randornzk has not violated Article XVII of GATS for three reasons.

- Firstly, the ban does not violate the GATS Schedule as Randornzk has not enlisted the sub-sector of On-line gaming in its Schedule. Therefore, it did not undertake any commitments. *Arguendo*, Randornzk's commitment for the relevant sector and the relevant mode of supply are unbound, thereby permitting Randornzk to maintain measures inconsistent with the national treatment obligation.
- Secondly, the services and service suppliers of Kiwi and GenX are not like because the Characteristics, End-uses, Classification and Consumers' Tastes and Habits Concerning Services, Health Risks of both the services are totally disparate.
- Thirdly, Randornzk by enacting a ban on the import of Reality GP did not accorded any less favourable treatment to foreign services/suppliers than that granted to like domestic services/suppliers and the measure does not modify the conditions of competition in favour of domestic suppliers.



### **Argument III**

Randornzk by issuing the Directive has not violated Article VI of GATS for two reasons.

- Article VI of GATS applies only in sectors with specific commitments and Randornzk has not made any Sectoral Commitment in the Schedule of Specific Commitments with respect to the gaming service provided by Kiwi Incorporated.
- *Arguendo*, Article VI of GATS only covers the administration of the measure. Here, the RBB Policy Directive is the measure and it does not administer any measure and so is out of scope of Article VI of GATS.

Randornzk by the issuance of the Directive did not violate Art. XI of GATS for two reasons.

- Firstly, the provision of Article XI of GATS exclusively applies to international transfers and payments that are related to a service pursuant to a specific commitment of a Member. Thus, Art. XI of GATS is not applicable as Randornzk has not provided for any Sectoral Commitment for the gaming service provided by Kiwi Incorporated.
- *Arguendo*, Randornzk has placed a restriction on international payments which is covered by the exception of para. 2 lit. a of the Annex on Financial Services. These restrictions were placed on the international payments for prudential reasons so as to reduce online high level financial frauds thereby, not violating Article XI of GATS.

Randornzk through the RBB Policy Directive 2024 did not violate its obligations under Article XVI of GATS for two reasons.

- The members should oblige to allow cross-border movement of capital and transfers of capital into its territory only if they are an essential part of the service for which the member has made a Specific Commitment to. The gaming service provided by Kiwi doesn't fall under the sectors where Randornzk has made Specific Commitment. Therefore, there arises no obligation on behalf of Randornzk to allow transfers of capital.
- *Arguendo*, the limitations and measures that fall within the scope of Article XVI are only those listed in the second paragraph of it. The measure taken by Randornzk does not fall within any of the forms enlisted in the second paragraph of Article XVI and therefore, Randornzk's measure is not covered by Article XVI of GATS.

**Argument IV:**

Randornzk's ban on the import of Reality GP is justified under Article XIV of GATS because

- Firstly, it is justified under Article XIV: a of GATS as the ban on the import of Reality GP is in consonance with the requirements of the chapeau of Article XIV of GATS. Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order." Randornzk enacted a ban on Reality GP, to protect public safety under Article XIV: a of GATS. The ban enacted on the import of Reality GP is also in consonance with the necessity test.
- Further, Randornzk by enacting a ban on the import of Reality GP is justified under Article XIV: b of GATS because Virtual Environments lead to Motion-Sick like Side Effects and Epilepsy. Thus, this will be affect 75% of gamers in Randornzk who were playing the Kiwi games using Reality GP thereby, tremendously causing inherent damages to the health. Randornzk enacted a ban to prevent dangers to health and thereby covered under Article XIV: b of GATS.

Randornzk is justified in issuing the Directive under Article XIV of GATS:

- The RBB Policy Directive issued by Randornzk is in consonance with the requirements of the chapeau of Article XIV of GATS as it did not create any discrimination nor did it result in a restriction on international trade.
- The prevention of money laundering and of fraud schemes arguably relates to both public morals and public order. In the present factual matrix, the RBB Policy Directive was issued to curb online high level frauds which relate to both public order and public morals thus falls under the Article XIV: a of GATS. Further, Randornzk is in consonance with the requirements of the necessity test.

## LEGAL PLEADINGS

### I. THE ACT OF BANNING THE IMPORT OF REALITY GP DOES NOT VIOLATE ARTICLE XVI OF GATS

#### A. RANDORNZK COMPLIES WITH ARTICLE XVI: 1 OF GATS

The essence of Art. XVI: 1 of GATS is that a Member should provide, with respect to market access, no less favourable treatment than that provided for in the Members' respective schedules.<sup>1</sup> Thus, to prove that Randornzk's act is in consonance with Art. XVI: 1 of GATS, it must be established that:

- i. Randornzk has not committed to grant full market access in the relevant services sector and mode of supply,<sup>2</sup>
- ii. Randornzk accords no less favourable treatment than that provided for in its respective schedule.<sup>3</sup>

*i. Randornzk has not committed to grant full market access in the relevant services sector*

Randornzk has not committed to grant full market access in the relevant services sector where the service supplied by Kiwi Incorporated [hereinafter Kiwi] falls. The sub-sector of "other audiovisual services," offers precisely the flexibility required for listing multimedia content and new electronic media emerging in the event of new technological developments.<sup>4</sup> Online games are a perfect example of multimedia that combine media formats such as film, audio, video, sounds, visuals, and performing arts.<sup>5</sup> It can be established that online games combine a variety of different media

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<sup>1</sup> Panel Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services* WT/DS285/R, (10 November 2004), ¶ 6.263 [hereinafter Panel Report, *US-Gambling*].

<sup>2</sup> Appellate Body Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/AB/R, ¶ 214, (7 April 2005) [hereinafter Appellate Body Report, *US-Gambling*].

<sup>3</sup> Panel Report, *US-Gambling*, *Supra* Note 1 ¶ 6.263.

<sup>4</sup> PATRICK A. MESSERLIN, STEPHEN E. SIWEK AND EMMANUEL COCQ, *THE AUDIOVISUAL SERVICES SECTOR IN THE GATS NEGOTIATIONS*, 2-3, (American Enterprise Institute for Public Policy Research, Washington, DC, GEM, 2004).

<sup>5</sup> Pascal Preston and Aphra Kerr, 'Digital Media, Nation-States and Local Cultures: The Case of Multimedia "content" production,' 111, (2001) 23 *Media Culture & Society* 109.

formats and modes of cultural expression in one channel. Thus, online games fall under the sub sector of other audio visual services.<sup>6</sup>

Alternatively, the Central Product Classification (CPC)<sup>7</sup> classifies the games produced by Kiwi under the sub-sector of on-line games for which Randornzk did not make any specific commitment to. Further, even if the games are partly played offline in the single-player mode, it seems that eventually all digital games whether played on a PC, portable device or game console, will at least partly be played online.<sup>8</sup> Here, the games fall under the sub-sector of on-line games.

The Schedule of Specific Commitments of Randornzk clearly states that in the sub-sector of other audio visual services, the limitations on market access are unbound,<sup>9</sup> thus indicating that there is no market access commitment made by Randornzk. In addition, there is no Sectoral Commitment made by Randornzk to the sub-sector of on-line games.

*ii. Randornzk accords no less favourable treatment than that provided for in its respective schedule*

The ordinary meaning of the terms contained in the first and second paragraphs of Art. XVI of GATS means that the only type of limitations and measures falling within the scope of Art. XVI of GATS are those listed in the second paragraph of Article XVI.<sup>10</sup> In the present case, the measure taken by Randornzk does not fall within any of the forms enlisted in the second paragraph of Art. XVI of GATS as elucidated below.

**B. RANDORNZK COMPLIES WITH ARTICLE XVI: 2 OF GATS**

The second paragraph of Art. XVI of GATS defines, in six sub-paragraphs, measures that a Member, having undertaken a specific commitment, is not to adopt or maintain, “unless otherwise specified in its Schedule.”

<sup>6</sup> Thomas Steiner, *Online Games under WTO Law: Unresolved Classification Issues*, NCCR Trade Regulation Swiss National Centre of Competence in Research, Working Paper No. 2009/3.

<sup>7</sup> *Central Product Classification (CPC)*, Sub-class 84391, Ver.2, Detailed structure and Correspondences of CPC Ver. 2 subclasses to ISIC Rev. 4 and HS 2007.

<sup>8</sup> EDWARD CASTRONOVA, *EXODUS TO THE VIRTUAL WORLD*, 46-48 (Palgrave Macmillan, New York, 2007); OECD, *INFORMATION TECHNOLOGY OUTLOOK*, 24, (OECD Publishing, Paris, 2006).

<sup>9</sup> Guide Lines for the Scheduling of Specific Commitments, ¶ 47 (Adopted by Council for Trade in Services 2001), S/L/92, 28 March 2001.

<sup>10</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.299

Thus, to prove that, Art. XVI: 2(a)-(d) of GATS does not apply it should be proved that:

- i. Randornzk has not committed to grant full market access in the relevant services sector<sup>11</sup> and mode of supply,
- ii. The measures adopted by Randornzk are not expressed in terms of designated numerical units in the form of quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test.<sup>12</sup>

In the present case, Art. XVI: 2(e)-(f) of GATS does not apply in any way because, there are no measures which restrict specific types of legal entity and place limitations on the participation of foreign capital.

*i. Randornzk has not committed to grant full market access in the relevant services sector*

As already elaborated above, Randornzk has not committed to grant full market access in the sector where the gaming service supplied by Kiwi falls.

*ii. The measures adopted by Randornzk are not expressed in terms of designated numerical units in the form of quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test*

It is humbly submitted that, the measure at issue does not constitute limitation expressed in the form listed under Art. XVI: 2(a)-(e) of GATS. One of the essentials to invoke Art. XVI: 2 of GATS is that, a Member must put forth a prima facie case showing that the challenged measure constitutes an impermissible limitation falling under one or more sub-paragraphs of Article XVI: 2.<sup>13</sup> The list provided under subparagraph is exhaustive.<sup>14</sup> In the instant case, the measure adopted by Randornzk does not take the form of monopolies, exclusive service suppliers or the requirements of an economic needs test.

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<sup>11</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 214.

<sup>12</sup> NELLIE MUNIN, *LEGAL GUIDE TO GATS*, GLOBAL TRADE LAW SERIES, 190, (Wolters Kluwer Law & Business).

<sup>13</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 143.

<sup>14</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.298.

**a) *The measure is not expressed in the form of numerical quotas***

The bare reading of Art. XVI: 2 of GATS indicate that, it applies only to limitations in the form of numerical quotas.<sup>15</sup> Here, Randornzk did not apply limitations in the form of any numerical quotas. If the Panel were to consider *US-Gambling* case which states that, ‘zero quota’ is included in the form of numerical quota even then, the ban on import of Reality GP is not a limitation on the number of service suppliers or service operations in the form of a “zero quota.” The Panel in *US- Gambling* case, held the existence of zero-quota because, there was a complete prohibition on on-line gambling service by US (i.e., prohibiting cross-border means of supply).<sup>16</sup> In the present case, the facts are different from that of *US-Gambling* case because, the gambling prohibition "in effect" specifies precisely how many remote suppliers there shall be (zero), even though it does not name a number; in contrast, the ban by Randornzk, although it presumably affects the number of service operations, does not specify a number, not even "in effect". Hence, the ban by Randornzk doesn't constitute ‘zero quota’ and cannot be included in numerical quotas.

**b) *The measure should be taken in its form rather than its effect***

It is humbly submitted that, the *US-Gambling* case was incorrectly decided on the point of interpretation of the words ‘in the form of’ as ‘having the effect of.’ The term “in the form of” must be interpreted narrowly.<sup>17</sup> Whether a measure is a market access restriction depends on its form and not on its effects.<sup>18</sup>

It is further submitted that, the so called “zero quota” theory is inconsistent with the balance between liberalization and regulation reflected in Members’ right to regulate services to achieve national policy objectives.<sup>19</sup> The approach taken under GATS, is to single out for the removal of certain forms of market access limitations consistent with the ordinary meaning of the text of Art. XVI: 2(c) of GATS. Other limitations –

<sup>15</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 23.

<sup>16</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶¶ 6.342, 6.331 & 6.332.

<sup>17</sup> Ortino, Federico, *Treaty Interpretation and the WTO Appellate Body Report in U.S.-Gambling: A Critique*, 139, *Journal of International Economic Law (JIEL)* Vol. 9 No. 1 (2006); Pauwelyn, Joost, *Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 132, *World Trade Review (WTR)* Vol. 4 No. 2 (2005).

<sup>18</sup> Snell, Jukka, *The Notion of Market Access: A Concept or a Slogan?* 5, *Common Market Law Review*, 2010, Vol. 47.

<sup>19</sup> General Agreement on Trade in Services, Object and purpose of GATS, ¶ 3, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

whether or not they have the *effect* of limiting the ability to supply a service, falls outside the scope of Art. XVI: 2(a) and Art. XVI: 2(c) of GATS.

Consequently, if the Panel's interpretation of the word 'in the form' in *US-Gambling* of Art. XVI of GATS was accepted, very little domestic regulation could "escape" Art. XVI of GATS. The above interpretation would be absurd, unreasonable and inconsistent with the object and purpose of the GATS to preserve "the right of Members to regulate the supply of services within their territories in order to meet national policy objectives."<sup>20</sup>

An interpretation which renders the preamble redundant is not permissible under the jurisprudence of the Appellate Body.<sup>21</sup> If this interpretation was accepted, then a licensing scheme for taxi drivers that requires them to show a high level of driving competence is "in effect" a forbidden numerical quota because it reduces the number of taxi drivers.<sup>22</sup> Further, the licensing exam for lawyers is "in effect" a forbidden numerical quota because it reduces the number of lawyers.<sup>23</sup> This would lead to a serious misinterpretation of Art. XVI of GATS.

**c) Measure which limits 'Input' for the Supply of Service is allowed**

Further, Article XVI: 2(c) of GATS does not cover measures of a Member which limit the input for the supply of service.<sup>24</sup> It is humbly submitted that, the ban on the import of Reality GP is a measure restricting the input for the supply of service and hence, does not violate Art. XVI: 2(c) of GATS. 'Input' means all goods used for providing any output service<sup>25</sup> and "input service"<sup>26</sup> means any service used by a provider of taxable service for providing an output service. In the present factual matrix, Reality GP is an input used for providing the service of virtual gaming. Therefore, the restriction on the same is allowed under Art. XVI: 2(c) of GATS.<sup>27</sup>

<sup>20</sup> Panel Report, *US – Gambling*, *Supra* Note 1, ¶ 3.53.

<sup>21</sup> Appellate Body Report, *United States-Standards For Reformulated And Conventional Gasoline*, Pg. 30, WT/DS2/AB/R, (29 April 1996) [hereinafter Appellate Body Report, *US-Gasoline*].

<sup>22</sup> Pauwelyn, Joost, *Supra* Note 17, Pg. 160.

<sup>23</sup> Ortino, Federico, *Supra* Note 17, Pgs. 141-142.

<sup>24</sup> GATS *Supra* Note 19.

<sup>25</sup> CENVAT Credit (Amendment) Rules, 2010 (India), S. 2 (B)(k)(ii).

<sup>26</sup> *Id.*, Note 25, S. 2(B)(l)(i).

<sup>27</sup> GATS, *Supra* Note 19, Art. XVII: 1.

## II. THE BAN ON THE IMPORT OF REALITY GP DOES NOT VIOLATE ARTICLE XVII OF GATS

Art. XVII of GATS, which is entitled “National Treatment” obliges WTO Members, not to discriminate between domestic and foreign services and service suppliers by treating foreign services and suppliers less favourably than that of like domestic services and suppliers, subject to any limitations noted in the Schedule of Specific Commitments.<sup>28</sup> The Agreement also provides that ‘formally identical or formally different treatment’ shall be considered to be less favourable if it modifies the conditions of competition in favour of domestic services or service suppliers of the Member compared to like services or service suppliers of any other Member.<sup>29</sup>

It has been established by WTO jurisprudence,<sup>30</sup> for any act to be consistent with Art. XVII of GATS, it must be established that:

- i. Randornzk has not made any national treatment commitment in the relevant sector (Motion Picture & Video Tape Production & Distribution Services);
- ii. GenX and Kiwi Services and Service Suppliers are not like; and
- iii. The measure by Randornzk does not accord less favourable treatment to foreign services/suppliers than that granted to *like* domestic services/suppliers<sup>31</sup> and does not modify the conditions of competition<sup>32</sup> in favour of domestic services/service suppliers.<sup>33</sup>

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<sup>28</sup> GATS, *Supra* Note 19, Art. XVII: 1.

<sup>29</sup> GATS, *Supra* Note 19, Art. XVII: 3.

<sup>30</sup> Panel Report, *China-Certain Measures Affecting Electronic Payment Services*, ¶ 7.641, WT/DS413/R. (16 July 2012).

<sup>31</sup> Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R, (11 December 2000), [hereinafter Appellate Body Report, *Korea-beef*]; Panel Report, *United States- Section 337 of Tariff Act of 1930*, BISD 36S/354, ¶ 5.11, (Adopted 7 November 1989); Appellate Body Report, *United States- Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶180 WT/DS406/AB/R (4 April 2012)

<sup>32</sup> Joost Pauwelyn, *Some Thoughts on the Concept of Likeness in the GATS*, WTO Staff Working Paper ERSD-2006-08 (2006); Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, L/833, (Adopted 23 October 1958), BISD 7S/60.

<sup>33</sup> Panel Report, *United States - Taxes on Automobiles*, ¶ 5.54, DS31/R (11 October 1994, Unadopted).



**A. RANDORNZK HAS NOT UNDERTAKEN NATIONAL TREATMENT COMMITMENT FOR VIRTUAL GAMING SERVICES IN ITS SCHEDULE OF SPECIFIC COMMITMENTS**

As was elaborated above, the gaming service supplied by Kiwi falls under the sector where Randornzk has not made any specific commitments in its schedule of specific commitments.

**B. THERE ARE NO LIKE DOMESTIC SERVICES/SERVICE SUPPLIERS**

The basis of comparison in Article XVII of GATS is the likeness of services and service suppliers.<sup>34</sup> In the instant case, there are two types of games at issue; games offered by Kiwi i.e., *Roderlam Gangsters & Agency Z* and games offered by GenX Gaming Inc. i.e., *Mystical Assassins*. The games offered by Kiwi can only be purchased online through the GP Live Market,<sup>35</sup> whereas GenX embeds the software of its games on Blue-Ray disks.<sup>36</sup> Digital products are treated as goods when they are delivered in a tangible form (eg., on CD's) recognized by Harmonized System[herein after HS Classification].<sup>37</sup> DVD's are one of the tangible forms recognized by HS Classification.<sup>38</sup> Here, it is humbly submitted that, the game offered by GenX is not a service but a good because GenX embeds the software of its games on Blue-Ray disks. Consequently, the question of likeness of services does not arise because; there exists no service to compare with the service supplied by Kiwi.

Even if the Panel were to accept that GenX is offering a service, still Kiwi and GenX services are unlike. The basic criteria for determining Likeness under the GATT was laid down in the Report of the Working Party on *Border Tax Adjustments*<sup>39</sup> which has been consistently referred to in GATT/WTO jurisprudence.<sup>40</sup> These criteria also apply to the GATS context, because the concept of national treatment in the GATT and in the

<sup>34</sup> WTO- TRADE IN SERVICES, KRAJEWSKI & ENGELKE ON ARTICLE XVII, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, Vol. 6, ¶ 15, (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle, Martinus Nijhoff Publishers, 2008).

<sup>35</sup> Compromis, ¶ 12.

<sup>36</sup> Compromis, ¶ 4.

<sup>37</sup> Tania Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS,' 17, (2007) 14 UCLA Entertainment Law Review 1, 5.

<sup>38</sup> Combined Nomenclature Code 8523 49 51, Harmonized Commodity Description and Coding System.

<sup>39</sup> Border Tax Adjustments, Report of the Working Party, Adopted 2<sup>nd</sup> December, 1970, BISD/ 18(97-109).

<sup>40</sup> Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, ¶ 20-21, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (4 October 1996); Appellate Body Report, *European Communities – Measures Affecting Asbestos And Asbestos Containing Products*, ¶ 85, WT/DS135/AB/R, (12 March 2001) [hereinafter Appellate Body Report, *EC-Asbestos*]; Panel Report, *Canada - Certain Measures Concerning Periodicals*, ¶ 5.18, WT/DS31/R, (14 March 1997).

GATS is identical.<sup>41</sup> Established opinion among WTO scholars also supports the application of this likeness test.<sup>42</sup> Accordingly, likeness must be assessed by the test focussed on the basis of Characteristics of the service,<sup>43</sup> Consumer preferences,<sup>44</sup> Consumer end-uses,<sup>45</sup> Services Classification,<sup>46</sup> health risks.<sup>47</sup> The *Border Tax Adjustments* likeness test is not a closed treaty-mandated list of criteria, but it rather follows a holistic and indicative approach.<sup>48</sup>

*i. Characteristics of Services are different*

The characteristics of the services include the nature and the quality of the service.<sup>49</sup> In the present factual matrix, the service produced by Kiwi using Reality GP is virtual 3D gaming which is of 3D quality<sup>50</sup> and is completely different from the quality of the games produced by the GenX Gaming Inc in the sense that, the former produces virtual gaming which involves 3D images and the latter produces games that involve 2D images. Therefore, it can be concluded that, the characteristics of the services are different.

As a result of this, the burden of proof on Roderlam is more because in *EC-Asbestos*,<sup>51</sup> the Appellate Body held that, in cases where the evidence relating to the properties establishes that the products at issue are physically quite different, the complainant shall have a higher burden to establish that, despite pronounced physical differences there is a competitive relationship between the products such that, all of the evidence, taken together, demonstrates that the products are *like*.

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<sup>41</sup> Senti. Richard & Conlan Patrica, *WTO : Regulation of World Trade after the Uruguay Round* (Zurich, 1998), Pg. 93.

<sup>42</sup> A. Mattoo, *National Treatment in the GATS, Corner-Stone or Pandora's Box?*, 25, *JWT*, 1997, Vol. 31 No. 1; M. Cossy, *Determining "likeness" under GATS: Squaring the Circle?*, 23, Staff Working Paper ERSD-2006-08, 2006.

<sup>43</sup> Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.322, WT/DS27/R/USA, (22 May 1997). [hereinafter Panel Report, *EC – Bananas*].

<sup>44</sup> *Border Tax Adjustments*, Working Party Report, BISD/18(97-109).

<sup>45</sup> M. Cossy, *Supra* Note 42, Pg. 21; W. Zdouc, '*WTO Dispute Settlement Practice Relating to the GATS*,' *Journal of International Economic Law* 2(1999), Pgs. 295-346, at 333 in: Ortino & Petersmann (eds), 381, 395; M. Krajewski, *National Regulation and Trade Liberalization in Services-The Legal Impact of The General Agreement on Trade in Services(GATS) on National Regulatory Autonomy*, 99, The Hague: Kluwer Law International, 2005.

<sup>46</sup> A . Mattoo, *Supra* Note 42, Pgs. 1, 107, 128.

<sup>47</sup> Appellate Body Report, *EC-Asbestos*, *Supra* Note 40, ¶ 113.

<sup>48</sup> Appellate Body Report, *EC-Asbestos*, *Supra* Note 40, ¶ 102.

<sup>49</sup> Panel Report, *EC – Bananas*, *Supra* Note 43, ¶ 7.322.

<sup>50</sup> Compromis, Annexure, Pg. 13.

<sup>51</sup> Appellate Body Report, *EC-Asbestos*, *Supra* Note 40, ¶ 118.

*ii. End-uses are distinct*

It is humbly submitted that, in so far as the GenX game “Mystical assassins” is concerned, the game is possibly played less for the purposes of entertainment but the main aim is to introduce the young children to the Timor faith and to religious or moral values. They are considered as a modern way of educating the children about the “Timor mythology.”<sup>52</sup> On one hand, Mystical Assassins was purchased to sensitize children towards cultural, religious and moral values and on the other hand, Kiwi games are purchased merely for the purpose of entertainment alone.

*iii. Consumer Preferences are disparate*

This criterion examines the extent to which consumers perceive and treat the services as alternative means of performing particular functions in order to satisfy a particular want or demand.<sup>53</sup> It is humbly submitted that virtual gaming has different consumers when compared to those of ordinary gaming. Kiwi’s own evidence shows that Reality GP is twenty years ahead of the competition and users will not feel for a second that they are actually playing a game.<sup>54</sup> Kiwi itself has stated that, virtual gaming is being created to offer a vastly different consumer experience than that of ordinary video gaming.<sup>55</sup> This evidence demonstrates that, the sensational attributes and consumer experiences likely to shape consumer perceptions of recreational value of an Internet virtual gaming are no more “like” those of an ordinary video game. For instance, the attributes of participation in a real football game are not “like” those of participation in a football video game. So the consumers’ tastes and end-uses are different while playing virtual games when compared to those playing ordinary video games.

*iv. Product Classification is contrasting*

The GATT Secretariat’s Classification is contained in the “W/120” list<sup>56</sup> and in the corresponding United Nations Central Product Classification (CPC). Indeed, so far WTO panels have always considered service classifications when determining

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<sup>52</sup> Compromis, ¶ 5.

<sup>53</sup> *Border Tax Adjustments*, Working Party Report, BISD/18(97-109).

<sup>54</sup> Compromis, ¶ 8.

<sup>55</sup> *Id.*, Note 54.

<sup>56</sup> Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, (10 July, 1991).

likeness.<sup>57</sup> Two services falling under different sectors of service classification are unlike.<sup>58</sup> The gaming service supplied by Kiwi falls under the sub-sector of ‘other audio visual services’ as well as the sub-sector of on-line games where as, the video games supplied by GenX falls under the sub-sector of ‘video games of a kind with a receiver.’<sup>59</sup> Hence, it can be inferred conclusively that they fall in two different sectors and are not ‘like’ services.

**v. *Health Risks involved are unlike***

In *EC – Asbestos*,<sup>60</sup> the Appellate Body took a view that, evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Art. III:4 of the GATT 1994. In the instant case, the risks of virtual gaming are farfetched than the risks associated with ordinary videogames.

**C. THE MEASURE BY RANDORNZK DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO FOREIGN SERVICES/SUPPLIERS THAN THAT GRANTED TO LIKE DOMESTIC SERVICES/SUPPLIERS**

**i. *No competition exists between Kiwi and GenX***

In order to examine the existence of competition between the services and service suppliers, they are to be viewed by the market as substitutes.<sup>61</sup> In the present case, the virtual gaming produced by Kiwi is not produced by GenX as it produces ordinary video games and are unlike services as already elaborated. Hence, they cannot be viewed as substitutes and there exists no competition between them.

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<sup>57</sup> Panel Report, *EC – Bananas*, *Supra* Note 43, ¶ 7.322; Panel Report, *Canada – Certain Measures Affecting The Automotive Industry*, ¶ 10.289, WT/DS139/R, WT/DS142/R, (11 February 2000) [hereinafter Panel Report, *Canada-Autos*].

<sup>58</sup> A. Mattoo, *Supra* Note 40, Pg. 128.

<sup>59</sup> Group 385, Class 3858, Sub-Class 38580, *Central Product Classification (CPC)*, Department of Economic and Social Affairs- Statistics Division, Statistical Papers, Series M No. 77, Ver. 1.1, (United Nations, New York, 2002).

<sup>60</sup> Appellate Body Report, *EC-Asbestos*, *Supra* Note 40, ¶ 113

<sup>61</sup> D.H.Ragen, ‘Regulatory Purpose and “Like Products” in Article III: 4 of the GATT (With Additional Remarks on Article III: 2), 447, 36 Journal of World Trade (2002).

*ii. The ban on the import of Reality GP does not modify the conditions of competition in the favour of domestic suppliers*

In *Canada- Autos*,<sup>62</sup> it was stressed by the Panel that, the context of the equivalent GATT Art. III: 4, that, “The equality of competitive opportunities is affected if a measure accords an advantage to the sale or use of domestic products but not to the sale or use of the like imported products, regardless of whether or not that advantage can also be obtained by other means.”

In the present factual milieu, the measure enacted by Randornzk accords no advantage to the sale or use of domestic products because in this scenario both the companies can sell video games without any discrimination and therefore, the conditions of the competition are one and the same for both Kiwi and GenX and are not modified by the ban.

Furthermore, the level of threat posed by imports i.e., virtual gaming produced by Kiwi games is far higher than those imposed by the ordinary video games produced by GenX. Also, the number of gamers playing virtual games is so high in Randornzk.<sup>63</sup> And GenX hasn’t even started producing the type of virtual gaming which Kiwi is producing. As a result, the scope of replicating the virtual gaming like the one produced by Kiwi is miniscule.

### **III. RANDORNZK THROUGH THE RBB POLICY DIRECTIVE 2024 HAS NOT VIOLATED ITS OBLIGATIONS UNDER GATS**

#### **A. RANDORNZK THROUGH THE RBB POLICY DIRECTIVE VIOLATED ARTICLE VI OF GATS**

The RBB Policy Directive [hereinafter referred to as Directive] does not violate Art. VI: 1 GATS, because, it is administered in a reasonable, objective and impartial manner.

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<sup>62</sup> Panel Report, *Canada-Autos*, *Supra* Note 57, ¶ 10.87.

<sup>63</sup> *Compromis*, ¶ 15.

*i. Article VI: 1 of GATS is not applicable*

Article VI: 1 of GATS applies only in sectors with specific commitments.<sup>64</sup> As elaborated above, Randornzk has not made any Sectoral Commitment in its Schedule of Specific Commitments where the gaming service provided by Kiwi falls.

*ii. Arguendo, the Directive is not an administration of the measure:*

Article VI: 1 applies to the administration of a measure, not to its substantive content.<sup>65</sup> Art. VI: 1 of GATS widely corresponds with Art. X: 3 (a) of GATT; thus, principles developed under that Article can also apply to Art. VI: 1 GATS.<sup>66</sup>

The Appellate Body in *EC-Selected Customs Matters* referred to *EC-Bananas III*<sup>67</sup> and *EC -Poultry*,<sup>68</sup> and reasoned that, as Article X: 3(a) of GATT establishes disciplines on the administration of the legal instruments of the kind described in Article X: 1 of GATT, claims concerning the substantive content of these Article X: 1 of GATT legal instruments fall outside the scope of Article X: 3(a) of GATT.<sup>69</sup>

The Appellate Body in *EC-Selected Customs Matter* concluded that, the term "administer" in Article X: 3(a) of the GATT 1994 relates to the application of laws and regulations, including administrative processes and their results but not to laws and regulations as such.<sup>70</sup> The definition of "measures" under Article XXVIII lit. a of GATS will apply.<sup>71</sup> Accordingly, Article VI: 1 of GATS covers any measure "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."<sup>72</sup> Accordingly, in the present factual milieu, the Directive is the measure in itself and is not the administration of the measure. Randornzk issued the Directive which is a measure in itself but not the administration of the measure. Therefore,

<sup>64</sup> WTO- TRADE IN SERVICES, KRAJEWSKI & ENGELKE ON ARTICLE VI, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, Vol. 6, ¶ 7, Pg.169, (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle, Martinus Nijhoff Publishers, 2008).

<sup>65</sup> Appellate Body Report, *European Communities- Selected Customs Matters*, ¶ 200, WT/DS315/AB/R, (13 November 2006) [hereinafter Appellate Body Report, *EC-Selected Customs Matters*].

<sup>66</sup> MITSUO MATSUSHITA/THOMAS SCHOENBAUM/PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY*, 630. (2<sup>nd</sup> ed., Oxford 2006).

<sup>67</sup> Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶ 200, WT/DS27/AB/R, (26 November 2008), [hereinafter Appellate Body Report, *EC – Bananas*].

<sup>68</sup> Appellate Body Report, *European Communities-Measures Affecting The Importation Of Certain Poultry Products*, ¶ 115, WT/DS69/AB/R, 13 July 1998.

<sup>69</sup> Appellate Body Report, *EC-Selected Customs Matters*, *Supra* Note 65, ¶ 199.

<sup>70</sup> Appellate Body Report, *EC-Selected Customs Matters*, *Supra* Note 65, ¶ 191.

<sup>71</sup> KRAJESWSKI & ENGELKE, *Supra* Note 64, pg. 169, ¶ 6.

<sup>72</sup> *Id.*, Note 71.

Article VI: 1 of GATS is out of scope as a measure cannot be interpreted to mean and include the administration of a measure. Hence, Art. VI: 1 of GATS has not been violated by Randornzk. Furthermore, violations of disciplines under Article VI can still be justified on the basis of Article XIV of GATS.<sup>73</sup>

## **B. RANDORNZK THROUGH THE DIRECTIVE DID NOT VIOLATE ARTICLE XI OF GATS**

Article XI of GATS as a general rule prohibits any restriction on international transfer and payments,<sup>74</sup> but permits exceptions in five sets of circumstances.<sup>75</sup>

### *i. Article XI of GATS is not applicable to Randornzk*

The provision of Article XI exclusively applies to international transfers and payments that are related to a service pursuant to a specific commitment of a Member and thus, Members' obligations under Art. XI are conditional obligations.<sup>76</sup> There must be a direct relationship between the service and the international transfer and payment in question.<sup>77</sup> As was elaborated above, Randornzk has not provided for any Sectoral Commitment for the gaming service provided by Kiwi thus Art. XI is not applicable in the first place.

### *ii. Arguendo, Article XI of GATS is not violated*

There are five alternative exceptions to the general rule of Article XI of GATS that a Member may not impose restrictions on international transfers and payments (for current or capital transactions) relating to specific commitment of such Member.<sup>78</sup> Randornzk has placed a restriction which is covered under any restriction covered by the exception of Para. 2 lit. a of the Annex on Financial Services. Measures for prudential reasons include any regulation to ensure the integrity or stability of the financial system.<sup>79</sup> Examples of prudential measures are rules against money

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<sup>73</sup> KERN ALEXANDER AND MADIS ANDENAS, *THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES*, 215, (Martinus Nijhoff Publishers).

<sup>74</sup> WTO- TRADE IN SERVICES, CHRIST & PANIZZON ON ARTICLE XI OF GATS, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, Vol. 6, Pg. 249, ¶ 11. (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle, Martinus Nijhoff Publishers, 2008).

<sup>75</sup> CHRIST & PANIZZON, *Supra* Note 74, Pg. 253, ¶ 23.

<sup>76</sup> CHRIST & PANIZZON, *Supra* Note 74, Pg. 250, ¶ 16.

<sup>77</sup> *Id.*, Note 74.

<sup>78</sup> CHRIST & PANIZZON, *Supra* Note 74, Pg. 253 ¶ 23.

<sup>79</sup> GATS *Supra* Note 19, ¶ 2.

laundering<sup>80</sup> which is a financial fraud.<sup>81</sup> In this manner, Randornzk placed the warning on International payments for prudential reasons so as to reduce online high level financial frauds. Further, the warning doesn't restrict purchasers from purchasing anything from the online merchants operating outside the territory of Randornzk but, it only warns them to proceed to purchase at their own risk. This warning was issued as it was impossible for the physical inspection of the online merchant sites operating outside the territory of Randornzk.<sup>82</sup> Therefore, by issuing the Directive, Randornzk has not violated Article XI of GATS.

**C. RANDORNZK THROUGH THE DIRECTIVE DID NOT VIOLATE ITS OBLIGATIONS UNDER ARTICLE XVI OF GATS**

The essence of Article XVI of GATS paragraph 1 is that a Member should accord, with respect to market access, no less favourable treatment than that provided for in the Members' respective schedules.<sup>83</sup>

Thus to prove an act is consistent with Article XVI: 1 of GATS, it must be established that:

- a) Randornzk has not committed to grant market access in the relevant services sector and mode of supply,<sup>84</sup> and
- b) The measure by Randornzk did not accord less favourable treatment than that provided for in its schedule.<sup>85</sup>
  - i. *Randornzk has not committed to grant market access in the relevant services sector and mode of supply*

As was elaborated above, the gaming services provided by Kiwi doesn't fall under the sectors where Randornzk has made commitment. The members should oblige to allow cross-border movement of capital and transfers of capital into its territory only if they

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<sup>80</sup> CHRIST & PANIZZON, *Supra* Note 74, Pg. 254 ¶ 27.

<sup>81</sup> *Fraud and Money Laundering*, Topic Gateway Series No. 31, (The Chartered Institute of Management Accountants, 2006)

<sup>82</sup> Compromis, ¶ 21 sub ¶ 4.

<sup>83</sup> Panel Report, *US- Gambling*, *Supra* Note 1, ¶ 6.263.

<sup>84</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 214.

<sup>85</sup> Panel Report, *US- Gambling*, *Supra* Note 1, ¶ 6.263.



are an essential part of the service the member has committed to.<sup>86</sup> Here, Randornzk did not make any commitment in the relevant sectors so no obligation arises on behalf of Randornzk to allow transfers of capital.

*ii. The measure by Randornzk did not accord for less favourable treatment than that provided for in its schedule*

The ordinary meaning of the terms contained in the first and second paragraphs of Art. XVI of GATS means that the only limitations and measures falling within the scope of Art. XVI of GATS are those listed in the second paragraph of Article XVI of GATS.<sup>87</sup> In the present case, the measure taken by Randornzk does not fall within any of the forms enlisted in the second paragraph of Article XVI of GATS is elucidated below.

*iii. Randornzk through the Directive did not violate its obligations under Article XVI: 2 of GATS*

As it was already elaborated the measure should be in the form of numerical quota to come under Article XVI: 2 of GATS. At the most, according to *US- Gambling* case the measure should be in the form of ‘zero quota’(i.e., a total prohibition) to come under one of the form of numerical quotas. In the instant case, the Directive is neither a limitation in the form of numerical quota nor in the form of zero quota (no total prohibition). It merely issues a directive which falls outside the scope of Article XVI of GATS.

**IV. RANDORNZK IS JUSTIFIED FOR ENACTING THE BAN ON THE IMPORT OF REALITY GP AND ISSUING THE DIRECTIVE UNDER ARTICLE XIV OF GATS**

**A. RANDORNZK BY ENACTING A BAN ON THE IMPORT OF REALITY GP IS JUSTIFIED UNDER ARTICLE XIV OF GATS**

*In casum* the Panel found the ban to be inconsistent with Art. XVI, or XVII of GATS, it is nonetheless justified under Article XIV of GATS. Art. XIV of GATS requires a “two-tier analysis” of the measure to be justified under that provision.<sup>88</sup> Violations of

<sup>86</sup> GATS, *Supra* Note 19, Footnote 8.

<sup>87</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.299.

<sup>88</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 292.

disciplines under any provision of GATS can still be justified on the basis of Article XIV.<sup>89</sup> Under the requirements of the chapeau of Art. XIV of GATS, the emphasis is on the application of the challenged measure,<sup>90</sup> as opposed to its substantive content, because the purpose of the chapeau is to prevent abuse of the Article XIV of GATS exceptions.<sup>91</sup> The Chapeau articulates that a measure must not be applied in a manner that constitutes (a) arbitrary discrimination between countries where like conditions prevail, (b) unjustifiable discrimination between countries where like conditions prevail, or (c) a disguised restriction on international trade.<sup>92</sup>

In the present factual milieu the ban on Reality GP is in consonance with the requirement of the chapeau in the following manner: Firstly, enacting a ban on the import of Reality GP is by no means an arbitrary discrimination because like conditions doesn't exist between the countries as the type of virtual gaming supplied by Kiwi is not supplied by GenX thereby indicating that, there is no like condition prevailing. Secondly, the ban enacted on the import Reality GP is not unjustifiable discrimination because like conditions do not exist as elucidated in the above lines. Thirdly, the ban is not a disguised restriction on trade as it was necessary to curb desensitization towards violence and it was the least trade restrictive measure.

*i. Randornzk is justified to enact the ban on the import of Reality GP under Article XIV (a) of GATS*

Pursuant to the text of Article XIV (a) of GATS the two elements<sup>93</sup> that must be demonstrated are:

- i) the measure must be one designed to “protect public morals” or to “maintain public order”; and
- ii) the measure for which justification is claimed must be “necessary” to protect public morals or to maintain public order.

**a) The act of banning the import of Reality GP is required to maintain public order:**

<sup>89</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶ 291.

<sup>90</sup> Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 6.6, WT/DS58/R (May 15, 1998); Appellate Body Report, *US-Gasoline*, *Supra* Note 21, Pg. 24.

<sup>91</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.574; Appellate Body Report, *US-Gasoline*, *Supra* Note 21, Pg. 22.

<sup>92</sup> GATS, *Supra* Note 19, Art. XIV.

<sup>93</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.455.

Article XIV (a) allows derogation from the substantive obligations under the GATS if it is “necessary to protect public morals or to maintain public order.”<sup>94</sup> Measures necessary to the enforcement of laws and regulations relating to “public safety,” are included in the legal concept of “public order” (“ordre public”).<sup>95</sup> The term “public order” refers to the familiar civil-law concept denoted in French by the expression “ordre public” and its functional counterpart in common law systems, the concept of “public policy.” The concept of “public order” refers to the “fundamental national conceptions of law, decency and morality.”<sup>96</sup> “Public morals” in turn refers to standards of right and wrong that can be described as “belonging to, affecting, or concerning the community or nation.”<sup>97</sup>

“The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”<sup>98</sup> In the GATS, invocation of the “public order” portion of this exception is limited to measures necessary to respond to “genuine and sufficiently serious” threats to a fundamental interest of society.<sup>99</sup> Participating in a violent VR game produced more aggressive thoughts than either watching this game or acting out the physical movements.<sup>100</sup> Violent content increases aggressive behaviour, particularly for young children. Action, as a form, arouses children and this arousal can then be channelled into aggressive or pro-social behaviours, depending upon situational contingencies.<sup>101</sup> After repeated exposure to aggressive or sexual content, the individual may become desensitized to that content and thus, not respond at all, or be insensitive to the plights of others.<sup>102</sup> If rewards are available for imitating the behaviour, the observer will often do so. Imitation can occur for all kinds of behaviours, be they pro-social or antisocial.

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<sup>94</sup> KERN ALEXANDER AND MADSEN ANDENAS, *Supra* Note 73, Pg. 382.

<sup>95</sup> Panel Report, *US- Gambling*, *Supra* Note 1, ¶ 3.278.

<sup>96</sup> *Case Concerning the Application of the Convention of 1902, Governing the Guardianship of Infants (Netherlands v. Sweden)*, 1958 I.C.J. 55, 90 (Judgment of 28 November) (sep. op. of J. Lauterpacht).

<sup>97</sup> THE NEW OXFORD ENGLISH DICTIONARY, 1827, 2204, (Catherine Soanes & Angus Stevenson, Oxford University Press, 11<sup>th</sup> ed., Rev.).

<sup>98</sup> GATS, *Supra* Note 19, Art. XIV, footnote 5; Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 3.278.

<sup>99</sup> Panel Report, *US Gambling*, *Supra* Note 1, ¶ 3.278.

<sup>100</sup> Calvert, S. L., & Tan, S. L., *Impact of Virtual Reality on Young Adults' Physiological Arousal and Aggressive Thoughts: Interaction versus Observation*, 125-139, *Journal of Applied Developmental Psychology*, 15.

<sup>101</sup> HUSTON, A.C. & WRIGHT, J.C., *MASS MEDIA AND CHILDREN'S DEVELOPMENT*, Vol. 4, *HANDBOOK OF CHILD PSYCHOLOGY, CHILD PSYCHOLOGY IN PRACTICE*, (W. Damon, I. Sigel, & K.A. Renninger, 5th ed., New York:Wiley)

<sup>102</sup> Sandra L. Calvert, *The Social Impact of Virtual Reality*, 9, *Handbook of Virtual Environment Technology*, Erlbaum, 2001.

However, if we see a model performing antisocial behaviours and get rewarded for them (or at least not punished), then those internal controls are undermined, or not inhibited.<sup>103</sup> Further, maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order."<sup>104</sup> Therefore, Randornzk is justified to protect public safety under Article XIV (a) of GATS.

***b) Randornzk's act of enacting the ban on Reality GP fulfils the necessity test***

In the Korea-Beef<sup>105</sup> and E.C.-Asbestos<sup>106</sup> cases, the Appellate Body laid out a three-factor balancing test for considering necessity

(1) the importance of the societal interests and values that the measure is intended to protect,<sup>107</sup>

(2) the "extent to which the challenged measure contributes to the realization of the ends pursued" by the measures,<sup>108</sup> and

(3) the trade impact of the challenged measure, including "whether a reasonably available WTO-consistent alternative measure" exists.<sup>109</sup>

In the present case Randornzk is in consonance with the necessity test due to the following reasons: Firstly, Randornzk deviated from the commitment so as to prevent the occurrence of violence in the interest of public safety. Secondly, the ban on virtual gaming was necessary to achieve the ends pursued i.e., reduce levels of desensitization towards violence.<sup>110</sup> Thirdly, there were trade impacts as a result of this measure but there was no other less trade restrictive alternative measure.

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<sup>103</sup> Bandura, A., *Self-efficacy: The Exercise of Control*, (W.H. Freeman & Co., 1997, New York).

<sup>104</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 3.279.

<sup>105</sup> Appellate Body Report, *Korea-beef*, *Supra* Note 31, ¶¶ 166 & 163.

<sup>106</sup> Appellate Body Report, *EC-Asbestos*, *Supra* Note 39, ¶ 172.

<sup>107</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.492; Appellate Body Report, *Korea-Beef*, *Supra* Note 31, ¶ 162.

<sup>108</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.494; Appellate Body Report, *Korea-Beef*, *Supra* Note 31, ¶ 163.

<sup>109</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.495-96; Appellate Body Report, *Korea-Beef*, *Supra* Note 31, ¶¶ 163 & 166.

<sup>110</sup> Sandra L. Calvert *Supra* Note 102.

*ii. Randornzk is justified in enacting the ban on the import of Reality GP under Article XIV: b of GATS*

DSB panels have unequivocally found measures relating directly to “maintenance of human health and life” to be valid under Article XIV (b).<sup>111</sup> The ban on the import of Reality GP is valid as its presence would negatively influence the values of their consumers. This ban was aimed primarily at reducing the potential for subsequent shootings and thus would constitute an objective relating to the maintenance of human life and health. This ban was aimed so as to prevent future outbreaks of deadly violence. Therefore, to seek justification under this Article it is to be proved that Reality GP affects the health of people which is triggered by the increasing levels of aggression.

**a) Virtual Environmental systems lead to motion sick-like side effects and epileptic seizures:**

VE (Virtual Environment) systems users are experiencing motion sick-like side effects in large numbers.<sup>112</sup> Few of the symptoms for motion sickness are headaches, dizziness, vertigo, nausea, eyestrain, sweating, and in rare cases, vomiting can occur.<sup>113</sup> Side effects from immersion into VEs closely resemble those of pure motion sickness.<sup>114</sup> Since 1983, much evidence has accumulated documenting the fact that virtual gaming provokes epileptic seizures.<sup>115</sup> Motion Sickness and epilepsy thus, will be affecting 75% of gamers in Randornzk who were playing the Kiwi games using Reality GP thereby tremendously causing inherent damages to the health.

**b) Virtual gaming leads to behavioural disorders:**

Through representational experiences, memories of the past and fantasies about the future become part of our current reality.<sup>116</sup> Violent content increases aggressive

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<sup>111</sup>Nicholai Diamond, *Killer Games and GATS: Why the WTO should permit Germany to restrict market access to violent online video games*, 460, *The George Washington International Law Review* (3) 45.

<sup>112</sup> Michael K. McGee, *Assessing Negative Side Effects in Virtual Environment*, 11 (Blacksburg, Virginia, February 1998).

<sup>113</sup> *Id.*, Note 112, Pg. 11.

<sup>114</sup> *Id.*, Note 112, Pg. 13.

<sup>115</sup> Funatsuka M, Fujita M, Shirakawa S, Oguni H, Osawa M., *Study on Photo-Pattern Sensitivity in patients with electronic screen game-induced seizures (ESGS): Effects of Spatial Resolution, Brightness, and Pattern Movement*. *Epilepsia*, 2001; 42:1185-1197.

<sup>116</sup> Sandra L. Calvert, *Supra* Note 102, Pg. 7.

behaviour, particularly for young children.<sup>117</sup> Action, as a form, arouses children and this arousal can then be channelled into aggressive or pro-social behaviours, depending upon situational contingencies.<sup>118</sup> Physiological arousal increases after virtual reality game play<sup>119</sup>; the arousal can then be channelled into any social behaviour (aggressive, pro-social, fantasy) that is triggered by the environment.<sup>120</sup> In the present case, with the help of Reality GP it will immerse the player in the game so much that the player would be unable to differentiate between the game and the reality. This would lead to a number of problems as people might start engaging in violent activities thinking that they are still playing a game which in fact might be reality. Further, it is humbly submitted that, Robert Steinhäuser, Sebastien B., Tim Kretschmer are examples of school shootings instances which took place in Germany as an outcome of playing violent computer games.<sup>121</sup> Randornzk was apprehensive about the occurrence of such kind of violent events and thus enacted the ban to prevent the occurrence of the same or any like kind of event. As a result of these serious impacts, due to virtuality of games on people, Randornzk is therefore justified under Article XIV: b for enacting the ban on Reality GP.

#### **B. RANDORNZK IS JUSTIFIED IN ISSUING THE DIRECTIVE UNDER XIV: A OF GATS**

In *EC-Bananas* the Appellate Body confirmed that the jurisprudence under the GATT 1994 could be relevant for the interpretation of analogous provisions contained in GATS.<sup>122</sup> Given the textual similarity, Article XX of the GATT 1994 and the Article XIV of the GATS, the former is relevant and useful in the interpretation of the latter.<sup>123</sup> Under the requirements of the chapeau, the emphasis is on the application of the challenged measure,<sup>124</sup> as opposed to its substantive content, because the purpose of the chapeau is to prevent abuse of the Article XIV exceptions.<sup>125</sup> The Chapeau articulates that a measure must not be applied in a manner that constitutes (a) arbitrary discrimination between countries where like conditions prevail, (b) unjustifiable

<sup>117</sup> HUSTON, A.C. & WRIGHT, J.C., *Supra* Note 101.

<sup>118</sup> *Id.*, Note 117.

<sup>119</sup> Sandra L. Calvert, *Supra* Note 100.

<sup>120</sup> Sandra L. Calvert, *Supra* Note 102, Pg. 12.

<sup>121</sup> Nicholai Diamond, *Supra* Note 111, Pg. 566.

<sup>122</sup> Appellate Body Report, *EC – Bananas*, *Supra* Note 67, ¶ 231.

<sup>123</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.448.

<sup>124</sup> Appellate Body Report, *US – Gambling*, *Supra* Note 2, ¶ 339; Appellate Body Report, *US-Gasoline*, *Supra* Note 21, Pg 20-21.

<sup>125</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.574; Appellate Body Report, *US-Gasoline*, *Supra* Note 21 Pg. 22.

discrimination between countries where like conditions prevail, or (c) a disguised restriction on international trade.<sup>126</sup> Randornzk by issuing the RBB Policy Directive did not create any discrimination nor did it result in a restriction on international trade.

**Randornzk by issuing the Directive is justified under Article XIV: a of GATS**

Pursuant to the text of Article XIV: a, the two elements<sup>127</sup> that must be demonstrated are:

- a) The measure must be one designed to “protect public morals” or to “maintain public order”; and
- b) The measure for which justification is claimed must be “necessary” to protect public morals or to maintain public order.

*i. Randornzk’s Directive is included in the definition of the term public order*

The term "public order" refers to the familiar civil-law concept denoted in French by the expression *ordre public* and its functional counterpart in common law systems, the concept of "public policy" (although the latter term is also used in other contexts with a broader meaning). The concept of "public order" refers to the "fundamental national conceptions of law, decency and morality."<sup>128</sup> "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."<sup>129</sup> "Public morals" in turn refers to standards of right and wrong that can be described as "belonging to, affecting, or concerning the community or nation."<sup>130</sup> The prevention of money laundering and of fraud schemes could arguably relate to both public morals and public order.<sup>131</sup> In the instant case, the Directive was issued to curb online high level frauds which relate to both public order and public morals thus falling under the Article XIV: a of GATS

<sup>126</sup> GATS, *Supra* Note 18, Art. XIV.

<sup>127</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.455.

<sup>128</sup> *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, 1958 I.C.J. 55, 90 (Judgment of 28 November) (sep. op. of J. Lauterpacht).

<sup>129</sup> GATS, *Supra* Note 19, footnote 5.

<sup>130</sup> *Supra* Note 97, Pgs. 1827, 2204.

<sup>131</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.469.

*ii. Randornzk's Directive is in consonance with the necessity test*

In the *Korea-Beef*<sup>132</sup> and *E.C.-Asbestos*<sup>133</sup> cases, the Appellate Body laid out a three-factor balancing test for considering necessity:

(1) the importance of the societal interests and values that the measure is intended to protect,<sup>134</sup>

(2) the “extent to which the challenged measure contributes to the realization of the ends pursued” by the measures,<sup>135</sup> and

(3) the trade impact of the challenged measure, including “whether a reasonably available WTO-consistent alternative measure” exists.<sup>136</sup>

To prove conformity with the necessity test, it is firstly submitted that the online high level frauds which were taking place in Randornzk are a part of the societal interest which were supposed to be protected and as a means of protection Randornzk issued the Directive. Secondly, by placing the Directive users will be extremely circumspective to use unknown or harmful sites thereby, reducing online frauds. Thirdly, Randornzk in pursuance of curbing online high level financial fraud issued the said measure as it was highly impossible for it to track and inspect transactions from online merchant operating from outside the territory of Randornzk. The Appellate Body in *US-Gambling* noted that, “a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective.”<sup>137</sup> Thus, all the essentials of the necessity test have been complied with by Randornzk.

Randornzk by issuing the Directive is justified under Article XIV (a) of GATS, because this Directive was issued on the background of the commission of online high level financial frauds. Hence, it is covered under the Article XIV (a) of GATS.

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<sup>132</sup> Appellate Body Report, *Korea-Beef*, *Supra* Note 31 ¶ 178.

<sup>133</sup> Appellate Body, *EC-Asbestos*, *Supra* Note 40, ¶ 172.

<sup>134</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶ 6.492; Appellate Body Report, *Korea-Beef*, *Supra* Note 31 ¶ 162.

<sup>135</sup> Panel Report, *US-Gambling* *Supra* Note 1, ¶ 6.494; Appellate Body Report, *Korea-Beef*, *Supra* Note 31 ¶ 163.

<sup>136</sup> Panel Report, *US-Gambling*, *Supra* Note 1, ¶¶ 6.495-96; Appellate Body Report, *Korea-Beef*, *Supra* Note 31 ¶¶ 163 & 166.

<sup>137</sup> Appellate Body Report, *US-Gambling*, *Supra* Note 2, ¶¶ 309–311.



## **REQUEST FOR FINDINGS**

Wherefore for the foregoing reasons, Randornzk respectfully requests this panel to adjudge and declare:

- 1) Randornzk by banning the import of Reality GP has not violated Article XVI of the GATS by failing to respect the market access commitment prescribed in its schedule of commitments.
- 2) Randornzk has not violated Article XVII of the GATS by “depriving Kiwi of the market advantage accruing from use of Reality GP” and “forcing equal treatment of unequal situations”
- 3) Randornzk through the RBB Policy Directive 2024 did not violate its obligations under Articles VI.1, XVI.1, XVI.2 and XI of the GATS.
- 4) Randornzk can claim justification its measures either under Article XIV (a), (b), (c)

Respectfully submitted,

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Agent(s) on behalf of the Respondent.