

6th GNLU
INTERNATIONAL MOOT COURT COMPETITION, 2014

BEFORE THE



DISPUTE SETTLEMENT BODY

RANDORNZK – MEASURES AFFECTING THE ONLINE GAMING INDUSTRY

WT/ DS/***

RODERLAM

(Complainant)

V.

RANDORNZK

(Respondent)

MEMORIAL FOR THE COMPLAINANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....iv

INDEX OF AUTHORITIES v

AGREEMENTS, TREATIES & CONVENTIONSV

TABLE OF CASESV

DECISIONS OF INTERNATIONAL COURT OF JUSTICE..... IX

DECISION OF FOREIGN COURTS IX

BOOKS, TREATISES AND DIGESTS IX

ARTICLES AND CONTRIBUTIONS.....X

REPORTS, GUIDELINES AND OTHER DOCUMENTS XI

REFERENCE MATERIAL XII

STATEMENT OF FACTSxiii

MEASURES AT ISSUE.....xv

SUMMARY OF PLEADINGSxvi

1. RANDORNZK HAS SCHEDULED COMMITMENTS IN THE AUDIO-VISUAL SECTOR..... XVI

2. THE BAN ON THE IMPORT OF REALITY GP AND THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XVI: 1 AND ARTICLE XVI: 2 OF THE GATS..... XVI

3. THE RBB POLICY DIRECTIVE VIOLATES ARTICLE VI:1 OF THE GATS. XVI

4. THE BAN ON THE IMPORT OF REALITY GP VIOLATES ARTICLE XVII OF THE GATS. XVI

5. THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XI OF THE GATS. XVI

6. THE BAN ON THE IMPORT OF REALITY GP AND THE RBB POLICY DIRECTIVE ARE NOT JUSTIFIABLE UNDER ARTICLE XIV (A) (B) OR (C) OF THE GATS.XVII

LEGAL PLEADINGS 1

1. RANDORNZK HAS SCHEDULED COMMITMENTS TO VIDEO GAMING SERVICES.....1

THE TERM MOTION PICTURE AND VIDEO TAPE DISTRIBUTION SERVICE ORDINARILY INCLUDES 3D VIDEO GAMING SERVICES 1

INTERPRETATION IN ACCORDANCE WITH ARTICLE 31 OF THE VCLT	1
SUPPLEMENTARY MEANS OF INTERPRETATION UNDER ARTICLE 32 OF THE VCLT.....	5
2. RANDORNZK MAINTAINS MEASURES INCONSISTENT WITH ARTICLE XVI OF GATS.5	
THE BAN ON REALITY GP ACCORDS LESS FAVOURABLE TREATMENT TO THE FOREIGN SERVICE SUPPLIERS THAN IS MENTIONED IN THE SCHEDULE OF COMMITMENTS.....	6
THE RBB POLICY DIRECTIVE RESTRICTS MARKET ACCESS TO THE FOREIGN SERVICE SUPPLIERS DESPITE SCHEDULED COMMITMENTS.....	9
3. RANDORNZK MAINTAINS MEASURES INCONSISTENT WITH ARTICLE VI OF THE GATS.....	10
THE RBB POLICY DIRECTIVE IS A PROTECTIONIST MEASURE	10
THE DIRECTIVE HAS NOT BEEN IMPLEMENTED IN A REASONABLE, OBJECTIVE AND IMPARTIAL MANNER.....	11
4. RANDORNZK HAS VIOLATED ITS COMMITMENTS UNDER ARTICLE XVII OF THE GATS.....	12
TEST 1: LIKENESS: THE DOMESTIC AND FOREIGN SERVICES ARE ‘LIKE’ SERVICES.....	12
TEST 2: LESS FAVOURABLE TREATMENT: THE FOREIGN SERVICES HAVE BEEN PROVIDED LESS FAVOURABLE TREATMENT	16
REGULATORY OBJECTIVES SHOULD NOT BE CONSIDERED UNDER NATIONAL TREATMENT.	16
5. THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XI OF THE GATS 17	
THE RBB POLICY DIRECTIVE 2024 IS A “RESTRICTION” ON CURRENT TRANSACTIONS FOR RANDORNZK’S SPECIFIC COMMITMENTS UNDER ARTICLE XI:1 OF THE GATS.....	18
THE RESTRICTIONS CANNOT BE JUSTIFIED UNDER ARTICLE XIV(C) OF THE GATS	20
THE DIRECTIVE CANNOT BE JUSTIFIED UNDER PARA 2 LIT. A OF THE ANNEX ON FINANCIAL SERVICES.....	22
6. THE BAN ON THE HMD IS NOT JUSTIFIED UNDER PARAGRAPHS (A) AND (B) OF ARTICLE XIV OF THE GATS	23
THE BAN’S OBJECTIVE DOES NOT SATISFY THE REQUIREMENTS UNDER PARAGRAPH (A) ...	23

THE BAN’S OBJECTIVE DOES NOT SATISFY THE REQUIREMENTS UNDER PARAGRAPH (B)....24

REQUEST FOR FINDINGSxviii

LIST OF ABBREVIATIONS

¶	Paragraph number
2D	Two Dimensional
3D	Three- Dimensional
AB	Appellate Body
Art.	Article
DSU	Dispute Settlement Understanding
Eds.	Editor
Et al.	Among others
FATF	Financial Action Task Force
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
Gen X	Gen X Gaming Incorporated
GP	Gaming Paradise
HMD	Head Mounted Display
HS	Harmonized System of Nomenclature
I.C.Q.L.	International and Comparative Law Quarterly
<i>Id.</i>	Ibidem
I.L.S.P	International Legal Studies Program
IMF	International Monetary Fund
Int. T.L.R	International Trade Law Review
Lit.	Littera(e) (letter(s))
U.N.T.S.	United Nation Treaty Series
U.N.C.P.C	United Nations Central Product Classification
U.N.C.T.A.D	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
Ver.	Version
W/120	Services Sectoral Classification List
World T.R.	World Trade Review
WTO	World Trade Organization

INDEX OF AUTHORITIES**AGREEMENTS, TREATIES & CONVENTIONS**

- General Agreement on Trade in Services 1995, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183
- General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.
- Understanding on Rules and Procedure Governing the Settlement of Disputes, April 15, 1994, 33 I.L.M. 112(1994).
- Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Textiles and Apparels	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R (November 25, 2012)
Chile – Alcoholic Beverages	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, (December 13, 1999)
China – Electronic Payment Services	Panel Report, <i>China – Certain Measures affecting Electronic Payment Services</i> , WT/DS413/R, (16 July 2012)
China – Audio-visual	Appellate Body Report, <i>China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audio-visual Entertainment Products</i> , WT/DS363/AB/R, (December 21, 2009)
China – Audiovisual	Panel Report, <i>China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products</i> , WT/DS363/R (August 12, 2009)

Dominican – Cigarettes	Appellate Body Report, <i>Dominican Republic – Measures Affecting The Importation And Internal Sale Of Cigarettes</i> , WT/DS302/AB/R (April 25, 2005)
Dominican – Cigarettes	Panel Report, <i>Dominican Republic – Measures Affecting The Importation And Internal Sale Of Cigarettes</i> , WT/DS302/R (November 26, 2004)
EC – Hormones	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998
EC – Tariff Preferences	Appellate Body Report, <i>European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries</i> , ¶ 94, WT/DS246/AB/R (April 7, 2004)
EC – Computer Equipment	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R (June 5, 1998)
EC – Selected Customs Matters	Appellate Body Report, <i>EC – Selected Custom Matters</i> , WT/DS315/AB/R, (November 13, 2006)
EC – Asbestos	Appellate Body Report, <i>EC – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R (March 12, 2001).
EC – Bananas III	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R (September 9, 1997)

EC – Bananas III	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R/ECU (May 22, 1997)
EC – GMOs	Panel Report, <i>European Communities – Measures Affecting The Approval And Marketing Of Biotech Products</i> , WT/DS291/R (September 29, 2006)
Indonesia – Autos	Panel Report, <i>Indonesia- Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R (July 2, 1998)
Japan – Alcoholic Beverages I	Panel Body, <i>Japan – Customs Duties, Taxes And Labelling Practices On Imported Wines And Alcoholic Beverages</i> , L/6216 - 34S/83
Japan – Alcoholic Beverages II	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, (October 4, 1996)
Kodak – Fuji	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , ¶ 10.85 WT/DS44/R (April 3, 1997)
Korea – Alcoholic Beverages	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, (January 18, 1999)
Korea – Beef	Appellate Body, <i>Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef</i> , , WT/DS161/AB/R (December 11, 2000)
Thailand – Cigarettes	Appellate Body Report, <i>Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines</i> , ¶ 134 , WT/DS371/AB/R, (June 17, 2011)
Thailand – Cigarettes	Panel Report, <i>Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines</i> , WT/DS371/R (November 15,

	2010)
Turkey – Textiles	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, (31 May 1999)
US – Cotton Yarn	Appellate Body Report, <i>United States – Transitional Safeguard Measure On Combed Cotton Yarn From Pakistan</i> , WT/DS184/AB/R (July 24, 2001)
US – Section 301	Panel Report, <i>United States – Sections 301-310 Of The Trade Act Of 1974</i> , WT/DS152/R (December 22, 1999)
US – Gasoline	Appellate Body Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R (April 29, 1996)
US – hot rolled steel	Appellate Body Report, <i>United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan</i> , 101 WT/DS184/AB/R (July 24, 2001)
US – Section 211	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act Of 1998</i> , WT/DS176/AB/R (January 2, 2002)
US – Shrimp	Appellate Body Report US – Shrimps <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R (October 12, 1998)
US – Shrimp	Panel Report, <i>United States – Import Prohibition Of Certain Shrimp And Shrimp Products</i> , WT/DS58/AB/R (October 12, 1998)
US – Autos	Panel Report, <i>United States – Taxes On Automobiles</i> , DS31/R (October 11, 1994)
US – FSC (Article 21.5- EC)	Appellate Body Report, <i>United States – Tax Treatment For "Foreign Sales Corporations</i> ,

	<i>Recourse To Article 21.5 Of The DSU By The European Communities, WT/DS108/AB/RW (January 14, 2002)</i>
US – Gambling	<i>Appellate Body Report, United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services, WT/DS285/AB/R (April 7, 2005)</i>
US – Gambling	<i>Panel Report, United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, 10 November 2004</i>
US – Offset Act	<i>Appellate Body Report, United States – Continued Dumping And Subsidy Offset Act Of 2000, WT/DS217/AB/R (January 16, 2003)</i>

DECISIONS OF INTERNATIONAL COURT OF JUSTICE

- Military and Paramilitary Activities in and against Nicaragua (Nicar v. U.S.), 1986 ICJ 14 ¶ 29.
- International Court of Justice, Merits, Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 ICJ 9, ¶17).
- Asylum Case (Colom./Peru), 1950 ICJ Reports, 266, 282.
- Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 ICJ 176, 196.

DECISION OF FOREIGN COURTS

- *Golden China TV Game Centre and Others v. Nintendo Co Ltd* 1997 (1) SA 405 (SCA).

BOOKS, TREATISES AND DIGESTS

- Molinuevo, *Article XX*, in *WTO TRADE IN SERVICES* 445, 445-465 (Rüdiger Wolfrum et al. eds., 2008).

- Delimatsis & Molinuevo, *Article XVI*, in WTO TRADE IN SERVICES 377, 367-396 (Rüdiger Wolfrum et al. eds., 2008).
- Krajewski, *Article VI*, in WTO TRADE IN SERVICES 168, 165-197 (Rüdiger Wolfrum et al. eds., 2008).
- WTO SECRETARIAT PUBLICATION, A HANDBOOK ON THE GATS AGREEMENT, 21 (1st ed. 2005).
- Krajewski & Engelke, *Article XVII*, in WTO TRADE IN SERVICES 398, 396-420 (Rüdiger Wolfrum et al. eds., 2008).
- NICHOLAS F. DIEBOLD, NON DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES, 256, (Lorand Bartels et al. eds., 1st ed. 2010).
- Joost Pauwelyn, *Comment: The unbearable lightness of Likeness*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 358, 365 (Marion Panizzon et al. eds., 1st ed., 2008).
- Von Bogdandy & Windsor, *Annex on financial services*, in WTO TRADE IN SERVICES 635, 618-640 (Rüdiger Wolfrum et al. eds., 2008).
- CHARLES GOODHART, THE BASEL COMMITTEE ON BANKING SUPERVISION, 303 (1st ed. 2011).
- Cottier, Delimatsis & Diebold, *Article XIV*, in WTO TRADE IN SERVICES, 302, 2187-328 (Rüdiger Wolfrum et al. eds., 2008).
- Jonathan Herbt & Peter Snowden, *Money Laundering and Financial Crime*, in Financial Services Law 311, 305-369 (Michael Blair QC & George Walker eds., 2006).

ARTICLES AND CONTRIBUTIONS

- Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (July 29, 2013) http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf (last visited: Jan 3, 2014).
- Thomas Steiner, *Online Games under WTO Law: Unresolved Classification Issues*, (Swiss National Centre for Competence in Research, Working paper No 2009/3, 2009), http://phase1.nccr-trade.org/images/stories/Steiner_Working%20Paper%202009%20_final.pdf (last visited: Jan 3, 2014).

- Mamiko Yokoi Arai, *GATS' prudential carve out in financial services and its relation with prudential regulation*, I.C.L.Q. 2008, 57(3), 613-648, available at www.westlawindia.com.
- Myriam Vander Stichele SOMO, *Potential risks of Liberalization of Financial services in GATS*, August 2003, available at <http://www.somo.nl/html/paginas/pdf/potentialrisksofliberalisation.pdf>.
- Sacha Wunsch - Vincent, *The Internet, cross border trade in services, and the GATS: lessons from US Gambling*, World T.R. 2006, 5(3), 319-355, available at www.westlawindia.com.
- Roger Kampf , *Liberalisation of financial services in the GATS and domestic regulation*, Int. T.L.R. 1997, 3(5), 155-166, available at: www.westlawindia.com.
- Robert E. Hudec, *GATT/WTO Constraints on National Treatment: Requiem for an "Aim and Effect Test"*, 32 International Lawyer 619-649 (1998), at: <http://www.worldtradelaw.net/articles/hudecrequiem.pdf>.
- Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?*(World Trade Organisation Economic Research and Statistics Division, Working paper No ERSD-2006-08, 2006), http://www.wto.org/english/res_e/reser_e/ersd200608_e.htm (last visited: Jan 3, 2014).
- R. Howse and DH Regan, *The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy'* 11 EJIL 249, 265 (2000).
- Byungsik Jung, *Standard of Review for Jurisprudence on prudential measures*, ILSJ Law Journal, Washington College of Law.
- Sydney J. Key, *Trade Liberalization and prudential regulation: The International Framework for Financial Services*.

REPORTS, GUIDELINES AND OTHER DOCUMENTS

- Border Tax Adjustments, Report of the Working Party, BISD 18S-97 (1970).
- Committee on specific commitments, *guidelines for the scheduling of specific commitments under the general agreement on trade in services (GATS)*, S/L/92(March 28, 2001).
- Committee on specific commitments, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade In Services (GATS)*, MTN.GNS/W/164 (Sept. 3, 1993).

- Council for Trade in Services, *Audiovisual Sector: Background note by the Secretariat S/C/W/40* (June 15, 1998).
- United Nation International Trade Statistics Knowledgebase Sectoral Classification List(W/120), UNITED NATIONS STATISTICS DIVISION
<http://unstats.un.org/unsd/tradekb/Knowledgebase/Sectoral-Classification-List-W120> (last visited: Jan 3, 2014).
- World Trade Organisation, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991).
- United Nations Statistics Division, *Detailed structure and correspondences of CPC Ver.2 subclasses to ISIC Rev.4 and HS 2007*, UNSTATS.UN.ORG
http://unstats.un.org/unsd/cr/registry/docs/CPCv2_structure.pdf (last visited Jan 4, 2014).
- United Nations Statistics Division, *CPC Ver.2 Explanatory notes*, UNSTATS.UN.ORG, http://unstats.un.org/unsd/cr/registry/docs/CPCv2_explanatory_notes.pdf (Last visited: Jan 4, 2013).
- FATF Standards, *FATF 40 Recommendations*, (October 2003), available at <http://www.fatfgafi.org/media/fatf/documents/FATF%20Standards%20%2040%20Recommendations%20rc.pdf> (Last visited: Jan 4, 2013).
- Directive 2005/60/EC of the European Parliament and of the Council on the use of the financial system for the purpose of money laundering and terrorist financing.
- Group of negotiations on service, *Communication from the International Monetary Fund: The Role of the Fund in the Area of Services Under its Articles of Agreement*, MTN.GNS/W/91 (January 10, 1991).
- UNCTAD, *Transfer of Funds, in SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS*, UNITED NATIONS NEW YORK AND GENEVA,14, UNCTAD/ITE/IIT/2 (2000).
- Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision*, (September 2012).
- Committee on Trade in Financial Services, *Report of the Meeting held on 27th November 2006*,S/FIN/M/53 (30 November 2006).

REFERENCE MATERIAL

- SHORTER OXFORD ENGLISH DICTIONARY (6th ed. Oxford University Press 2007).

STATEMENT OF FACTS

- Randornzk (developed country) has a nascent gaming industry. Gen X is one of the biggest developers and supplies an action based game ‘Mystical Assassins’, the software for which is embedded in Blu-Ray disks.
- The game is inspired by Randornzk mythology and despite protests from NGOs with regard to its violent nature; the Supreme Court on the grounds of ‘freedom to profess religion’, overturned the ban on the game.
- In 2023, Kiwi Corporation, based in Roderlam (developed country with highly developed software and banking sector) with a manufacturing industry in Drastford, started supplying the video games using Reality GP as a mode of delivery. This head mounted display device displays 3D stereoscopic images and is compatible only with a GP console.
- Roderlam Gangsters and Agency Z, were launched which are action and strategy based games. These games can be played online or offline and all purchases of the games have to take place online via GP Live Market. There are 50 other games sold online. Even a cloning service is provided to enhance the user experience. Access to the Internet and a credit card are a prerequisite for access to the gaming service.
- By the end of 2023, 75% Randornzk gamers had access to Reality GP, which costs 300 Randzk. A committee constituted by the Randornzk government stated that the combined effect of Reality GP with Agency Z and Roderlam Gangsters caused ‘desensitization towards violence’ and a subsequent ban on Reality GP was enacted in June 2024.
- The ban was enforced by launching a door-to-door collection campaign and by imposing a hefty penalty. Compliance was proven to be 90%. After the ban, non-3D versions of the games were marketed which did not garner much response. Preference for GP consoles fell to 15%.
- At the same time (June 2024), RBB policy directive was issued to prevent online financial fraud by requiring banks to file compliance reports, followed by a physical inspection. A warning was issued to the consumers, which cautioned them against online transactions with foreign service suppliers. This resulted in a fall of online transactions on GP live market by 90%.

- In February 2025, Roderlam and Drastord requested consultations with Randornzk under the WTO Dispute Settlement Understanding (DSU). Drastord held secret negotiations with Randornzk and did not request the establishment of a panel.
- Due to unsuccessful consultations with Roderlam, on the request of the parties, DSU established a panel on August 2025, which was composed on September 2025.

MEASURES AT ISSUE

There are two measures at issue in the present case:

- The ban on the import and usage of Reality GP imposed by the Randornzk government that seeks to prevent desensitization to violence.
- The mandatory warning issued by the RBB, the monetary bank of Randornzk, as part of its policy directive dissuades consumers against transacting online with foreign service suppliers.

SUMMARY OF PLEADINGS

1. RANDORNZK HAS SCHEDULED COMMITMENTS IN THE AUDIO-VISUAL SECTOR.

- The term Motion picture and video tape distribution service ordinarily includes 3D video gaming services
- The mode of supply is consumption abroad.
- Therefore it can be inferred that Randornzk has made a schedule of commitments.

2. THE BAN ON THE IMPORT OF REALITY GP AND THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XVI: 1 AND ARTICLE XVI: 2 OF THE GATS.

- The ban on Reality GP accords less favourable treatment to the foreign service suppliers than is mentioned in the schedule of commitments.
- The RBB policy directive restricts market access to the foreign service suppliers despite scheduled commitments.
- The implemented measures result in a limitation on the number of service suppliers or on the service operations or service output.

3. THE RBB POLICY DIRECTIVE VIOLATES ARTICLE VI:1 OF THE GATS.

- The RBB policy directive is a protectionist measure
- The directive has not been implemented in a reasonable, objective and impartial manner.

4. THE BAN ON THE IMPORT OF REALITY GP VIOLATES ARTICLE XVII OF THE GATS.

- The domestic and foreign services are ‘like’ services.
- The foreign services have been provided less favourable treatment.
- Regulatory objectives should not be considered under national treatment.

5. THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XI OF THE GATS.

- The Directive is a “restriction” on current transactions relating to Randornzk’s specific commitments within the meaning of Article XI:1.

- The Directive cannot be justified under Article XIV(c).
- The directive cannot be justified under para 2 lit. a of Annex on Financial Services.

6. THE BAN ON THE IMPORT OF REALITY GP AND THE RBB POLICY DIRECTIVE ARE NOT JUSTIFIABLE UNDER ARTICLE XIV (a) (b) or (c) OF THE GATS.

- The ban's objective does not satisfy the requirements under paragraph (a)
- The ban's objective does not satisfy the requirements under paragraph (b)
- It also satisfies the criteria of the chapeau of Article XIV.

LEGAL PLEADINGS

1. RANDORNZK HAS SCHEDULED COMMITMENTS TO VIDEO GAMING SERVICES.

THE TERM MOTION PICTURE AND VIDEO TAPE DISTRIBUTION SERVICE ORDINARILY INCLUDES 3D VIDEO GAMING SERVICES

- 1.1. Members' schedules are an integral part of the GATS Agreement.¹ Treaty rules are interpreted in accordance with the general rule of interpretation and supplementary means of interpretation under Article 31 and Article 32 of the VCLT, respectively.²
- 1.2. Randornzk has made commitments regarding video game services under 'audio-visual services'. These fall under 'motion picture & videotape production and distribution services'. Even if they fall under 'other audio-visual services', the mode of supply is consumption abroad. Hence, with Randornzk having scheduled 'none' (restrictions), market access and national treatment must be granted fully. While scheduling commitments, video games existed. In the movie industry too, commitments include 2D and 3D movies.³ A Member's unilateral intention for a commitment cannot be the basis for interpreting entries. Identification of Members' 'common intention' is guided by general rules of treaty interpretation, according to Article 3.2 of the DSU.⁴ The VCLT mandates an interpreter to identify common intentions of the Member parties.⁵

INTERPRETATION IN ACCORDANCE WITH ARTICLE 31 OF THE VCLT

- 1.3. Article 31 of the VCLT requires good faith interpretation of treaty terms. Ordinary meaning must be accorded context according to the objects and purpose of a treaty.⁶ Dictionary meanings of terms, should take the object and purpose of WTO agreements

¹ Article XX:3 of the GATS; Appellate Body Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, ¶ 159 WT/DS285/AB/R (Apr. 7, 2005) [hereinafter AB US – Gambling]; Appellate Body Report, *European Communities – Customs Classification Of Certain Computer Equipment*, ¶ 84 WT/DS62/AB/R (Jun. 5, 1998) [hereinafter AB EC – Computer Equipment].

² See AB US – Gambling, *supra* note 1, at ¶ 159; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 19, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter AB US – Gasoline]; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 10-12, WT/DS8/AB/R, (Oct. 4, 1996) [Hereinafter AB Japan – Alcoholic II].

³ Memorandum of Understanding between the People's Republic of China and the United States of America Regarding Films for Theatrical Release, U.S. DEPARTMENT OF STATE, <http://www.state.gov/documents/organization/202987.pdf> (Last visited: 3, 2014).

⁴ See AB US – Gambling, *supra* note 1 at ¶ 159; See AB EC – Computer Equipment, *supra* note 1, ¶ 84.

⁵ Appellate Body Report, *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, ¶ 84, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter AB China – Audiovisual].

⁶ Vienna Convention on the Law of Treaties, Art 31, 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

and GATS into consideration.⁷ Members' own schedules, schedules of other Members, and provision of the GATS serve as *context*.⁸

Good Faith

- 1.4. The 'Good faith' principle prescribes *effective interpretation*.⁹ Interpretation must not render treaty provisions redundant.¹⁰

Ordinary Meaning

- 1.5. 'Motion Picture' is defined as 'cinema film'.¹¹ Cinema is "*production of cinematographic films*".¹² Objects in films move by rapid projection of recorded photographs, with reproduction of recorded sound.¹³ The content in video game service features video, images and audio.¹⁴ Video games deliver a combination of films, audio, video, and performing arts.¹⁵ Delivery may be effected using physical or electronic media, in consonance with the principle of *technological neutrality*. So long as equivalent services exist, a technologically neutral position must be adopted irrespective of the means of delivery.¹⁶ Banning of Reality GP affects the delivery of high-quality visuals.
- 1.6. A commitment on sound recording includes both physical and electronic forms of delivery. Arguing that a scheduling Member did not contemplate the electronic form, at the time of making the commitments, is unsustainable.¹⁷ Thus, video games must be included in the above service subsector. The ordinary meaning of 'distribution' is "*dispersal of commodities among consumers affected by commerce*".¹⁸ Distribution

⁷ See AB US – Gambling, *supra* note 1, ¶ 164.

⁸ See AB US – Gambling, *supra* note 2, ¶ 178; See AB China- Audiovisual, *supra* note 5, ¶361 ¶ 373 ¶382.

⁹ Panel Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, ¶ 6.49, WT/DS285/R (Nov.10, 2004).

¹⁰ See US – Gasoline, *supra* note 3, ¶ 23.

¹¹ 1 SHORTER OXFORD ENGLISH DICTIONARY, 1845 (Angus Stevenson et al. eds., 6th ed., 2007).

¹² *Id.* at 414.

¹³ *Id.*

¹⁴ Thomas Steiner, *Online Games under WTO Law: Unresolved Classification Issues*, (Swiss National Centre for Competence in Research, Working paper No 2009/3,2009),

http://phase1.nccr-trade.org/images/stories/Steiner_Working%20Paper%202009%202_final.pdf (last visited: Jan 3, 2014).

¹⁵ Thomas Steiner, *supra* note 16.

¹⁶ ITU, World Telecommunication Policy Forum, *Report of the Secretary-General on IP Telephony*, at 23, Final Report (Jan 31, 2001) available at

http://www.itu.int/osg/spu/wtpf/wtpf2001/sgreport/finalreport31Jan_files/finalreport31Hereinafterdoc (last visited: Jan 3, 2014); ITU, Telecommunication Development Bureau: *ITU-D Study Groups*, ITU Doc. 1/090-E(Rev.1) (Mar. 16, 2000), available at http://www.itu.int/ITU-D/study_groups/SGP_1998-2002/SG1/Documents/2000/090r1e.doc.

¹⁷ WTO SECRETARIAT, *A Handbook on the GATS agreement*, 396 (1st ed., 2005).

¹⁸ 1 Shorter Oxford English Dictionary, *supra* note 11 at 717.

need not be limited to tangible products.¹⁹ Online distribution is thus covered by commitments under sub-sub-sector 2.D.(a). If video game services are not covered as contended above, they then fall under ‘other audio-visual services’.

Member’s Own Schedule

- 1.7. Randomzck’s schedule prescribes no limitations on sub-sub-sector 2.D.(a) under modes 1 and 2 of supply. No limitation is prescribed for ‘other audio-visual Services’ under Mode 2.
- 1.8. Electronic commerce constitutes *consumption abroad* i.e. Mode 2 of supply. It involves the consumer moving into the territory of another Member.²⁰ Terms and conditions listed on websites indicate that consumers visiting these are subject to laws of the host country.²¹ The RBB warning too indicates that international payment transactions occur in foreign countries’ jurisdictions. All transactions on GP Live take place in Roderlam’s currency. All this constitutes *virtual* movement; the consumer doesn’t *physically* change jurisdiction but consumes services in a different one.²²
- 1.9. In the absence of contrary intention, restrictions that hamper consumers’ use of services in the territory of another Member, fall under Mode 2.²³ All transactions concerning Kiwi’s video game service take place online.²⁴ The ban on Reality GP, and the warning, affected consumers’ ability to purchase the services online. Purchase of video game services of Kiwi thus falls under ‘consumption abroad’, as transactions can only take place online. Randomzck has granted full market access and national treatment to mode 2 of supply under ‘other audio-visual services’.

GATS Provisions

- 1.10. The structure of the GATS provides context for interpreting Members’ commitments.²⁵ Sectors and sub-sectors in Members’ schedules are mutually exclusive.²⁶ Annexes too

¹⁹ See AB China – Audiovisual, *supra* note 5, ¶ 355.

²⁰ WORLD TRADE ORGANISATION, *supra* note 21 at 15.

²¹ *Terms and Conditions*, iTUNES INDIA,

<http://www.apple.com/legal/internet-services/itunes/in/terms.html#SERVICE> (last visited Jan 4, 2014); *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Jan 4, 2014); *Adsense Terms and conditions*, GOOGLE, <https://www.google.com/adsense/localized-terms> (last visited: Jan 4, 2014); Anupam Chander, *Trade 2.0*, (University of Chicago Law School, Working paper No 465 ,2009); *Yahoo! India Terms of Service*, YAHOO!INDIA, <http://info.yahoo.com/legal/in/yahoo/tos.html> (last visited: Jan 4,2014).

²² WTO SECRETARIAT, SPECIAL STUDIES 2: ELECTRONIC COMMERCE AND THE ROLE OF WTO ECOMMERCE SPECIAL STUDY, 52, (1998).

²³ Committee for Trade in Financial Services, *Indicative Checklist Of Issues For Discussion*, S/FIN/W/14 (May 17, 1999).

²⁴ Moot proposition ¶ 13.

²⁵ See AB US – Gambling, *supra* note 1 ¶180.

²⁶ *Id.*

are an integral part of GATS.²⁷ Video game services do not involve transmission or reception of signals, and thus fall outside the scope of *telecommunications services*. The video game industry primarily deals with audio-visual content. Moving images are programmed by the developer.²⁸ Video games are thus covered only under this sector.

Other Members' Schedules

1.11. Members' schedules form an integral part of the GATS.²⁹ Many members treat video games as audio-visual products.³⁰ Others separately recognise each complex constituent element, including audio-visual content, within video games.³¹ Important Members treat video games as *cinematographic films*.³² The meaning of 'motion picture' and 'video tape' too confirms to the relevant context. The Swedish and US Supreme Courts³³ also classify video games as *motion pictures*.³⁴ The ordinary meaning of "motion picture and video tape" thus includes video games.

Object and Purpose

1.12. The ordinary meaning must be decided based on the objects and purpose, as enunciated in the Preamble.³⁵ Reigning in transparency, precision, and clarity is one of GATS' main objects.³⁶ Schedules should be clear and precise, so that they are "*readily understandable by all*".³⁷ Including video games under the audio-visual services also imparts transparency, clarity and precision to schedules. Randornzk's schedule doesn't explicitly rule out video games, and these are generally a part of audio-visual services.

1.13. Providing predictability to mutual rights and obligation furthers *progressive liberalization*, the overarching objective of GATS.³⁸ Although application of 'sound

²⁷ Article XXIX of GATS.

²⁸ Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (Jul. 29, 2013) http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf (last visited: Jan 3, 2014).

²⁹ GATS article XX:3.

³⁰ Andy Ramos et. al., *supra* note 28. See also The WTO and Global Convergence in Telecommunications and Audio-Visual Services, 218 (Damien Geradin & David Luff eds., 1st ed., 2004).

³¹ *Id.*

³² The South African Copyright Act, 78 of 1978 § 1. See, *Golden China TV Game Centre and Others v. Nintendo Co Ltd* 1997 (1) SA 405 (SCA); Andy Ramos et. al., *supra* note 37. See also, Masaya Uchimura, *Is a Video Game a Cinematographic Work? - Osaka District Court Confirms the Application of the Distribution Right for a Cinematographic Work to a Video Game*, 6 CASRIP Newsletter, (Autumn 1999). <http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=1999&article=newsv6i2jp2> (last visited: Jan 4, 2014).

³³ Andy Ramos et. al., *supra* note 28.

³⁴ *Id.*

³⁵ See AB China – Audiovisual, *supra* note 5, ¶ 390.

³⁶ GATS Preamble.

³⁷ See AB China – Audiovisual, *supra* note 5, ¶¶ 188-189.

³⁸ *Id.* ¶¶ 392-394.

recording’ and ‘distribution’ may change over time”,³⁹ Randornzk is already bound by commitments on video games.. On a reading of other member’s schedule and their national practices, this interpretation gives maximum effect to objectives of the GATS.

SUPPLEMENTARY MEANS OF INTERPRETATION UNDER ARTICLE 32 OF THE VCLT

- 1.14. The preparatory work of GATS includes the W/120,⁴⁰ UNCPC and scheduling guidelines.⁴¹ Interpretation under Article 32 will confirm that commitments on video gaming services form part of Randornzk’s schedule. In the UNCPC, and W/120, audio-visual and related services broadly fall under Recreational and Sporting Activities.
- 1.15. The explanation to motion picture distribution services (CPC Number 96140)⁴² covers video games, which must be construed as digital media. Commitments in this sector include permission to exhibit the work. Categories in these documents are exhaustive and mutually exclusive,⁴³ and hence not covered by the telecommunications sector.
- 1.16. The 2001 guidelines prescribe *precision* and *clarity* in scheduling commitments.⁴⁴ Randornzk failed to explicitly exclude video game services. They thus form part of its commitments. Unless stated otherwise, it is assumed that parties relied on the aforementioned documents to schedule commitments. The guidelines define ‘consumption abroad’ as “*movement of the consumer*”. A Member’s Measures cannot restrict activities taking place outside its jurisdiction.
- 1.17. The analysis of supplementary means thus substantiates and confirms that commitments were scheduled for video game services.

2. RANDORNZK MAINTAINS MEASURES INCONSISTENT WITH ARTICLE XVI OF GATS.

Measures at Issue

- 2.1. To establish market access and national treatment violations, a Member must identify the measures implemented, and their effect on trade in services.⁴⁵ A violation can be

³⁹ *Id.* ¶¶ 396-397.

⁴⁰ World Trade Organisation, *Services Sectoral Classification List*, MTN.GNS/W/120 (Jul. 10, 1991).

⁴¹ See AB US – Gambling, *supra* note 1 ¶196.

⁴² United Nations Statistics Division, *CPC Ver.2 Explanatory notes*, UNSTATS.UN.ORG, http://unstats.un.org/unsd/cr/registry/docs/CPCv2_explanatory_notes.pdf (Last visited: Jan 4, 2013) at 386.

⁴³ Panel Report, *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1223, WT/DS363/R (Aug. 12, 2009) [hereinafter Panel China – Audiovisual].

⁴⁴ Committee on specific commitments, *Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services (GATS)*, S/L/92 (Mar. 28, 2001).

⁴⁵ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶155, WT/DS139/AB/R, WT/DS142/AB/R, (May 31, 2000) [Hereinafter AB Canada – Autos].

established if trade in services is *affected*, even if it is not restricted.⁴⁶ Language used to define “measures” indicates a wide scope of application.⁴⁷ No measure is excluded a priori.⁴⁸ The Two “measures” at issue are; the ban on import of Reality GP, and the RBB directive.

- 2.2. Trade in services is defined as “Supply of the service”.⁴⁹ Gaming services fall under mode 2. To determine if a measure is related to trade in services, it is sufficient to establish the mode of supply.⁵⁰ “Affect” (*having an effect on*), indicates a broad scope⁵¹ which confirms to the drafters’ intent of assigning wide application to the GATS.⁵² After the ban on Reality GP, enthusiasm for the games reduced.⁵³ Kiwi was forced to market 2D versions to retain its reducing market share.⁵⁴ The number of purchasers preferring the GP console to any other also fell to 15 per cent.⁵⁵ The directive decreased Kiwi’s market share, and the number of online transactions.⁵⁶

THE BAN ON REALITY GP ACCORDS LESS FAVOURABLE TREATMENT TO THE FOREIGN SERVICE SUPPLIERS THAN IS MENTIONED IN THE SCHEDULE OF COMMITMENTS

Article XVI:1: Less Favourable Treatment

- 2.3. Randornzk maintains measures inconsistent with its market access commitments. Unless explicitly mentioned otherwise in its schedule of commitments, a Member must provide equal treatment to all services and service suppliers. Entries in Members’ schedules are considered minimum market access guarantees.⁵⁷ Regulating market access after scheduling commitments is against the objective of GATS.⁵⁸ To determine

⁴⁶ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.281, WT/DS27/AB/R [hereinafter AB EC – Bananas III]; Matthew Kennedy, *Services join GATT: an analysis of the General agreement on trade in services*, Int. T.L.R. 1995, 1(1), 11-20, 1995, available at www.westlawindia.com.

⁴⁷ Zacharias, *Article I*, in WTO TRADE IN SERVICES 54, 31-71 (Rüdiger Wolfrum et al. eds., 2008); Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 10.234, WT/DS139/R, WT/DS142/R, 11 February 2000.

⁴⁸ *Id.*

⁴⁹ Article I:2(b) of the GATS.

⁵⁰ See AB Canada – Autos, *supra* note 45, ¶ 156.

⁵¹ See AB EC – Bananas III, *supra* note 46 ¶ 220.

⁵² *Id.*

⁵³ Moot proposition ¶ 18.

⁵⁴ Moot proposition ¶ 18.

⁵⁵ Moot proposition ¶ 20.

⁵⁶ Moot proposition ¶ 22.

⁵⁷ Delimatsis & Molinuevo, *Article XVI*, in WTO TRADE IN SERVICES 371, 367-396 (Rüdiger Wolfrum et al. eds., 2008).

⁵⁸ Peter C. Mavroidis, *Highway XVI re-visited: the road from non discrimination to market access in GATS*, World T.R. 2007, 6(1), 1-23, available at: www.westlawindia.com.

a violation, the Panel must compare the minimum treatment committed to in a Member's schedule, with the actual treatment it offers.⁵⁹

- 2.4. Randornzk, in its schedule of commitments, has entered *none* under 2.D.a. Randornzk has therefore undertaken a market access commitment to not maintain measures that restrict access to these services. The import ban is a measure that accords the foreign service suppliers less favourable treatment than is entered in Randornzk's schedule.

Article XVI:2(a): Limitations on the number of service suppliers

- 2.5. Service suppliers are defined as “*persons who supply a service*”.⁶⁰ Supply of a service is further defined as the “*production, sale, distribution, marketing and delivery*” of a service.⁶¹ Nothing herein suggests a limited scope of the GATS.⁶²
- 2.6. Randornzk maintains measures totally prohibiting the supply of the service in a sector to which it has committed complete access.⁶³ Article XVI of GATS, resembles Article II of GATT that deals with the schedule of tariff concessions.⁶⁴ The latter prohibits members from imposing duty, rates for which are usually above zero.⁶⁵ But this does not imply that it does not refer to rates set at zero.⁶⁶ *Zero* is a number and thus, a numerical limit.⁶⁷ Though not expressly provided for in Article XVI:2(a), it was believed that Members wouldn't schedule commitments for services they intended to restrict completely.⁶⁸ The total ban has reduced the service's supply to *zero*, and is equivalent to a *zero quota*, which is prohibited.⁶⁹
- 2.7. Prohibition on one, several or all means of delivery included in Mode 1 indicates a market access limitation for the mode.⁷⁰ *Full market access* commitment under a mode applies to all modes of delivery.⁷¹ If a Member decides to limit a mode of delivery, it

⁵⁹ Panel Report, *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.263, WT/DS285/R, (Nov 10, 2004) [Hereinafter Panel US – Gambling].

⁶⁰ Article XXVIII (g) of the GATS.

⁶¹ Article XXVIII (b) of the GATS.

⁶² Panel Report, *European Communities -Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.281, WT/DS27/R/MEX, (May 22, 1997).

⁶³ See Panel US – Gambling, *supra* note 59, ¶ 3.129.

⁶⁴ DELIMATIS & MOLINUEVO, *supra* note 57 at 370.

⁶⁵ See AB US – Gambling, *supra* note 1, ¶ 233.

⁶⁶ *Id.*

⁶⁷ *Id.* at ¶ 227.

⁶⁸ See Panel United States – Gambling, *supra* note 59, ¶ 6.331.

⁶⁹ Council for Trade in Services, *Work Programme on Electronic Commerce*, Progress Report to the General Council, (Jul. 19 1999, S/L/74), [Hereinafter Council for trade in services S/L/74].

⁷⁰ See Panel Report, *United States – Gambling*, *supra* note 59, ¶ 6.286.

⁷¹ WORLD TRADE ORGANIZATION, *Analytical Index on GATS*, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_03_e.htm#article16A2c, (last visited Jan. 3, 2014).

must expressly state so in the schedule.⁷² The ban on the import of Reality GP restricts the means of delivery. The GATS does not discriminate amongst different technological means of supply.⁷³ This avoids re-negotiation of the schedule each time a new means of delivery is developed.⁷⁴ Also, a member inscribing a market access commitment in a sector or subsector commits to *all services* included therein.⁷⁵ The means of delivery does not alter specific commitments.⁷⁶ Randornzk's intention is not pertinent to ascertain if a commitment, with respect to a particular means of delivery, was scheduled.⁷⁷ Reality GP is a means of delivery of online gaming services. In banning the HMD, Randornzk restricts the delivery of a service for which it has scheduled *full market access* commitments.

Article XVI:2 (c): Limitations on the number of service operations

- 2.8. Article XVI: 2(c) provides against limitations on the total number of service operations or service output. Prohibiting supply of scheduled services amounts to *zero quota*.⁷⁸ Domestic laws restricting supply of services, limit service operations or the output, to zero.⁷⁹ There is scope for an overlap between the limits on the number of service operations and the quantity of service output. In the present case, through the import ban on Reality GP, service operations of Roderlam have been restricted. Kiwi's market share has reduced drastically; the consumers are no longer interested in investing in Kiwi's games.⁸⁰ The percentage of purchasers preferring the GP console over any other console has fallen to 15 per cent.⁸¹

Prohibition on Consumption

- 2.9. Randornzk has banned consumers' access to Roderlam's services. Through a penal restriction on consumers of the product, Randornzk has restricted the supply of the service.⁸² Measures restricting the ability consumers to consume the services will render market access commitments redundant.⁸³ This restricts the supply of the service

⁷² See Panel United States – Gambling, *supra* note 59, ¶ 6.286.

⁷³ See Council for Trade in Services S/L/74, *supra* note 71.

⁷⁴ See Panel China – Audiovisual, *supra* note 43, ¶ 4.225.

⁷⁵ See Panel US – Gambling, *supra* note 59, ¶ 6.290.

⁷⁶ See Council for Trade in Services S/L/74, *supra* note 71.

⁷⁷ Oral Statement by US at the First Substantive Meeting, See Panel Report, China – Audiovisual, *supra* note 43, ¶ 4.223.

⁷⁸ See AB United States – Gambling, *supra* note 1, ¶ 251.

⁷⁹ *Id.* at ¶ 250.

⁸⁰ Moot proposition ¶ 18.

⁸¹ Moot proposition ¶ 19.

⁸² Moot proposition ¶ 19.

⁸³ See AB United States – Gambling, *supra* note 1, ¶ 68.

to zero.⁸⁴ The import ban affects service suppliers too.⁸⁵ If allowed, it will enable Members to circumvent obligations they have undertaken.⁸⁶

THE RBB POLICY DIRECTIVE RESTRICTS MARKET ACCESS TO THE FOREIGN SERVICE SUPPLIERS DESPITE SCHEDULED COMMITMENTS

Article XVI:1: Less Favourable Treatment

- 2.10. Article XVI of the GATS is similar to Article II of the GATT.⁸⁷ “Terms and conditions” imposing qualifying restrictions or conditions *limit the scope* of commitments.⁸⁸ Importing Members must define offers to suit their needs.⁸⁹ Randornzk has not specified any limiting terms and conditions on market access under the aforementioned services. It therefore cannot unilaterally diminish its obligations.⁹⁰
- 2.11. Article XVI covers discriminatory *origin neutral quantitative measures*, and also policies that restrict market access in a non-discriminatory manner.⁹¹ Although Randornzk claims to have implemented the directive for fraud prevention, in reality, it is a restriction on market access. Roderlam’s well developed banking sector is the result of stringent safeguards. Randornzk cannot claim that the measure applies to both domestic, and foreign service suppliers alike, as the directive still results in treatment less favourable than is scheduled.

Article XVI:2(a): Limitations on the number of service suppliers

- 2.12. Credit cards are the only mode of payment on GP Live.⁹² Card transactions involve several entities; issuing institutions, card companies, and settlement banks.⁹³ The directive makes operations of foreign service suppliers in the market unviable, enabling the domestic industry to flourish.⁹⁴ Legal requirements in the form of the warning impose an unnecessary burden on Roderlam’s suppliers.⁹⁵ Only domestic suppliers

⁸⁴ See AB US – Gambling, *supra* note 1, ¶ 68.

⁸⁵ DELIMATIS & MOLINUEVO, *supra* note 57, 395.

⁸⁶ See AB US – Gambling, *supra* note 1, ¶ 68.

⁸⁷ DELIMATIS & MOLINUEVO, *supra* note 57, 370.

⁸⁸ Appellate Body Report, *Canada – Measures affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 134, WT/DS103/AB/R, WT/DS113/AB/R (Oct. 13, 1999) [hereinafter AB Canada – Dairy].

⁸⁹ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 109, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, (Jun 5, 1998).

⁹⁰ Appellate Body Report, *European Communities – Measures affecting the Importation of Certain Poultry Products*, ¶ 98, WT/DS69/AB/R, 13 July 1998 [hereinafter AB EC – Poultry].

⁹¹ DELIMATIS & MOLINUEVO, *supra* note 57 at 370.

⁹² Moot Proposition ¶ 14.

⁹³ Panel Report, *China – Certain Measures affecting Electronic Payment Services*, ¶ 7.14, WT/DS413/R, (July 16, 2012) [Hereinafter Panel China – Electronic Payment].

⁹⁴ *Id.*, ¶ 7.500.

⁹⁵ *Id.*, ¶ 2.1.

benefit.⁹⁶ Thus, a small number of service suppliers are protected from competition.⁹⁷ This amounts to limitation on the number of service suppliers, inconsistent with Randornzk's market access commitments.⁹⁸

Article XVI:2(c): Limitations on the number of service operations

- 2.13. An example of a measure covered under is “*restrictions on the broadcasting time available for films*”,⁹⁹ which mentions no numbers or units. A measure which is not a quota “*can fall within the ambit of Article XVI: 2 (a) ... (if it is quantitative in its thrust and limits the supply of a service as a quota would do)*”.¹⁰⁰ This is applicable to paragraph(c) due to the use of similar language.¹⁰¹ The RBB policy qualifies as a restriction on the number of service operations as ‘*all*’ online transactions with any foreign merchant will be issued a warning. Online transactions have reduced, as the mandatory warning dissuades consumers against transacting with foreign suppliers.
- 2.14. An input is defined as a “*segmented contribution to the production of the service when added to other inputs leads to the supply of the service*”.¹⁰² Reality GP is a means of delivery, not an ‘input’ used in the ‘production’ of the gaming service. It is an *end product* that is marketed by Kiwi.

Prohibition on consumers

- 2.15. The warning issued to consumers enables Randornzk to avoid its commitments by claiming that its measures apply to consumers and not the service supplier. But the warning has a limiting effect, on the number of service suppliers, and the number of service operations.¹⁰³

3. RANDORNZK MAINTAINS MEASURES INCONSISTENT WITH ARTICLE VI OF THE GATS

THE RBB POLICY DIRECTIVE IS A PROTECTIONIST MEASURE

- 3.1. Domestic regulations impede trade in services.¹⁰⁴ Domestic regulations constituting market access barriers are prohibited, unless otherwise specified in the schedule.¹⁰⁵ Members have the right to *regulate trade*, not the right to *regulate the right to trade*.¹⁰⁶

⁹⁶ *Id.*, ¶ 7.595

⁹⁷ *Id.*, ¶ 7.586

⁹⁸ See AB US – Gambling, *supra* note 1, ¶ 230.

⁹⁹ See Committee on specific commitments S/L/92, *supra* note 44.

¹⁰⁰ See Panel China – Electronic Payment, *supra* note 93, ¶ 7.592.

¹⁰¹ *Id.*

¹⁰² DELIMATIS & MOLINUEVO, *supra* note 57, 381.

¹⁰³ See AB US – Gambling, *supra* note 1, ¶ 68.

¹⁰⁴ PETER VAN DEN BOSSCHE, LAW AND POLICY, WTO, 497 (1st ed. 2005).

¹⁰⁵ *Id.*

¹⁰⁶ See Panel China – Audiovisuals, *supra* note 43, ¶ 4.524.

Article VI of the GATS represents the *interface* of services *trade liberalization* and domestic *policy autonomy*.¹⁰⁷ Article VI obligations supplement the non-discrimination and market access provisions.¹⁰⁸ Members' *right to regulate* ends when rights of other Members are impaired.¹⁰⁹ Randerzok is bound by the level of market access and national treatment committed to, and cannot maintain measures that restrict entry or operations of the foreign service provider.¹¹⁰ Its right to regulate the services ended once the measures in question started 'affecting' Randerlam.

THE DIRECTIVE HAS NOT BEEN IMPLEMENTED IN A REASONABLE, OBJECTIVE AND IMPARTIAL MANNER

- 3.2. Where specific commitments are undertaken, Members should ensure the administration of measures affecting trade in services in a '*reasonable, objective and impartial manner*'. Measures affecting the supply of a service include the '*purchase, payment and use of a service*'.¹¹¹ The directive affects Randerlam's gaming industry, ignoring its advanced banking sector. Article VI:1 applies regardless of the breadth and depth of the commitment made in a particular sector. Randerzok was obliged to ensure non-arbitrary administration of the regulations. The directive undermines Randerzok's commitments, and also results in market distortions and inefficiencies.¹¹²
- 3.3. 'Reasonable' refers to '*accepted standards of rationality and on sound judgment*'.¹¹³ Reasonableness requires rational reason for questionable conduct.¹¹⁴ Randerzok has cited 'online financial fraud' as the reason behind its implementation, but the directive does not primarily aim at online fraud prevention. Also, no evidence of the instances of online financial fraud has been tendered. The directive is unreasonable, and impedes trade in services.
- 3.4. 'Objectivity' ordinarily means processes that are beyond 'irrational, emotional and personal *intentions*'.¹¹⁵ It refers to the *circumstances of a decision*. In the present case,

¹⁰⁷ Panagiotis Delimatsis, *Determining the necessity of domestic regulations in services: the best is yet to come*, E.J.I.L. 2008, 19(2), 365-408, available at: www.westlawindia.com.

¹⁰⁸ Krajewski, *Article VI*, in WTO TRADE IN SERVICES 167, 165-197 (Rüdiger Wolfrum et al. eds., 2008).

¹⁰⁹ See Panel United States – Gambling, *supra* note 59, ¶ 6.316.

¹¹⁰ Philip Ruttley, *The WTO financial Services Agreement*, J.I.F.M. 1999, 1(3), 109-127, available at: www.westlawindia.com.

¹¹¹ Article XXVIII:(c)(i) of the GATS.

¹¹² Roger Kampf, *Liberalisation of financial services in the GATS and domestic regulation*, Int. T.L.R. 1997, 3(5), 155-166, available at: www.westlawindia.com.

¹¹³ Panel report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.385, WT/DS302/R, (Nov. 26, 2004).

¹¹⁴ KRAJEWSKI, *supra* note 108, at 171.

¹¹⁵ *Id.*

the existence of domestic suppliers supplying like services has coloured the RBB's decision making, leading to variable levels of regulation amongst domestic and foreign suppliers. This is unfair and discriminatory, and a highly subjective determination of a crucial matter.

- 3.5. 'Impartial' decisions are taken without according to one party special consideration and privileges.¹¹⁶ Randornzk's suppliers have been provided certain privileges that foreign suppliers are not entitled to. They have provided for a measure that is more burdensome on the foreign service supplier, in contradiction to its schedule of commitments.
- 3.6. A measure can be challenged based on any one of the requirements under Article VI:1.¹¹⁷ Article VI:1 draws its language from Article X:3 of GATT.¹¹⁸ The timing of the scheme must be impartial in relation to the supplying countries.¹¹⁹ In the present case, the directive has been implemented at a time when a large part of the market share is held by Kiwi. The measure is biased towards facilitating only domestic transactions, while restricting foreign ones. Refusal to publish necessary information is inconsistent with the reasonableness requirements under Article X: 3.¹²⁰ Here too Roderlam has been given no notice regarding the measure's implementation.

4. RANDORNZK HAS VIOLATED ITS COMMITMENTS UNDER ARTICLE XVII OF THE GATS

- 4.1. Establishing a national treatment violation includes; first, determining whether the service is inscribed in the schedule; second, whether the measure affects the supply of the service; third, whether the services are like; and lastly whether they have been treated less favourably than the domestic service suppliers.¹²¹
- 4.2. Randornzk has undertaken full commitments in the audio-visual sector. The ban on Reality GP restricts the consumers from accessing the programming content in high quality. Thus, Randornzk has denied market advantage and has forced equal treatment of unequal situations.

TEST 1: LIKENESS: THE DOMESTIC AND FOREIGN SERVICES ARE 'LIKE' SERVICES

- 4.3. The domestic and foreign gaming services provide recreation and entertainment services. They require the purchase of the content, either through discs or through

¹¹⁶ *Id.* at 172.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 168.

¹¹⁹ Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples*, ¶ 6.4, (L/6491 - 36S/93), (Apr. 18, 1989).

¹²⁰ Panel Report, *Japan's Measures on Imports of Leather*, ¶ 28, (L/5042 - 27S/118), (Oct. 20, 1980).

¹²¹ See Panel report *China – Audiovisuals*, *supra* note 43, ¶ 7.944.

electronic means. The content is consumed through video game consoles. The quality of the content is enhanced by the use of Reality GP, which had provided a competitive advantage to Kiwi. For this reason, the ban was enacted.

- 4.4. In *EC – Bananas III*, it was expressed that ‘the nature’ and ‘characteristics’ determine ‘likeness’. Mystical Assassins and Agency X provide the user with a feature to be a member of either side of the team; they are strategy and action based. Though the content is delivered through different means, they are not unlike.¹²²

The Working Report in Border tax adjustment framework

- 4.5. GATS national treatment jurisprudence draws from GATT, especially when the relevant provisions use similar language.¹²³
- 4.6. The Working Party on Border tax adjustment framework has certain criteria to adjudicate on the likeness of goods.¹²⁴ Under GATS, ‘likeness’ will be determined by services’ nature and characteristics, the consumer perception, tastes and habits, the end use and the classification under UN CPC and W/120 list.¹²⁵

The Nature and Characteristics

- 4.7. Kiwi and GenX supply video gaming services having the same nature and properties. The criterion is examined based on the substitutability of the games.¹²⁶ Those properties which affect the competitive relationship in the marketplace should be focused on.¹²⁷
- 4.8. Health risks should be examined under likeness depending on its effect on the competitive relationship, from the consumer’s perspective.¹²⁸ Any health risk, as viewed by the authorities should be examined under Article XIV of GATS.¹²⁹ Whether the video game service posed any health risk is debatable. Mystical Assassins is still marketed despite its health effects were raised. The health issue, of the game being violent, didn’t affect the consumer’s perception. There was no reduction in the market

¹²² COUNCIL FOR TRADE IN SERVICES, *supra* note 26.

¹²³ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act Of 1998* ¶ 242, WT/DS176/AB/R (Jan. 2, 2002); Krajewski & Engelke, *Article XVII*, in WTO TRADE IN SERVICES 398, 396-420 (Rüdiger Wolfrum et al. eds., 2008).

¹²⁴ Appellate Body Report, *European Communities – Measures Affecting Asbestos And Asbestos-Containing Products*, ¶ 101 WT/DS135/AB/R (Mar. 12, 2001) [hereinafter AB EC-Asbestos]; Panel Report, *Canada - Certain Measures Concerning Periodicals*, ¶ 5.18 WT/DS31/R (Mar. 14, 1997), See Japan Alcoholic Beverages II, *supra* note 3 ¶ 20.

¹²⁵ Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?* (World Trade Organisation Economic Research and Statistics Division, Working paper No ERSD-2006-08, 2006), http://www.wto.org/english/res_e/reser_e/ersd200608_e.htm (last visited: Jan 3, 2014).

¹²⁶ NICHOLAS F. DIEBOLD, *NON DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES*, 256, (Lorand Bartels et al. eds., 1st ed. 2010).

¹²⁷ See AB EC – Asbestos, *supra* note 124, ¶ 114.

¹²⁸ *Id.*

¹²⁹ Antigua’s submissions, See Panel US – Gambling, *supra* note 59, ¶ 3.163.

share of Kiwi until the ban was enacted. By 2023, 75% of gamers in Randornzk owned a Reality GP, even though questions about its risks were raised. Thus, the consumers' decision is an informed one.

- 4.9. Goods with similar characteristics are deemed to be competitive.¹³⁰ The 'inherent' characteristics of the games are similar to the ones provided by the domestic industry. The better quality of the Kiwi game provides it with a fair competitive advantage. This doesn't make them unlike.

End Uses

- 4.10. End use determines the competitive relationship between the products; it is objective and differs from consumer tastes and habits.¹³¹ All services that perform the function of recreation and entertainment are not 'like'.¹³² Both foreign suppliers and domestic suppliers have the same end function of providing recreational and entertainment; they involve displaying video game content through consoles and involve participation from the gamer. The additional usage of Reality GP only enhances the quality of the audio-visual content and doesn't change the end use or function. Hence, the services are in a competitive relationship, which has been distorted by the introduction of the measure.

Consumer tastes and Habits

- 4.11. "Consumers tastes and habits are constituted by their willingness to use the products to perform similar functions"¹³³. In the present case, the consumers have found the service to be interchangeable. "Almost 75% of Randornzk 'gamers' had purchased Reality GP".¹³⁴ Thus, the targeted consumers, the gamers could have used either for consumption.

Classification

- 4.12. In the context of services, classification under the UNCPC and W/120 list should be used.¹³⁵ There is no different classification for three- dimensional or two dimensional video content delivery services under audio-visual service category. This confirms the services as 'like'.

¹³⁰ Panel Report, *Korea – Taxes on Alcoholic Beverages*, ¶ 10.64, WT/DS75/R, (Sep. 17, 1998).

¹³¹ See AB EC – Asbestos, *supra* note 124, ¶ 117.

¹³² *Id.* ¶ 138.

¹³³ See AB EC – Asbestos, *supra* note 124, ¶ 117.

¹³⁴ *Id.*

¹³⁵ Panel EC – Bananas III, *supra* note 62, ¶ 7.289.

Directly competitive and substitutable

- 4.13. Directly competitive and substitutable relationship should be examined for *likeness*.¹³⁶ Under the GATS, less favourable treatment amounts to modification of the conditions of the competition. Likeness is decided on a case-by-case basis.¹³⁷
- 4.14. Elasticity of substitution is a relevant factor to determine likeness.¹³⁸ Cross price elasticity may be used to determine the competitive and substitutable relationship.¹³⁹ Competition and substitutability are decided in the marketplace, keeping in mind latent consumer demand.¹⁴⁰ The price difference didn't matter to the consumers as a large number of them possessed Reality GP.
- 4.15. GenX is the largest developer of video games in the domestic market. Kiwi is the only other major player. Since the gaming industry in Randornzk is still nascent,¹⁴¹ it can be assumed that there are no other major domestic or foreign players. Thus, the market is narrowly defined; if access to one is restricted, the consumers of video games, will turn to the other supplier. The fall in purchases of Kiwi games indicates the latent demand for Reality GP.
- 4.16. Another factor that should be looked into is the supplier substitutability.¹⁴² High substitutability results in lesser discrimination, and low substitutability results in higher discrimination. The cost of the norms imposed has been high, indicated by the losses incurred by Kiwi.¹⁴³
- 4.17. Even if consumers don't consider the services substitutable, in the absence of one, another is capable of substituting it in the marketplace. This renders them *like*,¹⁴⁴ as demonstrated by the market survey.¹⁴⁵ In the present case, *likeness between service suppliers* is not relevant. This is because the measure at issue doesn't discriminate based on suppliers.¹⁴⁶ It would have been relevant if supply was by modes 3 or 4.¹⁴⁷

¹³⁶ Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, ¶ 118, WT/DS75/AB/R, (Jan. 18, 1999) [Hereinafter AB Korea – Alcoholic Beverages].

¹³⁷ See AB EC – Asbestos, *supra* note 124, ¶¶ 101-103; See Japan-Alcoholic Beverages II, *supra* note 3 at 20.

¹³⁸ See Japan – Alcoholic Beverages II, *supra* note 3 at 25.

¹³⁹ Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from The Philippines*, ¶ 7.25-7.41, WT/DS371/R (November 15, 2010).

¹⁴⁰ See Korea – Alcoholic Beverages, *supra* note 136, ¶¶ 114-115.

¹⁴¹ Moot Proposition ¶ 4.

¹⁴² Nicolas F. Diebold, *Standards of non-discrimination in International Economic Law*, 4 I.C.Q.L. 831, 847; Panel Report, *United States – Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products*, ¶ 7.342, WT/DS381/R (Sep. 15, 2011).

¹⁴³ Moot Proposition ¶ 20.

¹⁴⁴ See Korea – Alcoholic Beverages, *supra* note 136, ¶¶ 114-115.

¹⁴⁵ Moot Proposition ¶ 20.

¹⁴⁶ MIREILLE COSSY, *supra* note 125.

¹⁴⁷ Japan Submissions, See Panel US – Gambling, *supra* note 59 at ¶ 4.46.

TEST 2: LESS FAVOURABLE TREATMENT: THE FOREIGN SERVICES HAVE BEEN PROVIDED LESS FAVOURABLE TREATMENT

4.18. If the conditions of competition are modified in favour of the domestic services, it amounts ‘less favourable treatment’. Issuing of license constitutes an incentive for operators, to the exclusion of third country, which constitutes less favourable treatment.¹⁴⁸ The seemingly origin neutral criteria also has been applied discriminately.

4.19. It is believed that Reality GP was banned as it inspires desensitization towards violence. This is formally different treatment, as Mystical Assassins is permitted despite its link to violence by providing a religious justification. However, the real religious teachings are not expounded in the video game.¹⁴⁹ Thus, the apparently neutral criterion has been applied selectively. This amounts to discrimination.¹⁵⁰ Reality GP provided a competitive advantage to gamers, by enhancing their gaming experience. Inequality due to the competitive advantage does not make the products unlike.

Modification of the conditions of the competition

4.20. Implications in the marketplace are pertinent for the determination of ‘less favourable treatment’.¹⁵¹ The ban denied Kiwi the market advantage. Due to the trade distorting effect of the measure, the purchasers of services from Kiwi fell from to 15%. Due to lack of apposite data, it is assumed that there are only two major players in the market. Hence, the asymmetric impact test, by the panel in *EC – Bananas* has been satisfied.¹⁵²

4.21. Article III: 2 (GATT) protects “*expectations on competitive relationship between imported & domestic products rather than expectations on trade volume*”.¹⁵³ Thus, even if there is no data to show that domestic services profited from the ban, it can be assumed that competitive relations have been modified in favour of the domestic gaming industry as they are substitutable.

REGULATORY OBJECTIVES SHOULD NOT BE CONSIDERED UNDER NATIONAL TREATMENT

4.22. It is contented that a legitimate regulatory objective should not be considered under the national treatment, but, under exceptions as it is in line with the principle of effective

¹⁴⁸ See *EC – Bananas III*, *supra* note 62, ¶ 7.379.

¹⁴⁹ Moot Proposition ¶ 4.

¹⁵⁰ See *AB EC – Bananas*, *supra* note 46, ¶ 233.

¹⁵¹ Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations" Recourse To Article 21.5 Of The DSU By The European Communities*, ¶ 215-221, WT/DS108/AB/RW (Jan. 14, 2002) [hereinafter *US – FSC*]. ; See Panel *China – Audio-visuals*, *supra* note 43, ¶ 7.1130–7.1131.

¹⁵² See Panel *EC – Bananas III*, *supra* note 62, ¶ 7.332-7.338.

¹⁵³ Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶ 5.11, L/6216 - 34S/83, (Nov. 10, 1987).

treaty interpretation.¹⁵⁴ The ‘aims and effect’ test has been explicitly rejected.¹⁵⁵ This is in consonance with the general object and purpose, which is to ensure equality of conditions of competition.¹⁵⁶ Reference to Article III:1 for ‘likeness’ doesn’t require separate consideration of whether a measure “affords protection to domestic production.”¹⁵⁷ The term, *so as to afford protection*, indicates that the intent of the legislators need not be considered if the measures result in a protectionist effect.¹⁵⁸ If the regulatory purpose does play an important role, the test of necessity has to be considered. The measure doesn’t stand the test of necessity under Article XIV and there is no rational nexus with the object of the measure. The design, structure and application of a measure determine whether it is a protectionist measure.¹⁵⁹

4.23. The ban affected the purchase of the other 48 games. The government launched a door-to-door campaign to ensure that consumers are not given any chance to use the other games of Kiwi. This coincides with the directive, which further limits the transactions on the GP live market. The real intention of the government is inferred by the statement, “The ban on the games itself would not be equitable unless the government “*shut down a substantial part of the gaming industry*”.”¹⁶⁰ Differential treatment is considered as evidence of protectionist measure.¹⁶¹

5. THE RBB POLICY DIRECTIVE IS INCONSISTENT WITH ARTICLE XI OF THE GATS

5.1. The GATS forbids Members from restricting international current transactions, except to avoid a balance of payments difficulty *and* external financial crises.¹⁶² The provision secures the value of Members’ specific commitments.¹⁶³ In its absence, scheduled commitments will lose legitimacy and contracts, their value.¹⁶⁴ To establish conduct inconsistent with Article XI:1, Roderlam must enumerate Randerzck’s restrictions on

¹⁵⁴ Antigua’s written submissions, See Panel US – Gambling, *supra* note 59, ¶ 3.165; See AB US – Gasoline ¶ 3; AB Japan – Alcoholic I ¶ 10-12.

¹⁵⁵ See AB EC – Bananas III, *supra* note 46, ¶ 241; See Appellate Body, Japan – Alcoholic Beverages II, *supra* note 3 at 25; Panel report, *Japan – Taxes on Alcoholic Beverages* ¶¶ 6.15-6.19, WT/DS8/R (Jul. 11, 1996).

¹⁵⁶ See AB EC – Asbestos, *supra* note 7, ¶ 97; GATS art XVII:3.

¹⁵⁷ See AB EC – Bananas III, *supra* note 46, ¶ 216.

¹⁵⁸ See AB Japan – Alcoholic Beverages II, *supra* note 3 at 27-28.

¹⁵⁹ Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 134, WT/DS371/AB/R (June 17, 2011); R. Howse and DH Regan, *The Product/Process Distinction- An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy* 11 EJIL 249, 265 (2000).

¹⁶⁰ Moot proposition ¶ 18.

¹⁶¹ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 170, WT/DS18/AB/R (Nov. 6, 1998).

¹⁶² GATS Article XII:2 (emphasis added).

¹⁶³ See Panel US – Gambling, *supra* note 59, ¶¶ 6.441-2.

¹⁶⁴ *Id.* (emphasis added).

international payments.¹⁶⁵ Roderlam must also rebut any *prima facie* defence made out by Randornzk under Article XIV(c), or para 2 lit. a of the Annex on Financial Services.¹⁶⁶ Roderlam's burden is to provide evidence that the policy directive, as a restriction, affects current transactions tied to Randornzk's market access commitments.¹⁶⁷

THE RBB POLICY DIRECTIVE 2024 IS A "RESTRICTION" ON CURRENT TRANSACTIONS FOR RANDORNZK'S SPECIFIC COMMITMENTS UNDER ARTICLE XI:1 OF THE GATS

- 5.2. In the absence of any definitive interpretation of the word "restriction" within the GATS jurisprudence, recourse must be taken to rules of general customary law within the WTO framework.¹⁶⁸
- 5.3. The challenge is directed at the mandatory standard warning to users. Foreign merchant sites are required to warn credit card users that their compliance with Randornzk's financial data protection laws is not subject to Randornzk's review.¹⁶⁹

Ordinary Meaning

- 5.4. The dictionary describes the word 'restrict' as "*limit, bound, confine (to, within)*".¹⁷⁰ *Restriction* is explained as "*a thing which restricts (someone or something); a limitation on action; a limiting condition or "regulation"*".¹⁷¹ To be given complete meaning and effect, the word restrictions in Article XI:1 must be read in light of the phrase "*measures by Members affecting trade in services*".¹⁷² This points towards

¹⁶⁵ See Appellate Body US – Gambling, *supra* note 1 ¶ 138; Appellate Body Report, *United States – Countervailing Duties On Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, ¶ 98, WT/DS213/AB/R (Nov. 28, 2002) [hereinafter AB US – Carbon Steel]; Appellate Body Report, *EC – Measures Concerning Meat And Meat Products (Hormones)* ¶ 157, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter AB EC – Hormones]; Appellate Body Report, *United States – Measures Affecting Imports Of Woven Wool Shirts And Blouses From India*, at 14, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter AB US – Wool Shirts and Blouses].

¹⁶⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7 WT/DS58/AB/R (Oct. 12, 1998) [hereinafter AB US – Shrimp]; Panel Report, *United States – Sections 301-310 Of The Trade Act Of 1974*, ¶ 7.14-15, WT/DS152/R (Dec. 22, 1999) [hereinafter Panel US – Section 301]; Also, on *prima facie* case, See Appellate Body US – Gambling, *supra* note 1 ¶140; Appellate Body, *Japan – Measures Affecting The Importation Of Apples*, ¶ 159, WT/DS245/AB/R (Nov. 26, 2003) [hereinafter AB Japan – Apples].

¹⁶⁷ Appellate Body Report, *European Communities – Conditions For The Granting Of Tariff Preferences to Developing Countries*, ¶ 105 from Military and Paramilitary Activities in and against Nicaragua (Nicar v. U.S.), 1986 ICJ 14 ¶ 29 (quoting International Court of Justice, *Merits, Fisheries Jurisdiction Case (U.K. v. Ice.)*, 1974 ICJ 9, ¶17).

¹⁶⁸ See Appellate Body US – Gasoline, *supra* note 3 at 17; See AB Japan – Alcoholic II, *supra* note 3, ¶10-12.

¹⁶⁹ Moot Proposition ¶ 21.

¹⁷⁰ 2 SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 11 at 2553.

¹⁷¹ *Id.* (emphasis added).

¹⁷² GATS Article I:1.

construing the term restrictions broadly.¹⁷³ A restrictive interpretation will undermine the value of specific commitments.¹⁷⁴

Object and Purpose

- 5.5. The preamble holds the object and purpose of a treaty.¹⁷⁵ The object and purpose being context, it thus holds the context for the ‘ordinary meaning of words’.¹⁷⁶ The *third recital* gives Members the absolute rights to regulate, except when commitments have been scheduled.¹⁷⁷ The policy directive is a law aimed at tackling online financial fraud.¹⁷⁸ Immediately after the directive was issued, purchases on GP Live fell by 90 percent.¹⁷⁹ The warning has drastically reduced the payments of current transactions of GP Live and related services, despite Randornzk’s specific commitments.

Supplementary Means of Interpretation

- 5.6. The role and jurisdiction of the IMF under Article XI and XII of GATS is due to its communications during the Uruguay Round.¹⁸⁰ These are documents introduced “*in connexion with*” the GATS.¹⁸¹
- 5.7. Payments for current transactions are defined as “*payments which are not for the purpose of transferring capital*”.¹⁸² The guiding principle used by the Fund in identifying “restrictions” as under Article XI:1, is whether the measure is *put in place directly by the government*.¹⁸³ Conversely, a restrictive measure may allow transfers but create other obstructions.¹⁸⁴ In the absence of any balance of payments crisis, the mandatory warning imposes significant limitations on the availability of foreign exchange for effecting payments or transfers, which also amounts to a “restriction”.¹⁸⁵ The restriction on non-resident suppliers creates an unreasonable burden on international payments.

¹⁷³ See Panel Report EC – Bananas, *supra* note 62, ¶ 7.281.

¹⁷⁴ See Panel Report US – Gambling, *supra* note 59, ¶ 6.44.

¹⁷⁵ Asylum Case (Colom./Peru), 1950 ICJ Reports, 266, 282; Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 ICJ 176, 196.

¹⁷⁶ See Panel US – Section 301, *supra* note 167, ¶ 7.22.

¹⁷⁷ Hestermeyer, *Preamble GATS, in WTO TRADE IN SERVICES* 26, 17-31 (Rüdiger Wolfrum et al. eds., 2008).

¹⁷⁸ Moot Proposition ¶ 21.

¹⁷⁹ Moot Proposition ¶ 22.

¹⁸⁰ Group of negotiations on service, *Communication from The International Monetary Fund: The Role of the Fund in the Area of Services Under its Articles of Agreement*, MTN.GNS/W/91 (Jan. 10, 1991).

¹⁸¹ See Panel US – Gambling, *supra* note 59, ¶ 296; See Appellate Body Report Japan – Alcohol II, *supra* note 3, at 10-12; See Appellate Body US – Gasoline, *supra* note 3, at 17.

¹⁸² Articles of Agreement of the International Monetary Fund., Article 8,

¹⁸³ GROUP OF NEGOTIATIONS ON SERVICE, *supra* note 23 at 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

THE RESTRICTIONS CANNOT BE JUSTIFIED UNDER ARTICLE XIV(C) OF THE GATS

5.8. A panel's examination of measures sought to be justified under Article XIV, involves a "two-tier process"; first, determining if the measure falls within the scope of any of the paragraphs of Article XIV, which in turn requires that; (a) challenged measure address the interest specified in the paragraph; and (b) adequate nexus exists between the measure and the interest sought to be protected; and second, determining whether the measure at issue satisfies the requirements of the chapeau of Article XIV.¹⁸⁶

Scope of Article XIV(c)

5.9. The mandatory warning to credit card users appears to be a measure which Randomz will defend under paragraph (c) of Article XIV. The measure must be consistent with paragraph (c), and also the chapeau of Article XIV.¹⁸⁷ Judicial decisions on Article XX(d) are relevant to the analysis of XIV(c).¹⁸⁸ Justification under paragraph (c) requires, first, that the measure must 'secure compliance' with laws and regulations consistent with the GATS.¹⁸⁹ Second, the measure must be necessary to do so.¹⁹⁰

5.10. The phrase 'to secure compliance' implies that the measure must enforce 'obligations' contained in the laws and regulations, not merely fulfil objectives contained therein.¹⁹¹ Parties may act inconsistently with the General Agreement when necessary to ensure the effective enforcement of these obligations.¹⁹² But the fourth provision of the RBB directive is aimed at achieving the 'objectives' of the act. The provision seeks to prevent online fraud, without enforcing any obligation contained within the first three provisions of the directive. There is therefore a means-end dissonance.

Necessity

5.11. For deciding on the 'necessity' of the measure, the factors for panels to consider are; first, the contribution of the measure to the realization of the ends pursued by it; and second, the restrictive impact of the measure on international commerce.¹⁹³

¹⁸⁶ See Appellate Body US – Shrimp, *supra* note 167, ¶ 147; See also Appellate Body US – Gasoline, *supra* note 3 at 22.

¹⁸⁷ See Appellate Body US – Gambling, *supra* note 1 ¶ 292; See Appellate Body US – Shrimp, *supra* note 167 ¶ 147, Appellate Body US – Gasoline, *supra* note 3, at 22.

¹⁸⁸ See Appellate Body US – Gambling, *supra* note 1 ¶ 292; See Panel US – Gambling, *supra* note 59 ¶ 6.537.

¹⁸⁹ Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 157, WT/DS161/AB/R (Dec. 11, 2000) [hereinafter AB Korea – Beef].

¹⁹⁰ *Id.*

¹⁹¹ See Panel US – Gambling, *supra* note 59, ¶ 6.538.

¹⁹² See Panel Report US – Gambling *supra* note 59, ¶ 5.539-40; See Panel Korea – Beef, *supra* note 191, ¶ 658.

¹⁹³ See Appellate Body US – Gambling, *supra* note 1, ¶¶ 306 – 307, See Appellate Body Korea – Beef, *supra* note 189 ¶ 162, ¶ 164, ¶ 166; See Appellate Body EC – Asbestos, *supra* note 124, ¶ 172.

5.12. Although a measure may ‘facilitate’ combating fraudulent practices, other WTO-consistent measures can achieve the same end.¹⁹⁴ While Randerzck could have tried WTO-consistent or less trade-restrictive measures, it chose not to do so. The warning will not ‘prevent’ online transactions in any way. Nor will it ensure ‘compliance’ by a foreign merchant. In its present form, the measure’s ‘necessity’ is not established.

Chapeau

5.13. To be consistent with the chapeau, a measure must not, discriminate in an arbitrary or unjustifiable manner between countries where like conditions prevail, or constitute a disguised restriction on trade. The chapeau is an expression of good faith.¹⁹⁵ There is consensus that Members’ rights must not be exercised to evade obligations under substantive rules’.¹⁹⁶ Acts that defeat the object and purpose of the treaty provision in question or the entire treaty must be avoided.¹⁹⁷

5.14. The policy directive ignored the fact that highly developed nature of Roderlam’s banking industry might be indicative of the highest levels of anti-fraud and anti-deception steps. There was no attempt made by the RBB to enquire from Roderlam its level of protection. The measure also discriminates between domestic and foreign suppliers, merely on the basis of their origin. Furthermore, the measure was enacted in the absence of specific instances or numbers of online fraud being documented, (much like the HMD ban). It is therefore arbitrary and unreasonable. Evidence suggests that the measure only obstructs commerce, contrary to the manifest intentions of important members negotiating on the Work Programme on electronic commerce.¹⁹⁸ It is therefore unnecessarily trade restrictive with respect to Roderlam.

¹⁹⁴ See Appellate Body Korea – Beef, *supra* note 191, ¶ 180, ¶¶ 672-675.

¹⁹⁵ See Appellate Body US – Shrimp, *supra* note 167, ¶ 158; Appellate Body Report, *United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan*, ¶ 101, WT/DS184/AB/R (Jul. 24, 2001) [Hereinafter US- hot rolled steel]; Appellate Body Report, *United States – Transitional Safeguard Measure On Combed Cotton Yarn From Pakistan*, ¶ 81, WT/DS184/AB/R (Jul. 24, 2001) [Hereinafter US – Cotton Yarn]; Appellate Body Report, *United States – Continued Dumping And Subsidy Offset Act Of 2000*, ¶ 297 , WT/DS217/AB/R (Jan. 16, 2003) [Hereinafter US – Offset Act].

¹⁹⁶ See AB US – Gasoline, *supra* note 3, at 22.

¹⁹⁷ See AB US –Shrimp, *supra* note 3, ¶158; Panel Report, *United States – Continued Dumping And Subsidy Offset Act Of 2000*, ¶ 7.64, WT/DS217/R , (Sep. 16, 2002) [Hereinafter Panel US – Offset Act].

¹⁹⁸ General Council, *Preparations For The 1999 Ministerial Conference, Electronic Commerce, Communication From Japan*, WT/GC/W/253 (Jul. 14, 1999); Council For Trade In Services, *Communication from the European Union and the United States Contribution to the Work Programme on Electronic Commerce S/C/W/338* (Jul. 13, 2011).

THE DIRECTIVE CANNOT BE JUSTIFIED UNDER PARA 2 LIT. A OF THE ANNEX ON FINANCIAL SERVICES

- 5.15. Payments on current account transactions related to supplied or consumer services should be free from restrictions.¹⁹⁹ Irrespective of the status of Randornzk scheduled commitments with regards to financial services, it must ensure that payment mechanisms for no service sector are restricted. The only exception is the Annex FS, that deals with a ‘prudential carve out’ mechanism. Paragraph 2 (a) of the Annex FS states that ‘prudential’ measures shall not be used to avoid the commitments or obligations under the GATS.
- 5.16. The ‘prudential carve out’ cannot be used for other than prudent reasons.²⁰⁰ In order to prevent abuse, it is necessary that the prudential measures be set out in a transparent manner at the country level.²⁰¹ It is not necessary for a member to prove that a prudential measure is ‘necessary’ under Article XIV of the GATS.²⁰² The prudential carve out provides to the host country with discretion, this discretion should be exercised in good faith and in accordance with the principle of “*pacta sunt servanda*”.²⁰³ The good faith principle states that every right should be exercised in a reasonable and fair manner with a reasonable nexus to the objectives; exercise of discretion in an arbitrary or vague manner would amount to abuse of such discretion.²⁰⁴
- 5.17. In the present case, the RBB under the guise of using prudential measures such as the directive to prevent online financial fraud is in fact trying to evade its commitments under market access and national treatment. There is no reasonable nexus between the objective they seek to pursue and the directive that has been implemented as it sets different standards of treatment for the domestic and foreign service providers though the alleged offence is of the same gravity.
- 5.18. A prudential measure includes any regulation that seeks to maintain the stability of the financial system. In the present case, there is nothing that potentially threatens the

¹⁹⁹ Piritta Sorsa, *The GATS Agreement on Financial Services- A Modest Start to Multilateral Liberalization*, (International Monetary Fund, Working Paper No. 55, 1997).

²⁰⁰ Von Bogdandy & Windsor, *Annex on Financial Services*, in *WTO TRADE IN SERVICES*, 635, 618-640 (Rüdiger Wolfrum et al. eds., 2008).

²⁰¹ PIRITTA SORSA, *supra* note 201.

²⁰² Wei Wang, *Prudential carve out*, in *THE WTO AND TRADE IN SERVICES*, 604, 610-614 (Kern Alexander et al. eds., 2008)).

²⁰³ Byungsik Jung, *Standard of Review for Jurisprudence on prudential measures*, *ILSP Law Journal*, Washington College of Law.

²⁰⁴ *Id.*

stability of the financial system of Randornzk. There is also no evidence of online financial fraud. Randornzk disregards the fact that Roderlam has a well-developed banking system. Services are prone to regulation and regulation is prone to protectionism;²⁰⁵ prudential measures do not enable a member to maintain measures that are *protectionist in effect*.²⁰⁶

5.19. The Core principles of the Basel Committee facilitate both on-site and off-site supervision; such supervision is carried out based on the particular conditions and circumstances of the country and the bank. In the present case, Roderlam has a well-established banking sector; it need not be subject to such a stringent measure. Prudential measures include those that are intended to protect the depositor's interests, mitigate banking risks and ensure safe and sound operations of the banking system.²⁰⁷ There is no activity that poses risks to the operations of the banking system of Randornzk.

6. THE BAN ON THE HMD IS NOT JUSTIFIED UNDER PARAGRAPHS (a) AND (b) OF ARTICLE XIV OF THE GATS

6.1. Roderlam forwards the present argument conditional to Randornzk establishing a *prima facie* justification under paragraphs (a) or (b). Analysis under paragraphs (a) and (b) follows the 'two-tier' scheme as used in the analysis under paragraph (c).²⁰⁸

THE BAN'S OBJECTIVE DOES NOT SATISFY THE REQUIREMENTS UNDER PARAGRAPH (A)

6.2. Values prevalent amongst Members, as understood by the framers, represent public morals.²⁰⁹ WTO members possess a limited right to unilaterally determine the scope of 'public morals'.²¹⁰ A measure's necessity is qualified by the importance of the societal value at stake, the measure's contribution to the objectives pursued and its trade restrictive impact.²¹¹ The United States' legislative measures targeting crime, fraud,

²⁰⁵ MATTHEW KENNEDY, *supra* note 46

²⁰⁶ VON BOGDANDY & WINDSOR, *supra* note 202, at 636.

²⁰⁷ Committee on trade in Financial Services, *Report Of The Meeting Held On 27 November 2006, Note by the Secretariat*, S/FIN/M/53 (Nov.30, 2006) ¶ 26(b).

²⁰⁸ See Appellate Body US – Shrimp, *supra* note 167 ¶147. See Appellate Body US – Gasoline, *supra* note 3 at 22.

²⁰⁹ See Appellate Body US – Gambling, *supra* note 167, ¶ 6.461 ¶6.465; Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT'L L. 227, 225 (2008); See Appellate Body US – Shrimp, *supra* note 167, ¶129; See also Appellate Body Japan – Alcoholic Beverages II, *supra* note 3.

²¹⁰ See Panel Report U.S – Gambling, *supra* note 1, ¶ 6.491.

²¹¹ See Panel Report U.S – Gambling, *supra* note 59, ¶ 6.492; See Appellate Body US – Shrimp, *supra* note 167, ¶¶ 306-307; See Appellate Body Korea – Beef, *supra* note 191, ¶ 162, 164, 166; See Appellate Body EC – Asbestos, *supra* note 124, ¶ 172.

gambling addiction and underage gambling were valid since they all contributed to protecting public morals and public order.²¹²

- 6.3. With respect to banning violent video games, state practice varies, but points against bans. Existing measures by Members, address effects of pornography, narcotics, gambling, and hurting religious beliefs, all of which adversely impact societal moral standards. Desensitization is not linked to acts of violence or development of violent tendencies. Randornzk's measure does not help reduce violent tendencies. It also ignores that restrictions by other Members address multiple moral and public order issues simultaneously. The measure merely restricts trade to the detriment of the suppliers and the users.²¹³

THE BAN'S OBJECTIVE DOES NOT SATISFY THE REQUIREMENTS UNDER PARAGRAPH (B)

- 6.4. The object of the ban, 'protecting human life', is not impaired by the 3D version of the games. Positive evidence refers to evidence which is objective and verifiable in nature. No public or legislative records, as in *US – Gambling*, provide proof of sufficient debate or research to draw a conclusion to the contrary.²¹⁴ The three-member committee's report is neither statistically backed nor objective, and thus not verifiable.²¹⁵ Randornzk thus fails to present 'positive evidence' to show the existence of health risks associated with violent video games.²¹⁶ The risk, in contrast to decided WTO cases, certainly does not raise concerns of being life-threatening.²¹⁷
- 6.5. Alternative measures to protect ill-effects of excessive gaming are already in use by WTO Members. Since less trade-restrictive alternatives exist,²¹⁸ the ban on the HMD is not "indispensable" to the protection of human life or health.²¹⁹ Consequently, the requirement for establishing 'necessity' for the adoption of the ban on grounds of health

²¹² Executive Summary of the Second Written Submission of the United States, See Appellate Body *US – Gambling*, *supra* note 1, ¶ 37; See Panel *US – Gambling*, *supra* note 59, ¶ 6.486-87; See Appellate Body *US – Gambling*, *supra* note 1, ¶ 299.

²¹³ Moot Proposition ¶ 19.

²¹⁴ See Panel *US – gambling*, *supra* note 59, ¶ 6.486; See Appellate Body *US – Gambling*, *supra* note 1, ¶ 296.

²¹⁵ Moot Proposition ¶ 17.

²¹⁶ See Appellate Body *US – Hot-Rolled Steel*, *supra* note 197, ¶ 192; Appellate Body Report, *United States – Sunset Reviews Of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 340, WT/DS268/AB/R, (Nov. 29, 2004).

²¹⁷ See Panel Report *US – Gambling*, *supra* note 59, ¶6.486-87; See Appellate Body *US – Gambling*, *supra* note 1 ¶ 299; Executive Summary of the Second Written Submission of the United States; See Appellate Body *EC – Asbestos*, *supra* note 124, ¶172.

²¹⁸ See Appellate Body *US – Gambling*, *supra* note 1, ¶ 306-307; See Appellate Body *Korea – Beef*, *supra* note 191, ¶162, ¶164, ¶166; See Appellate Body *EC – Asbestos*, *supra* note 124, ¶172.

²¹⁹ See Appellate Body *Korea-Beef*, *supra* note 191, ¶161.

is not met.²²⁰ Two alternatives available to Randornzk (already in use by WTO Members):

- Mandating violence levels ratings on all games.
- Enforcing a minimum age-limit with respect to games with violent content

Chapeau

6.6. Exercise of a right, if done in good faith, cannot neglect substantive treaty obligations.²²¹ Randornzk is obligated to uphold its market access and national treatment commitments. Alternative measures available and implemented by Members indicate that Randornzk had recourse to these. In choosing to ignore these, Randornzk abused its right to protect public morals and health.²²² Randornzk cannot claim its inability to enforce less trade-restrictive measures as an excuse to restrict trade. For these reasons, the ban on the HMD is therefore arbitrary, and constitutes a disguised restriction on trade.

²²⁰ *Id.* See Appellate Body US – Gambling, *supra* note 1, ¶ 306.

²²¹ See Appellate Body US – Gasoline, *supra* note 3, ¶ 22; See Appellate Body US – Shrimp, *supra* note 167 ¶ 158; See Appellate Body US – Hot Rolled Steel, *supra* note 197, ¶ 101; See Appellate Body US – Cotton, *Supra* note 197, ¶ 81 (footnote 53); See Appellate Body US – Offset Act, *supra* note 197, ¶ 297.

²²² See Appellate Body US – Shrimp, *supra* note 167, ¶ 158; See Panel US – Offset Act, *supra* note 197, ¶ 7.64.

REQUEST FOR FINDINGS

Roderlam requests the panel to:

1. Find that the ban on Reality GP is inconsistent with the Randornzk's commitments under Article XVI and XVII and is not capable of being justified under Article XIV (a) or (b) or (c) of the GATS.
2. Find that the RBB Policy Directive 2024 violated Randornzk's obligations under Articles VI.1, XVI.1, XVI.2 and XI and is not capable of being justified under Article XIV (a) or (b) or (c) of the GATS.