

**BEFORE THE PANEL ESTABLISHED BY THE WTO DSB**

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**RANDORNZK: MEASURES AFFECTING THE ONLINE**

**GAMING INDUSTRY**

**COMPLAINANT: RODERLAM**

**WT/DS/XXX**

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**MEMORIAL FOR THE COMPLAINANT**

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**SIXTH INTERNATIONAL GNLU MOOT COURT COMPETITION,**

**2014**

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## LIST OF ABBREVIATIONS

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AM. J. INT'L L.	AMERICAN JOURNAL OF INTERNATIONAL LAW
Annex.	ANNEXURE
APPLIED COGNITIVE PSYCHOL.	APPLIED COGNITIVE PSYCHOLOGY
Art.	ARTICLE
DS	DISPUTE SETTLEMENT
DR	DOMINICAN REPUBLIC
ed.	EDITOR
EC	EUROPEAN COMMUNITIES
GP	GAMING PARADISE
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
GATT B.I.S.D	GENERAL AGREEMENT ON TARIFFS AND TRADE BASIC INSTRUMENTS AND SELECTED DOCUMENTS
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES
GEO. WASH. INT'L L. REV.	GEORGE WASHINGTON INTERNATIONAL LAW REVIEW
I.L.M	INTERNATIONAL LEGAL MATERIALS
J. WORLD TRADE	JOURNAL OF WORLD TRADE
Kiwi	KIWI INCORPORATED
NCCR	NATIONAL CENTRE OF COMPETENCE IN RESEARCH
N.Y.U. L. REV.	NEW YORK UNIVERSITY LAW REVIEW
Supp.	SUPPLEMENT
U.N.T.S	UNITED NATIONS TREATY SERIES

US	UNITED STATES
U. PA. J. INT'L ECON. L.	UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW
WTO	WORLD TRADE ORGANIZATION
¶	PARAGRAPH
§	SECTION

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## STATEMENT OF FACTS

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### **THE PARTIES**

Roderlam is a developed North American island country with a highly advanced software industry in addition to a well-developed banking sector. The state currency is Roda. Randornzk is a developed Southeast Asian country and seventy five percent of its citizens follow the religion Timor. The state currency is Randzk. Drastord is a developing African nation in an advanced stage of development.

### **THE RANDORNZK GAMING INDUSTRY**

GenX Gaming Inc is one of the largest videogame developers in Randornzk. GenX games are distributed through Blue-Ray disks and are wholly compatible with several domestically produced consoles. These consoles allow for multiplayer gaming. *Mystical Assassins* is a hugely popular GenX videogame that is based on Randornzk mythology. The Randornzk government enacted a ban on *Mystical Assassins* in 2022 because of the high degree of violence that the game exhibited. However, this ban was subsequently overturned by the Randornzk Supreme Court seeking to protect the “freedom of religion” of the Timor people.

### **THE RODERLAM GAMING INDUSTRY**

Kiwi Inc is an immensely successful videogame developer, publisher and distributor based in Roderlam. Kiwi, having invested heavily in developing virtual games, acquired a company called Gaming Paradise that manufactured compatible consoles and head mounted displays. The head mounted display, Reality GP, permitted a highly immersive 3-D experience for gamers. The production of this hardware is carried out at a manufacturing unit set up in Drastord. The games as well as the hardware are supplied to foreign countries, including Randornzk, since 2023.

Two of Kiwi’s most popular virtual games are Roderlam Gangsters and Agency Z. Both these games are online multiplayer games in which players engage in combat with adversaries in order to win. The games are played on GP Live, an online gaming service that has set up dedicated servers in Roderlam to host such multiplayer games.

The games can only be purchased online through GP’s merchant site with a credit card. Such purchases are always in the Roda currency, and buyers typically incur a currency conversion fee in addition to the currency exchange rate. The advent of these virtual games along with Reality GP substantially increased the share of Kiwi Inc in the Roderlam gaming market. Furthermore, the number of gamers in Randornzk owning a GP console shot up to 75%.

### **BAN ON IMPORT OF REALITY GP**

In 2024, the Randornzk government set up a committee of qualified psychiatrists and psychologists to investigate the psychological effects of Reality GP and the two Kiwi games. The committee opined that the combined effect of the games and Reality GP was of complete desensitization towards violence, and recommended a ban on both. Based on this report, the government enacted a ban on the import of Reality GP in June 2024. They also launched a door-to-door campaign to collect Reality GP from those consumers who had previously purchased it, which achieved 90% compliance. Even though the government did not enact a ban on the games themselves, the games could not be viewed comprehensibly without the device, since they were designed for 3-D viewing.

In the absence of Reality GP, it was found that there was limited incentive for gamers in Randornzk to invest in a GP console. The number of new purchasers preferring a GP console to other consoles fell to 15%.

### **RBB POLICY DIRECTIVE 2024**

In order to counter the high extant level of online financial fraud, the Randornzk Reserve Bank issued the RBB Policy Directive in June 2024. It laid down several rules to ensure data protection on online merchant sites, both domestic and foreign. Domestic issuing institutions are to track user complaints against merchant sites and report them to the RBB. If more than five complaints are registered against a company, it would be subjected to a mandatory physical inspection. Since such an inspection would be unfeasible for foreign sites, no transactions with such sites were to be allowed unless they issued a warning to the user of the site. This warning would inform users that the foreign website does not have to comply with Randornzk's strict data and hence they should proceed at their own risk.

Subsequent to the issuance of the RBB Directive, credit card users have become very wary of making payments on foreign merchant sites. Consequently, the online sales of Kiwi games and Clones fell by 90%.

In February 2025, Roderlam and Drastord requested consultations with Randornzk regarding the Ban on import of Reality GP and also regarding the RBB Directive. Despite the failure of consultations, Drastord continues to hold secret negotiations with Randornzk. Roderlam requested for the establishment of a Panel, which was constituted by the WTO Director General in September 2025.

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## MEASURE OF ISSUES

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### I.

WHETHER THE BAN ON IMPORT OF REALITY GP IS IN VIOLATION OF ARTICLE XVI OF THE GATS?

### II.

WHETHER THE BAN ON IMPORT OF REALITY GP IS IN VIOLATION OF ARTICLE XVII OF THE GATS?

### III.

WHETHER THE BAN ON IMPORT OF REALITY GP IS JUSTIFIABLE UNDER ARTICLE XIV OF THE GATS?

### IV.

WHETHER THE RBB POLICY DIRECTIVE 2024 IS IN VIOLATION OF ARTICLE VI: 1 OF THE GATS?

### V.

WHETHER THE RBB POLICY DIRECTIVE 2024 IS IN VIOLATION OF ARTICLE XVI: 1 AND ARTICLE XVI: 2 OF THE GATS?

### VI.

WHETHER THE RBB POLICY DIRECTIVE 2024 IS IN VIOLATION OF ARTICLE XI: 1 OF THE GATS?

### VII.

WHETHER RBB POLICY DIRECTIVE IS JUSTIFIABLE UNDER ARTICLE XIV OF THE GATS?

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## SUMMARY OF PLEADINGS

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### **1. THE BAN ON IMPORT OF REALITY GP IS INCONSISTENT WITH ARTICLE XVI OF THE GATS**

1.1. Randornzk has undertaken full market access commitments for the consumption of online gaming services. This is because the online gaming service falls within the ambit of “Other Audiovisual Services” and it is through consumption abroad.

1.2. The ban constitutes a market access limitation as laid down in Article XVI:2 (c). This is because the ban affects the output of the gaming service as the device is *essential* for using the service. The ban also imposes a ‘zero quota’ on the supply of the virtual gaming service.

### **2. THE BAN ON IMPORT OF REALITY GP IS INCONSISTENT WITH ARTICLE XVII OF THE GATS**

2.1. Randornzk has undertaken full national treatment commitments for the consumption of online gaming services abroad.

2.2. The ban is a ‘measure affecting the supply of services’ as defined under Article XXVIII of the GATS as it is a government backed regulation affecting Roderlam’s competitive opportunities.

2.3. The foreign and domestic gaming services affected by the ban are ‘like’ services, since they have been discriminated between based solely on their religion, and they are substitutable services.

2.4. The foreign gaming services have been granted less favourable treatment than their domestic counterparts, in the form of *de facto* discrimination.

### **3. RANDORNZK CANNOT TAKE THE DEFENCE OF ARTICLE XIV OF THE GATS FOR ITS BAN ON IMPORT OF REALITY GP**

3.1. The measure is not justified under Article XIV (a) as it does not fall within the range of policies designed to protect public morals or maintain public order as desensitization to violence never formed a part of either in the case of Randornzk and there was no risk to the same. The ban was not necessary as it does not contribute sufficiently to the objective; and was more trade restrictive than necessary less restrictive alternatives being available.

3.2. The measure is not justified under Article XIV (b) as there was no risk to human health in the first place. In any case, the ban was not necessary for the same as the contribution it made was too less to justify its trade restrictiveness.

3.3. In any case, the ban is not justified under the chapeau to Article XIV, as like conditions did exist between Randornzk and Roderlam and the ban constituted arbitrary and unjustifiable discrimination. The ban was also a disguised restriction to trade as it was made with a protectionist intent and in bad faith.

#### **4. THE RBB POLICY DIRECTIVE 2024 VIOLATES ARTICLE VI OF THE GATS.**

4.1. Randornzk has undertaken specific commitments for online gaming services. The RBB Policy Directive thus affects services in a committed sector.

4.2. The RBB Directive is a measure of ‘General Application’ as it affects all issuing institutions, users and applies to domestic as well as foreign suppliers. As it affects an ‘unidentified’ number of cases, it is covered under Article VI.

4.3. The RBB Directive made users circumspect about using their credit cards online. Thus, as it affects the purchase, payment of the service as well as access to it, it is a measure affecting trade in online gaming services.

4.4. The RBB Policy Directive is administrative in nature as it merely lays down an enforcement mechanism and not the standards themselves. Thus, the substantive content of the Directive can be challenged under Article VI.

4.5. The RBB Policy Directive is not reasonable, objective or impartial and thus, is in violation of Article VI of the GATS.

#### **5. THE RBB DIRECTIVE VIOLATES ARTICLE XVI:1 AND XVI:2 OF THE GATS**

5.1. Randornzk has undertaken full market access commitments for consumption of online gaming services abroad. The RBB Policy Directive thus affects services in a committed sector.

5.1. The RBB Directive constitutes a market access limitation under Article XVI:2 (c) since it has the effect of a quantitative restriction on the supply of the online gaming service. The Directive seeks to impose this restriction through a test of social desirability.

## **6. THE RBB POLICY DIRECTIVE VIOLATES ARTICLE XI OF THE GATS.**

6.1. Randornzk has undertaken specific commitments for online gaming services. The RBB Policy Directive thus affects services in a committed sector.

6.2. The RBB Policy Directive relates to credit card services for online transactions on foreign merchant websites. These credit card services are international transfers and payments as they take place across national borders.

6.3. The payments for the online gaming services are current transactions covered under the ambit of Article XI as payment for services is included in the definition of current transactions.

6.4. The RBB Policy Directive amounts to a 'restriction' to transfers and payments as restrictions include direct as well as indirect measures. The Directive directly restricts transfers as it is an approval procedure and indirectly as it discourages users from making purchases.

6.5. Further, Randornzk cannot justify the measure under the Annex on Financial Services as it applies only to financial services. Even if this exception is held to have applicability, the Directive has not been issued for 'prudential reasons' but to avoid Randornzk's commitments.

## **7. RANDORNZK CANNOT TAKE THE DEFENCE OF ARTICLE XIV OF THE GATS FOR THE MANDATORY WARNING.**

7.1. The measure does not secure compliance with the RBB Policy Directive as it does not enforce the law. In any case, it is not *necessary* for the same as it does not make a material contribution towards enforcing the law and is more trade restrictive than necessary. Less restrictive alternatives were available.

7.2. In any case, the measure is not justified under the chapeau to Article XIV as the conditions existing in Roderlam were never taken into cognizance and their not negotiating with Roderlam constitutes arbitrary and unjustifiable discrimination.

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## LEGAL PLEADINGS

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### **1. THE BAN ON IMPORT OF REALITY GP IS INCONSISTENT WITH ARTICLE XVI OF THE GATS.**

Randomzk has imposed a ban on the import of the head mounted display, Reality GP, which is essential for the viewing of virtual games produced by Kiwi Inc.<sup>1</sup> It is submitted that this ban illegally restricts the market access of Roderlam's online gaming services because Randomzk has undertaken market access commitments for the service in question [1.1], and the ban constitutes a market access limitation as laid down in Article XVI:2 (c) [1.2].<sup>2</sup>

#### *1.1. RANDORNZK HAS UNDERTAKEN FULL MARKET ACCESS COMMITMENTS FOR CONSUMPTION OF MULTIPLAYER ONLINE GAMING SERVICES ABROAD*

Randomzk has undertaken market access commitments in the "Other Audiovisual Services" Sub-sector of its Schedule, for consumption abroad.<sup>3</sup> According to the GATS, a WTO member is only bound by the Market Access discipline in those sectors which it has committed to, in its schedule.<sup>4</sup> Roderlam submits that the online gaming service falls within "Other Audiovisual Service" sub-sector [1.1.1], and that its mode of supply is consumption abroad [1.1.2].

#### **1.1.1. The online gaming services fall within the ambit of "Other Audiovisual Services"**

The foreign services which have been affected by Randomzk's trade-restrictive measure are virtual games, such as Roderlam Gangsters and Agency Z.<sup>5</sup> These qualify as online games, since they are played on an online gaming server.<sup>6</sup> To identify whether the games classify as audiovisual services, the meaning of "audiovisual" should be examined.<sup>7</sup> The Panel in *China-Audiovisuals* identified the term "audiovisual" to include content pertaining to both vision

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<sup>1</sup> Fact on Record, ¶ 18.

<sup>2</sup> GATS, art. XVI.

<sup>3</sup> Fact on Record, Annexure 1.

<sup>4</sup> MARCUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALISATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES ON NATIONAL REGULATORY AUTONOMY 76 (2003).

<sup>5</sup> Fact on Record, ¶ 18.

<sup>6</sup> Fact on Record, ¶ 11.

<sup>7</sup> Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.46-6.47, WT/DS285/R (Nov. 10, 2004) [hereinafter US - Gambling Panel Report].

and sound.<sup>8</sup> Online games prima facie fit this description since they incorporate both visual and sound effects, characteristic to multimedia products.<sup>9</sup>

The fact that Randornzk has undertaken obligations for such games is also apparent in the decision of the government to not ban the games themselves.<sup>10</sup> The government conceded that a ban on the games would be inequitable unless they shut down a substantial part of the gaming industry.<sup>11</sup> This implies recognition of the National Treatment obligation, according to which the government has to accord treatment no less favourable to foreign games than to their domestic counterparts.<sup>12</sup> National Treatment obligations only arise in sectors which have been scheduled in a Member's specific commitments.<sup>13</sup> Randornzk has scheduled specific commitments *only* in the Audiovisual Services sector.<sup>14</sup> Hence, this is indicative of Randornzk scheduling commitments for online games, in the Audiovisuals sector.

Furthermore, the commitments undertaken for limitations on market access are identical to those undertaken for limitations on national treatment in each sub-sector.<sup>15</sup> It can thus be inferred that Randornzk has undertaken market access commitments in addition to national treatment commitments for the use of the gaming service.

It is further argued that the Audiovisual Services sub division "other" offers precisely the flexibility required for listing such multimedia and new electronic media.<sup>16</sup> It is contended that none of the other sub-sectors under Audiovisual Services can be construed to include online games. Hence, Roderlam submits that Randornzk has scheduled online gaming services under the category of "Other Audiovisual Services" in its specific commitments.

### **1.1.2. The supply of the online gaming service is through consumption abroad**

Gamers in Randornzk have to connect to dedicated servers based in Roderlam in order to play the multiplayer games,<sup>17</sup> and also to update their games.<sup>18</sup> Consumption abroad (Mode 2) would apply when consumers from Randornzk avail of a service supplied in the territory

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<sup>8</sup> Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1340, WT/DS363/R (Aug. 12, 2009) [hereinafter *China - Audiovisual Panel Report*].

<sup>9</sup> Thomas Steiner, *Online Games under WTO law: Unresolved classification issues* 16 (NCCR Trade, Working Paper No. 3, 2009).

<sup>10</sup> Fact on Record, ¶ 18.

<sup>11</sup> Fact on Record, ¶ 18.

<sup>12</sup> GATS, art. XVII.

<sup>13</sup> NELLIE MUNIN, LEGAL GUIDE TO GATS 147 (2010).

<sup>14</sup> Fact on Record, Clarification 22.

<sup>15</sup> Fact on Record, Annexure 1.

<sup>16</sup> PATRICK A. MESSERLIN ET AL., THE AUDIOVISUAL SERVICES SECTOR IN GATS NEGOTIATIONS 2-3 (2004).

<sup>17</sup> Fact on Record, ¶ 11.

<sup>18</sup> Fact on Record, ¶ 12.



of Roderlam.<sup>19</sup> It is submitted that the supply of multiplayer online gaming services from Roderlam is through Mode 2, since the consumer ‘visits’ the GP Live service, to play or update the games, thus electronically “travelling” abroad.<sup>20</sup> Since Randornzk has inscribed “None” in both the Market Access and National Treatment columns of “Other Audiovisual Services” for Mode 2, it has undertaken to provide full market access to such games.<sup>21</sup>

*1.2 THE BAN CONSTITUTES A MARKET ACCESS LIMITATION LAID DOWN IN ARTICLE XVI:2 (C)* ARTICLE XVI:2 (C) includes as a limitation, restrictions on the total amount of service output in the form of a quota.<sup>22</sup> It is submitted that the ban on Reality GP restricts the output of the gaming *service* [1.2.1] through a “zero quota” [1.2.2].

### **1.2.1. The ban restricts the output of the gaming service**

While it is conceded that the Head Mounted Device in and of itself is a good, it is impossible to separate the supply of Reality GP from the supply of the virtual gaming service. This is because the Head Mounted Device is essential for the supply of the 3D virtual gaming service, and Roderlam Gangsters and Agency Z cannot be viewed without Reality GP.<sup>23</sup> Hence it is submitted that a services transaction can also implicate trade in goods if certain goods or equipment *must* be used to provide the service in question.<sup>24</sup>

### **1.2.2. The ban imposes a “zero quota” on the virtual gaming service**

The virtual games produced by Kiwi cannot be viewed without Reality GP.<sup>25</sup> Roderlam contends that the ban on import of Reality GP has the effect of imposing a “zero quota” on the output of Kiwi’s online virtual games. In *US-Gambling*, the Appellate Body upheld that domestic laws prohibiting the supply of a committed service, effectively limit to *zero* the total quantity of service output.<sup>26</sup> This “zero quota” amounts to a quantitative restriction under Article XVI:2 (c) because it *completely* prevents the service output.<sup>27</sup> Since online virtual games fall within the scope of online games which is a committed sector, the commitments

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<sup>19</sup> MUNIN, *supra* note 13, at 8.

<sup>20</sup> MUNIN, *supra* note 13, at 9.

<sup>21</sup> US - Gambling Panel Report, *supra* note 7, ¶ 6.279.

<sup>22</sup> GATS, art. XVI:2 (c).

<sup>23</sup> Fact on Record, ¶ 18.

<sup>24</sup> DANIEL C.K. CHOW AND THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW* 279 (2008).

<sup>25</sup> Fact on Record, ¶ 18.

<sup>26</sup> 6 MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, *WTO- TRADE IN SERVICES* 380 (Rüdiger Wolfrum et al. eds., 2008).

<sup>27</sup> US - Gambling Panel Report, *supra* note 7, ¶ 6.355; Appellate Body Report; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 252, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter US - Gambling Appellate Body Report].

also apply to them.<sup>28</sup> Hence, Randornzk has contravened its obligations under Article XVI, by effectively imposing a total prohibition on the supply of Roderlam’s virtual online games.

## **2. THE BAN ON IMPORT OF REALITY GP IS INCONSISTENT WITH ARTICLE XVII OF THE GATS**

In order to establish that the ban in question amounts to a limitation on national treatment prohibited under Article XVII it is necessary to demonstrate that Randornzk has undertaken National Treatment commitments for online gaming services through Mode 2 [2.1], that the ban amounts to a measure affecting the supply of services [2.2], that the foreign and domestic online games are “like” [2.3], and that the foreign games have been granted treatment less favourable than their domestic counterparts [2.4].

### *2.1. RANDORNZK HAS UNDERTAKEN FULL NATIONAL TREATMENT COMMITMENTS FOR CONSUMPTION OF ONLINE GAMING SERVICES ABROAD*

National Treatment obligations only arise in sectors which have been scheduled in a Member’s specific commitments.<sup>29</sup> It has already been established in Section 1.1 that Randornzk has undertaken market access commitments for the consumption of online gaming services abroad. Since Randornzk’s commitments for national treatment exactly mirror those for market access,<sup>30</sup> it is submitted that Randornzk has scheduled National Treatment commitments for consumption of online gaming services abroad.

### *2.2. THE BAN IS A ‘MEASURE AFFECTING THE SUPPLY OF SERVICES’ AS PER GATS DEFINITION IN ARTICLE XXVIII*

A measure under Article XXVIII includes any measure by a Member in the form of a rule or regulation,<sup>31</sup> enforced by an organ of the state.<sup>32</sup> It is submitted that the ban on Reality GP amounts to a measure, as it is a regulation enforced by the Randornzk government.<sup>33</sup>

The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application.<sup>34</sup> In *Canada-Autos* the panel referred to the equivalent GATT Article III:4 and deduced that a measure thus “affects” the supply of goods when the government alters the relative competitive opportunities prevalent in the market.<sup>35</sup>

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<sup>28</sup> MUNIN, *supra* note 13, at 136.

<sup>29</sup> MUNIN, *supra* note 13, at 147.

<sup>30</sup> Fact on Record, Annexure 1.

<sup>31</sup> GATS, art. XXVIII (a).

<sup>32</sup> China - Audiovisual Panel Report, *supra* note 8, ¶ 7.189-7.190.

<sup>33</sup> Fact on Record, ¶ 18.

<sup>34</sup> Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter EC - Bananas Appellate Body Report].

<sup>35</sup> Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, ¶ 10.78, WT/DS139,142/R (Feb. 11, 2000) [hereinafter Canada - Autos Appellate Body Report].

“Supply of services” is defined in Article XXVIII to include the production, distribution, marketing, sale and delivery of a service.<sup>36</sup>

In the present case, the ban on import of Reality GP has had a significant effect on the marketing and sale of the virtual games compatible with Reality GP. The measure has caused Kiwi to completely cease sales of the virtual games due to their inability to be viewed without the Head Mounted Device.<sup>37</sup> This has been to the detriment of Kiwi Inc.’s competitive opportunities, which is evident from a survey among gamers indicating a loss of preference for the Kiwi games in the absence of Reality GP.<sup>38</sup> It is thus submitted that the ban on import of Reality GP is a “measure affecting supply of services”.

### 2.3. THE FOREIGN AND DOMESTIC SERVICES AFFECTED BY THE BAN MEASURE ARE ‘LIKE’

It is submitted that the domestic and foreign services are ‘like’ because the measure discriminates between them entirely based on origin [2.3.1], and furthermore, the two services fulfill the traditional criteria for determining likeness [2.3.2].

#### 2.3.1. There exists an origin based distinction

‘Like’ services requirement in Article XVII is met as long as there are domestic and foreign services that, under the measure, are distinguished between solely based on origin.<sup>39</sup> Roderlam submits that this distinction is satisfied in the instant case. The reason averred by the Randornzk government for the banning of Reality GP was that along with the Kiwi games it caused desensitization towards violence.<sup>40</sup> However, the government had also recognised the justification of senseless violence given by the domestic game Mystical Assassins and enacted a ban on it in 2022.<sup>41</sup> This is indicative of the similar nature and treatment of violence in both the domestically and foreign produced video games. However, since the ban on Mystical Assassins was overturned to protect “freedom of religion”, there is discrimination between the similar forms of video games. The “like” domestic service is treated more favourably because of the origin-specific culture and religion of Randornzk.

#### 2.3.2. In any event, the traditional test to determine likeness is satisfied

The “traditional criteria” developed in GATT context include *inter alia* the end-uses as well as consumers’ tastes and habits.<sup>42</sup> These criteria are subjective indicators of cross-price

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<sup>36</sup> GATS, art. XXVIII(b).

<sup>37</sup> Fact on Record, ¶ 18.

<sup>38</sup> Fact on Record, ¶ 20.

<sup>39</sup> MUNIN, *supra* note 13, at 167.

<sup>40</sup> Fact on Record, ¶ 17.

<sup>41</sup> Fact on Record, ¶ 6.

<sup>42</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC - Asbestos Appellate Body Report].

elasticity of demand and are also relevant in the GATS context.<sup>43</sup> Hence, characteristics of services, which reflect the competitive relationship or substitutability between foreign and domestic services, should be taken into account when determining likeness.<sup>44</sup>

The domestic market for video games in Randomzsk was initially dominated by a domestic supplier, GenX Gaming Inc.<sup>45</sup> However, after the entry of Reality GP and Kiwi games into the market, 75% of gamers in Randomzsk owned a GP console, compatible with the Kiwi games.<sup>46</sup> This indicates a shift in consumer preferences from the domestic gaming service to the foreign gaming service supplied by Roderlam. This is proof of the substitutability of the games.

Even if it is held that the virtual gaming service provided by Roderlam is a *superior* variety of gaming services, the element of “direct substitutability” remains.<sup>47</sup> It would be protectionist for Randomzsk to restrict supply of a “like” service simply because of its superior nature and consequent competitive advantage.<sup>48</sup> It is hence submitted that the domestic and foreign gaming services are “like” because of their substitutability of end-uses in the given market.<sup>49</sup>

#### 2.4. THE FOREIGN GAMING SERVICES ARE GRANTED TREATMENT LESS FAVOURABLE THAN THE DOMESTIC LIKE SERVICES

It is submitted by Roderlam that the ban on Reality GP constitutes de facto discrimination which effectively disadvantages foreign services [2.4.1] by modifying the conditions of competition in the online gaming market to favour Randomzsk [2.4.2].

##### 2.4.1 The ban constitutes De facto discrimination

*De facto* discrimination is effected where an allegedly “neutral” criterion is applied which nevertheless discriminates between imported services and like services.<sup>50</sup> Such a measure has the effect of direct discrimination because of the distinct characteristics of the two classes.<sup>51</sup> Thus, this discrimination occurs when the measure introduces a distinguishing concept, which is typically more easily fulfilled by domestic service suppliers.<sup>52</sup> In the instant case, the ban on Reality GP was justified by the government as necessary to prevent

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<sup>43</sup> MUNIN, *supra* note 13, at 168.

<sup>44</sup> MAX PLANCK, *supra* note 26, at 402.

<sup>45</sup> Fact on Record, ¶ 4.

<sup>46</sup> Fact on Record, ¶ 15.

<sup>47</sup> WON-MOG CHOI, ‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW 15 (John H. Jackson ed., 2003).

<sup>48</sup> *Id.*

<sup>49</sup> CHOI, *supra* note 47, at 27.

<sup>50</sup> MUNIN, *supra* note 13, at 161.

<sup>51</sup> KRAJEWSKI, *supra* note 4, at 108.

<sup>52</sup> KRAJEWSKI, *supra* note 4, at 113.

desensitization towards violence.<sup>53</sup> However, a similar ban on the domestically produced game *Mystical Assassins* was overturned because the game depicted Randornzk's majority religion, Timor.<sup>54</sup> This decision had the effect of favouring the gaming services produced by GenX, which were largely inspired by Randornzk mythology.<sup>55</sup> Since GenX is one of the largest domestic video game suppliers, it is submitted that this measure had the effect of favouring domestic suppliers over their foreign counterparts.

#### **2.4.2. The measure modifies the conditions of competition in favour of Randornzk**

Article XVII:3 states that even formally identical treatment shall be considered less favourable if it modifies the conditions of competition in favour of the services or service suppliers of the concerned Member.<sup>56</sup> The assessment of competitive opportunities in a market before and after application of the measure requires a definition of the relevant market.<sup>57</sup> It is reasonable to define markets more broadly when implementing laws that are primarily designed to protect competitive opportunities.<sup>58</sup> Hence in the present case the relevant online gaming market would include both virtual and digital gaming. The Ban on Reality GP adversely affected Roderlam's competitive opportunities. This is evident from the market survey among gamers that concluded that the Kiwi games in absence of Reality GP were not substantially better than the games available through other consoles.<sup>59</sup> The equivalent GATT provision for National Treatment seeks to ensure that internal measures are not applied to imported products in a manner that offers *protection* to domestic products.<sup>60</sup> The ban on Reality GP is protectionist as it removes the competitive advantage that Kiwi games had over other domestically produced video games.

In *EC-Bananas* it was observed that the complainants held a relative majority of the market share in the relevant service sector prior to the imposition of the discriminatory measure.<sup>61</sup> Furthermore, the possibility of such a measure improving or preserving the respondent's market share was considered sufficient change in the conditions of competition.<sup>62</sup> Similarly in the instant case, Kiwi's majority share in the Randornzk gaming market fell drastically after

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<sup>53</sup> Fact on Record, ¶ 17.

<sup>54</sup> Fact on Record, ¶ 6.

<sup>55</sup> Fact on Record, ¶ 4.

<sup>56</sup> GATS, art. XVII:3.

<sup>57</sup> MUNIN, *supra* note 13, at 163.

<sup>58</sup> Panel Report, *Korea - Taxes on Alcoholic Beverages*, ¶ 10.81, WT/DS75,84/R (Sept. 17, 1998) [hereinafter *Korea - Alcohol Panel Report*].

<sup>59</sup> Fact on Record, ¶ 20.

<sup>60</sup> CHOI, *supra* note 47, at 106.

<sup>61</sup> EC - Bananas Appellate Body Report, *supra* note 34, ¶ 7.334.

<sup>62</sup> EC - Bananas Appellate Body Report, *supra* note 34, ¶ 7.337.

imposition of the measure.<sup>63</sup> Hence, it is submitted that for all the above reasons, foreign gaming services have been subjected to treatment less favourable than like domestic services.

### **3. RANDORNZK CANNOT TAKE THE DEFENCE OF ARTICLE XIV OF THE GATS FOR ITS BAN ON IMPORT OF REALITY GP**

Roderlam submits that the ban by Randornzk on Reality GP cannot be defended under Article XIV of GATS. Roderlam submits that *first*, the measure cannot be justified under Article XIV (a) [3.1], *second*, the measure cannot be justified under Article XIV (b) [3.2] and *further*, the measure cannot be justified under the chapeau of Article XIV [3.3].

#### *3.1. THE MEASURE IS NOT JUSTIFIED UNDER ARTICLE XIV (A)*

Article XIV (a) of the GATS justifies the adoption of measures which are necessary to protect public morals and maintain public order. The ban on Reality GP cannot be protected under this article as it does not fall within the range of policies designed to protect public morals or maintain public order [3.1.1] and furthermore, the ban is not necessary to meet the objective [3.1.2].

#### **3.1.1. The measure does not fall within the range of policies designed to protect public morals and maintain public order**

Desensitization to violence did not form a part of the public morals or public order of Randornzk [3.1.1.1], and *further*, the trade in gaming services gives rise to no real risk of desensitization to violence [3.1.1.2].

##### *3.1.1.1. Prevention of desensitization to violence does not constitute a part of the public morals or public order of Randornzk*

Public morals have been defined by the panel as standards of right and wrong conduct maintained by or on behalf of a community or nation.<sup>64</sup> A member must substantiate with evidence that a particular issue forms a part of its public morals.<sup>65</sup> In the case of Randornzk, it is submitted, evidence points quite to the contrary. The domestically produced game *Mystical Assassins*, which has violent content, has been allowed to circulate in the market.<sup>66</sup>

In addition, it is advanced that protection from desensitization to violence amounting to maintenance of public order is unlikely. Footnote (5) of the GATS lays high standards for an objective to form a part of public order, mandating that there needs to be “*genuine and*

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<sup>63</sup> Fact on Record, ¶ 20.

<sup>64</sup> US - Gambling Panel Report, *supra* note 7, ¶ 6.465.

<sup>65</sup> Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exceptions After Gambling*, 81 N.Y.U. L. REV. 802, 824 (2006).

<sup>66</sup> Fact on Record, ¶¶ 4, 6.

sufficiently serious threat” posed to “one of the fundamental interests of society”.<sup>67</sup> It is questionable whether desensitization to violence is a fundamental interest to Randornzk given the fact that the Supreme Court of Randornzk chose to overturn the ban on the violent domestic game *Mystical Assassins* to uphold the right to religious freedom of the people.<sup>68</sup>

### 3.1.1.2. *There was no risk of desensitization to violence*

Studies conducted on the effect of video games on desensitization to violence indicate that in the long term, the effects may not persist, as the emotional memory of the person may not be affected.<sup>69</sup> Most of the previous studies conducted on the subject ascertained desensitization to violence immediately after the subject had played violent video games.<sup>70</sup> Hence, it can be said that violent games do not pose any long term risk of desensitization.

### **3.1.2. In any case, The measure is not necessary to protect public morals and maintain public order**

The analysis of the necessity of a measure involves a weighing and balancing process.<sup>71</sup> Roderlam submits that the measure is not necessary since it does not contribute towards the objective of preventing desensitization to violence [3.1.2.1], and it is more trade restrictive than necessary [3.1.2.2].

#### 3.1.2.1. *The measure does not contribute to preventing desensitization to violence*

The ban on Reality GP was imposed ostensibly to counter the threat of desensitization towards violence posed by the Kiwi Games.<sup>72</sup> Roderlam submits that the ban on Reality GP does not make a material contribution to this objective, and thus does not satisfy the necessity test.<sup>73</sup>

*Mystical Assassins*, a domestic game, was banned for its violence by the government of Randornzk.<sup>74</sup> However, this ban was overturned by the Randornzk Supreme Court.<sup>75</sup> The persistence of this threat from another source, which the ban never sought to address at all, is a relevant factor affecting the material contribution of the measure.<sup>76</sup> Moreover, Randornzk

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<sup>67</sup> GATS, art. XIV (a), no. 5.

<sup>68</sup> Fact on Record, ¶ 6.

<sup>69</sup> Holly J. Bowen & Julia Spaniol, *Chronic Exposure to Violent Games is not Associated with Alterations of Emotional Memory*, 25(6) APPLIED COGNITIVE PSYCHOL. 906, 915 (2011).

<sup>70</sup> *Id.*

<sup>71</sup> Appellate Body Report, *Korea – Measures Affecting the Import of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161,169/AB/R (Dec. 11, 2000) [hereinafter Korea - Beef Appellate Body Report].

<sup>72</sup> Fact on Record, ¶ 18.

<sup>73</sup> Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Brazil - Tyres Appellate Body Report].

<sup>74</sup> Fact on Record, ¶ 6.

<sup>75</sup> *Id.*

<sup>76</sup> Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 297, WT/DS381/AB/R (May 16, 2012).

cannot take the defence that it was an action taken by its judiciary as it is nevertheless bound by it.<sup>77</sup>

3.1.2.2. *The measure was more trade restrictive than necessary to fulfill the objective*

Although the ban was only on the Head Mounted Display, the consequent trade restrictiveness was substantial.<sup>78</sup> There was not much demand for the non-3-D versions, and number of persons preferring a GP Console reduced to 15%.<sup>79</sup> Restricting trade in services to such an extent was not necessary as there were less restrictive alternatives available.

An alternative measure must be weighed and balanced taking into account three considerations.<sup>80</sup> These conditions are; the extent to which the measure contributes to the realization of the end pursued, the difficulty of implementation and the relative trade impact of the alternative measure. Mandating of warnings on the games that the combined effect of the games with Reality GP would amount to graphic violence could be a possible alternative. This alternative is less trade restrictive than banning Reality GP altogether. It would act as an effective deterrent to those consumers who are concerned about graphic violence, hence contributing to preventing desensitization to violence. This is not a measure which is difficult to implement, as it would involve merely directing *Kiwi Games* to print the warning or face a ban. Additionally, age restrictions could have been imposed on the use of the games. Online age verification technology could have been used to implement it effectively. Even if the recall of Reality GP had to be enacted, it should have been done only where people below the age restriction were using the game.

Another alternative that could have been explored was the banning of only the clones service, which allowed the user to use a character with similar physical attributes as the user.<sup>81</sup> The three member committee had determined the clones to be a possible factor to cause desensitization to violence,<sup>82</sup> but there was no ban on them. Also, research on First Person Shooter games shows that both the immersiveness of the game and the point of view of the player matter when it comes to desensitization.<sup>83</sup> Where users are allowed to use characters with similar attributes as and a photo of the user, the user would, in effect, see himself

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<sup>77</sup> US - Shrimp Appellate Body Report, *supra* note , ¶ 173.

<sup>78</sup> Fact on Record, ¶ 20.

<sup>79</sup> Fact on Record, ¶¶ 18, 20.

<sup>80</sup> Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 6.226, WT/DS276/R (Apr. 6, 2004) [hereinafter *Canada – Wheat Panel Report*].

<sup>81</sup> Fact on Record, ¶ 13.

<sup>82</sup> Fact on Record, ¶ 21.

<sup>83</sup> Christopher P. Barlett et al., *Longer you play, the more hostile you feel: examination of first person shooter video games and aggression during video game play*, 33(6) *AGGRESSIVE BEHAVIOR* 486, 488 (2007).



performing violent acts. Clearly, banning this service would make at least an equal contribution to preventing desensitization as banning Reality GP.

### 3.2. *THE MEASURE IS NOT JUSTIFIED UNDER ARTICLE XIV (B)*

Article XIV (b) of the GATS justifies the adoption of measures which are necessary to protect Human, Animal or Plant Life or Health. The ban on Reality GP is not justified under this article as *firstly*, it does not fall within the range of policies designed to protect health and life [3.2.1] and *secondly*, the ban is not *necessary* to meet the objective [3.2.2].

#### **3.2.1. The measure does not fall within the range of policies designed to protect human health and life**

The possibility of the adverse effect should be linked directly with the antecedent cause.<sup>84</sup> As has already been presented by Roderlam in section 3.1.1.2, it is doubtful whether violent video games cause desensitization in the long run. Hence, Roderlam submits that there was no ostensible risk to human health or life.

#### **3.2.2. In any case, the measure is not necessary to protect human health and life**

##### *3.2.2.1. The measure does not make a material contribution to the objective*

The measure needs to be much closer to the pole of indispensable rather than simply making a contribution to the objective to be deemed necessary.<sup>85</sup> Roderlam cites the example of school shootings in Germany, committed by children, which the government had linked to the playing of violent video games.<sup>86</sup> There was sufficient evidence to suggest that violent games were only a minor contributor to the incidents. Other factors such as family problems, low grades etc. were mainly linked to the accidents.<sup>87</sup> In the light of this uncertainty, combined with the extreme rarity of these incidents, Roderlam submits that the contribution made by these measures is too little to justify the large trade restrictiveness of the measure.

##### *3.2.2.2. The measure is more trade restrictive than necessary*

In section 3.1.2.2, the trade restrictiveness of the measure and possible alternatives have already been discussed.

### 3.3. *IN ANY CASE, THE MEASURE IS NOT JUSTIFIED UNDER THE CHAPEAU TO ARTICLE XIV*

A measure would fail under the chapeau if it is applied in a manner that forms arbitrary or unjustifiable discrimination between countries where like conditions prevail [3.3.1] or if it is a disguised restriction on trade in services [3.3.2].

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<sup>84</sup> Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, ¶ 202, WT/DS245/AB/R (Nov, 26, 2003) [hereinafter Japan - Apples Appellate Body Report].

<sup>85</sup> Korea - Beef Appellate Body Report, *supra* note 71, ¶ 161.

<sup>86</sup> Nicholai Diamond, *Killer Games and GATS*, 45 GEO. WASH. INT'L. L. REV. 539, 541 (2013).

<sup>87</sup> Diamond, *supra* note 86, at 539.

### **3.3.1. The measure amounts to arbitrary and unjustifiable discrimination between countries where like conditions prevail**

The standards of the chapeau address the nature of the application of the measure rather than its content.<sup>88</sup> These standards seek to keep members from misusing the exceptions by applying in an arbitrary and unjustifiable manner a measure that is ostensibly fair.<sup>89</sup>

In this regard, it would be important to note that although Randoznk has banned Reality GP to prevent desensitization to violence, it has failed to restrict the sales of a similarly violent gaming service produced in its own country, *Mystical Assassins*.

#### *3.3.1.1. Like conditions did exist between Randoznk and Roderlam*

Roderlam submits that Randoznk cannot take the defence of there being no like conditions between countries. Under the GATT Article XX, prevailing conditions between countries can be compared on the basis of the likeness of the products.<sup>90</sup> Products can be considered to be like only if they do not differ with respect to the policy pursued.<sup>91</sup> The declared objectives of the measure are hence relevant in deciding the relevant conditions for comparison.<sup>92</sup> The same approach must be extended to services under the GATS as well.

The fact that *Kiwi Inc.*'s games involved the use of the device Reality GP cannot be used as a justification for discrimination. This is because the panel of psychologists had determined *both* the games themselves and Reality GP to have a combined effect of desensitization and recommended a ban on both.<sup>93</sup> The only reason a ban on the games per se was not made was because Randoznk believed that it would not be equitable to do so.<sup>94</sup> Therefore, the purported threat of desensitization still persists even without Reality GP. The government had also imposed a ban, that was later overturned for unrelated reasons, on the domestically produced game *Mystical Assassins* due to its violent content.<sup>95</sup> In this regard, there is no difference between Kiwi games and Gen X games, even in the absence of the head mounted device.

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<sup>88</sup> US - Gambling Panel Report, *supra* note , ¶ 6.581; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter US - Shrimp Appellate Body Report].

<sup>89</sup> US - Shrimp Appellate Body Report, *supra* note 88, ¶ 160.

<sup>90</sup> Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil-Tyres*, 43 J. WORLD TRADE 507, 513 (2009).

<sup>91</sup> *Id.*

<sup>92</sup> Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 779 (2001).

<sup>93</sup> Fact on Record, ¶ 17.

<sup>94</sup> Fact on Record, ¶ 18.

<sup>95</sup> Fact on Record, ¶ 6.

Moreover, with regards to the content of the games, *Mystical Assassins* is far more desensitizing than the *Kiwi Games*. The game *Mystical Assassins* involves betraying allies and engaging in violent battles with enemies, while *Roderlam Gangsters* and *Agency Z* mainly involved working together as a team. Studies have shown that competitive interaction is far more desensitizing than co-operative interaction in a game.<sup>96</sup> This brings these two services to an even more level plane when it comes to desensitizing towards violence.

### 3.3.1.2. *The measure discriminated in an arbitrary and unjustifiable manner*

Having established that like conditions did exist, Roderlam submits that the measure discriminated in an arbitrary and unjustifiable manner. It was held by the Appellate Body in *Brazil - Retreaded Tyres* that arbitrary and unjustifiable discrimination exists when the reasons given for the discrimination bear no rational connection with the objective falling under the paragraphs.<sup>97</sup> The reasons given for the discrimination by the Supreme Court were to uphold the right to freedom of religion of the people of the Timor religion in *Randornzk*.<sup>98</sup> Since *Randornzk* is bound by the actions of its judiciary,<sup>99</sup> it is submitted that this justification does not bear any rational connection with the objective of the measure.

The Appellate Body in *US - Shrimp* considered the actions of the United States government to enter into serious negotiation with some countries while neglecting others to be discrimination of an unjustifiable nature.<sup>100</sup> *Randornzk* has entered into secret negotiations with *Drastord*, but has made no similar efforts with *Roderlam*.<sup>101</sup> *Randornzk* submits that such actions should be considered to constitute unjustifiable discrimination.

### 3.3.2. **The measure forms a disguised restriction to trade in services**

*Randornzk* submits that the ban on *Reality GP* forms a disguised restriction on trade in services as it was made with a protectionist objective. In such a case, a compliance with an exception is just a disguise to conceal trade restrictive objectives.<sup>102</sup> *Roderlam* submits that the measure of banning *Reality GP* was in fact intended to protect the nascent video games industry of *Randornzk*.<sup>103</sup> *Reality GP* was the device that provided the distinctiveness and competitive advantage to *Kiwi Games*.<sup>104</sup> It was the key to their capturing 75% of market

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<sup>96</sup> Barlett, *supra* note 83, at 487.

<sup>97</sup> *Brazil - Tyres* Appellate Body Report, *supra* note 73, ¶ 227.

<sup>98</sup> Fact on Record, ¶ 6.

<sup>99</sup> *US - Shrimp* Appellate Body Report, *supra* note 88, ¶ 173.

<sup>100</sup> *US - Shrimp* Appellate Body Report, *supra* note 88, ¶ 172.

<sup>101</sup> Fact on Record, ¶ 23.

<sup>102</sup> *EC - Asbestos* Panel Report, *supra* note 42, ¶ 8.236.

<sup>103</sup> Fact on Record, ¶ 4.

<sup>104</sup> Fact on Record, ¶¶ 18, 20.

share in Randornzk.<sup>105</sup> Despite the fact that the experts identified both, the games *Roderlam Gangsters* and *Agency Z*, and Reality GP to be posing a risk, the government chose only to ban Reality GP. The ban on Kiwi games was not effected possibly so that it would not be charged of discrimination in favour of *Mystical Assassins*. Moreover, it is unclear why Randornzk continues to hold secret negotiations with Drastord,<sup>106</sup> who are merely the manufacturers of Reality GP.<sup>107</sup> This seriously calls to question the good faith of Randornzk, which is the basic principle behind the analysis of the chapeau.<sup>108</sup>

#### **4. THE RBB POLICY DIRECTIVE VIOLATES ARTICLE VI OF THE GATS.**

The RBB Policy Directive 2024 was issued by the RBB in order to address the high level of financial fraud in Randornzk.<sup>109</sup> The Directive laid down a mechanism for the enforcement of high data protection levels for both foreign as well as domestic merchants.<sup>110</sup> The RBB Policy Directive is a measure affecting trade in services under Article XXVIII (c) as it relates to the purchase of and payment for services.<sup>111</sup>

Article VI:1 requires Members to ensure that a measure affecting services in a committed sector is administered in a reasonable, objective and impartial manner.<sup>112</sup> With regard to this, it is submitted that Randornzk had undertaken specific commitments in online gaming [4.1] and the RBB Policy Directive 2024, being a measure of general application [4.2], affects trade in those online gaming services [4.3]. It is further submitted that the RBB Policy Directive being administrative in nature can be challenged under Article VI of the GATS [4.4] and that it has not been administered in a reasonable, objective and impartial manner [4.5], thereby amounting to a violation of Article VI:1.

##### *4.1. RANDORNZK HAS UNDERTAKEN SPECIFIC COMMITMENTS FOR ONLINE GAMING SERVICE*

It has already been established in Section 1.1 and Section 2.1 that Randornzk has undertaken market access and national treatment commitments for consumption of online gaming services.

##### *4.2. THE RBB DIRECTIVE IS A MEASURE OF 'GENERAL APPLICATION'*

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<sup>105</sup> Fact on Record, ¶ 15.

<sup>106</sup> Fact on Record, ¶ 23.

<sup>107</sup> Fact on Record, ¶ 8.

<sup>108</sup> US - Shrimp Appellate Body, *supra* note , ¶ 158.

<sup>109</sup> Fact on Record, ¶ 21.

<sup>110</sup> Fact on Record, ¶ 21.

<sup>111</sup> GATS, art. XXVIII (c) (i).

<sup>112</sup> GATS, art. VI:1.

A measure may be in the form of a law, regulation, rule, procedure, decision, administrative action or in any other form.<sup>113</sup> The RBB Directive has the status of law in Poland. Thus, the RBB directive amounts to a measure.<sup>114</sup>

The term ‘general application’ used in the equivalent GATT Article X:3 was interpreted by the Panel as actions having a ‘*significant impact on the overall administration of the law, and not simply the outcome in a single case in question.*’<sup>115</sup> In *US- Underwear*, the Panel stated that a measure was one of general application if it affected an unidentified number of operators, domestic as well as foreign, and not merely one specific case.<sup>116</sup> Thus, general laws and regulations fall under ‘measures of general application.’<sup>117</sup> The RBB Directive applies to ‘all issuing institutions’ and ‘all online merchants’.<sup>118</sup> The Directive was issued to tackle the high level of online financial fraud and imposes regulations on *both* domestic and foreign merchant sites. Furthermore, the warning notice has to be put up by all foreign merchants and not only GP live.<sup>119</sup> Thus, the Directive has affected a large number of operators and is not limited to a single case. Hence, since it applies to the overall administration of online purchases it is submitted that it is a ‘measure of general application’ under Article VI of the GATS.

#### 4.3. THE RBB DIRECTIVE IS A MEASURE AFFECTING TRADE IN ONLINE GAMING SERVICES

A measure amounts to a measure affecting trade in services when it affects the purchase, payment or use of a service.<sup>120</sup> The term ‘affecting’ was interpreted as wider in scope than ‘governing’ or ‘regulating’ and has been taken to mean ‘*having an effect on.*’<sup>121</sup> The introduction of the RBB Directive caused the online purchases through GP Live Market to fall by 90%.<sup>122</sup> Thus, the purchase of the service was affected by the Directive. According to the Panel in *Argentina- Hides and Leather*, if there is a change in competitive situation, it amounts to a violation of Article X of the GATT, which is the equivalent of Article VI of the GATS.<sup>123</sup> In the present case, the mandatory online warning applies only to foreign merchant

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<sup>113</sup> GATS, art. XXVIII (a).

<sup>114</sup> Fact on Record, Clarification 11.

<sup>115</sup> Panel Report, *United States - Anti Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 7.268, WT/DS/184/R (Feb. 28, 2011).

<sup>116</sup> Panel Report, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, ¶ 7.65, WT/DS24/R (Nov. 8, 1996).

<sup>117</sup> MAX PLANCK, *supra* note 26, at 169.

<sup>118</sup> Fact on Record, ¶ 21.

<sup>119</sup> Fact on Record, ¶ 21.

<sup>120</sup> GATS, art. XXVIII (c) (i).

<sup>121</sup> EC - Bananas Appellate Body Report, *supra* note 34, ¶ 220.

<sup>122</sup> Fact on Record, ¶ 22.

<sup>123</sup> Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.77, WT/DS155/R (Dec. 19, 2000). [hereinafter *Argentina - Hides Panel Report*].

sites and not similar domestic sites, thereby giving them an unfair advantage in a competitive market.

A measure may be a measure affecting trade in services even if it affects access to the supply of a service.<sup>124</sup> In the present case, the warning notice appears when people access the website of foreign merchants.<sup>125</sup> The website is the source of supply of the services. With regards to Kiwi games, GP Live is the only source of supply as these products can only be purchased online.<sup>126</sup> Users in Randornzk have been circumspect about using their credit cards on seeing the warning.<sup>127</sup> Thus, it affects access to the supply of the service as well. Hence, the RBB Policy Directive 2024 is a measure affecting trade in services.

#### 4.4. THE RBB POLICY DIRECTIVE IS ADMINISTRATIVE IN NATURE

The Appellate Body in *EC- Bananas III* and *EC- Poultry* distinguished between the substantive content of a legal instrument and its administration.<sup>128</sup> However, the Appellate Body in *EC- Selected Customs Matters*, stated that in the two aforementioned cases they had not excluded the possibility of challenging the validity of a legal instrument under Article X:3 (a) of the GATT on the grounds that it is responsible for the administration or implementation of another legal instrument. The panel in *Argentina- Hides and Leather* stated that it must be seen if a measure is substantive or administrative in nature. If a measure is administrative, the content of the measure may be reviewed under Article X: 3(a) of the GATT.<sup>129</sup> It further stated that if challenging the substance of the measure was not to be allowed, Article X: 3(a) would have no application whatsoever.<sup>130</sup> Thus, it must be seen if the RBB Policy Directive is administrative or substantive in nature.

In *Argentina- Hides and Leather*, Resolution 2235 was considered to be administrative in nature as it provided for assistance to Customs officials in applying and enforcing the rules on classification and export duties and did not create these classification rules or export duties themselves.<sup>131</sup> The RBB Policy Directive 2024 creates the mechanism of a ten-digit password, complaint mechanism and warning.<sup>132</sup> Thus here, the RBB Policy Directive lays down the mechanism for the enforcement of the data protection rules but does not state the

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<sup>124</sup> Article XXVII(c) of GATS.

<sup>125</sup> Fact on Record, ¶ 21.

<sup>126</sup> Fact on Record, ¶ 12.

<sup>127</sup> Fact on Record, ¶ 21.

<sup>128</sup> Appellate Body Report, *European Communities - Selected Customs Matters*, ¶ 199, WT/DS315/AB/R (Nov. 13, 2006).

<sup>129</sup> *Argentina - Hides* Panel Report, *supra* note 122, ¶ 11.72.

<sup>130</sup> *Argentina - Hides* Panel Report, *supra* note 122, ¶ 11.71.

<sup>131</sup> *Argentina - Hides* Panel Report, *supra* note 122, ¶ 11.72.

<sup>132</sup> Fact on Record, ¶ 21.

standards of data protection themselves<sup>133</sup>. Thus, it is administrative and not substantive in nature.

#### 4.5. THE RBB POLICY DIRECTIVE IS NOT REASONABLE, OBJECTIVE, OR IMPARTIAL.

The standards of reasonability, objectivity, and impartiality apply cumulatively. Thus, if even one of these is not met, it amounts to a violation of Article VI.<sup>134</sup> Hence, it is sufficient to show that even one of these standards has been breached.

##### 4.5.1. The RBB Policy Directive is not ‘Reasonable’

The term ‘reasonable’ was interpreted by the Panel, based on the ordinary meaning of the term, to be ‘*in accordance with reason*’, ‘*not irrational or absurd*’, ‘*proportionate*’, ‘*having sound judgement*’, ‘*sensible*’, ‘*not asking for too much*’, ‘*within the limits of reason, not greatly less or more than might be thought likely or appropriate*’, ‘*articulate*.’<sup>135</sup> It is submitted that Section 4 of the RBB Policy Directive sets an unreasonable requirement for service suppliers based abroad. Section 3 of the RBB Policy Directive makes a provision for physical inspection of the premises of domestic merchants on receipt of five complaints.<sup>136</sup> However, the warning is displayed on the websites of foreign merchants without a complaint mechanism being put into place. Thus, it is ‘disproportionate’ as foreign merchants who might, in fact, comply with the high level of data protection are adversely affected by the warning as well. The warning makes prospective consumers circumspect in their use of credit cards. The warning notice thus is ‘disproportionate’ and sets a requirement greater than is appropriate. Thus, it is submitted, that the RBB Policy Directive is unreasonable.

##### 4.5.2. The RBB Policy Directive is not ‘objective’

The term objective, in the ordinary meaning of the term, requires a process free from irrational, emotional, personal opinions, feelings or intentions.<sup>137</sup> The application of a measure should not be arbitrary.<sup>138</sup> Arbitrary has been defined as ‘*based on one’s discretion, whim; based on random choice or impulse*’.<sup>139</sup> Here, the purpose of the RBB Policy Directive was to prevent online financial fraud and ensure compliance with high levels of data protection. The warning notice prescribed in Section 4 does nothing in furtherance of this

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<sup>133</sup> Fact on Record, ¶ 21.

<sup>134</sup> Panel Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.383, WT/DS302/R (Nov. 26, 2004) [hereinafter DR - Cigarettes Panel Report]; MAX PLANCK, *supra* note 26, at 172.

<sup>135</sup> DR - Cigarettes Panel Report, *supra* note 133, ¶ 7.385.

<sup>136</sup> Fact on Record, ¶ 21.

<sup>137</sup> MAX PLANCK, *supra* note 26, at 171; COMPACT OXFORD REFERENCE DICTIONARY 579 (Catherine Soanes ed., 6th ed. 2003).

<sup>138</sup> *Id.*

<sup>139</sup> COMPACT OXFORD REFERENCE DICTIONARY 36 (Catherine Soanes ed., 6th ed. 2003).

objective. It merely acts as a deterrent for consumers from using websites of foreign merchants.<sup>140</sup> It does not prevent the fraud in itself but prevents a few people from the risk of being defrauded. Thus, it is an arbitrary measure. Hence, the RBB Policy Directive is not objective in nature.

#### **4.5.3. The RBB Policy Directive is not ‘impartial’**

The standard of impartiality is characterized by the principle of non-discrimination. A decision is ‘impartial’ when it is taken without giving special consideration, privileges or importance to one party over another party who is equally affected by the decision.<sup>141</sup> Sections 3 and 4 of the RBB Policy Directive 2024, set out different standards for domestic and foreign service providers. While Section 3 makes a provision for inspection of domestic service providers only after complaints have been received, Section 4 is preemptive. Thus, instead of having a provision for action (like blocking) against foreign providers complained against, consumers are completely discouraged from using these sites. There is a clear lack of similar standards for the two.

### **5. THE RBB DIRECTIVE VIOLATES ARTICLE XVI:1 & XVI:2 OF THE GATS**

The RBB Directive 2024 mandates foreign merchant sites to display a warning to users from Randornzk, stating that the site is located in foreign territory and does not have to comply with Randornzk’s strict data protection laws.<sup>142</sup> Roderlam submits that this directive contravenes Randornzk’s market access commitments for online gaming services [5.1] by imposing a limitation prohibited by Article XVI:2 (c) [5.2].

#### *5.1. RANDORNZK HAS UNDERTAKEN FULL MARKET ACCESS COMMITMENTS FOR CONSUMPTION OF ONLINE GAMING SERVICES ABROAD*

ARTICLE XVI:1 allows for treatment to other Members which is no less favourable than that provided for under the terms, limitations and conditions in a Member’s Schedule.<sup>143</sup> It has already been established in Section 1.1 that Randornzk has undertaken *full* market access commitments with respect to consumption of online games abroad.

#### *5.2. THE DIRECTIVE AMOUNTS TO A LIMITATION PROHIBITED BY ARTICLE XVI:2(C)*

The RBB Directive requiring the GP Merchant site to display a deterrent warning has caused purchases of the Kiwi games to fall drastically.<sup>144</sup> It is submitted that the RBB Directive falls

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<sup>140</sup> Fact on Record, ¶¶ 21, 22.

<sup>141</sup> Argentina - Hides Panel Report, *supra* note 122, ¶ 11.100; MAX PLANCK, *supra* note 26, at 172.

<sup>142</sup> Fact on Record, ¶ 21.

<sup>143</sup> GATS, art. XVI:1.

<sup>144</sup> Fact on Record, ¶ 22.



within the scope of Article XVI:2 (c) as it is a limitation on the total quantity of service output [5.2.1] through the requirements of a test of social desirability [5.2.2].

### **5.2.1. The RBB Directive is a limitation on the total quantity of service output**

In *US-Gambling* the panel gave a broad interpretation to the market access limitations in XVI:2. It included any measure having an *effect* similar to that of any of the market-access limitations listed in Article XVI:2.<sup>145</sup> A seemingly qualitative regulation could be considered a market access limitation if it produces quantitative effects.<sup>146</sup> Thus a limitation under XVI:2(c) can be exhibited by a specification that indirectly affects the quantity of service output.<sup>147</sup> The Panel in *US-Gambling* defined “service output” as the result of the production of the service.<sup>148</sup> The gaming industry in Roderlam produces games such as *Agency Z* and *Roderlam Gangsters* as well as related services like Clones.<sup>149</sup> The RBB Directive has had the effect of substantially limiting the output of the Kiwi games and related services through the GP Live Market. This is evident in that the online purchases of the games and Clones fell by 90% after the introduction of the RBB directive.<sup>150</sup>

### *5.2.2. The RBB Directive is in the form of a test of social desirability*

While a typically scheduled economic needs test involves the circumstances of demand and supply, several countries have deviated from this norm.<sup>151</sup> Countries such as Switzerland have also included tests of social desirability within their schedules.<sup>152</sup> Similarly in the instant case, the RBB Directive seeks to enforce a test to ensure high levels of data protection to the citizens of Randornzk. Foreign service suppliers are only allowed to supply services through merchant sites if they meet the requirements of the directive.<sup>153</sup> Hence, it is submitted that the RBB Directive is an test within the scope of Article XVI:2(c).

## **6. THE RBB POLICY DIRECTIVE 2024 VIOLATES ARTICLE XI OF THE GATS.**

Article XI of the GATS prevents a Member from applying restrictions to international transfers and payments pursuant to it specific commitments.<sup>154</sup> In the present case, it is submitted that Randornzk had undertaken specific commitments in online gaming [6.1].

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<sup>145</sup> US - Gambling Panel Report, *supra* note 7, ¶¶ 6.338, 6.355; US - Gambling Appellate Body Report, *supra* note 27, ¶¶ 239, 252.

<sup>146</sup> MUNIN, *supra* note 13, at 203.

<sup>147</sup> MUNIN, *supra* note 13, at 192.

<sup>148</sup> US - Gambling Panel Report, *supra* note 7, ¶¶ 6.348-6.349.

<sup>149</sup> Fact on Record, ¶¶ 10, 13.

<sup>150</sup> Fact on Record, ¶ 22.

<sup>151</sup> KRAJEWSKI, *supra* note 4, at 88-89.

<sup>152</sup> KRAJEWSKI, *supra* note 4, at 88.

<sup>153</sup> Fact on Record, ¶ 21.

<sup>154</sup> GATS, art. XI.

Further, credit card transactions, which amount to international transfers and payments [6.2] for current transactions in the given circumstances [6.3], are restricted by the RBB Policy Directive [6.4]. Thus, the RBB Policy Directive is in violation of Article XI of the GATS. It is further submitted that the measure is not covered under the exception to Article XI for ‘prudential reasons’ [6.5] nor under the general exceptions.

*6.1. RANDORNZK HAS UNDERTAKEN SPECIFIC COMMITMENTS FOR ONLINE GAMING SERVICES*

It has already been established in Section 1.1 and Section 2.1 that Randornzk has undertaken Market Access and National Treatment commitments for the online gaming services.

*6.2. CREDIT CARD TRANSACTIONS AMOUNT TO INTERNATIONAL TRANSFERS AND PAYMENTS UNDER ARTICLE XI*

Credit card transactions are considered payments.<sup>155</sup> The term international refers to a situation where the transaction takes place across national borders.<sup>156</sup> Here, the online merchant GP Live is based in Roderlam and the consumers in Randornzk. Thus, international transfers and payments are being affected.

*6.3. PAYMENTS FOR THE ONLINE GAMING SERVICES AMOUNT TO CURRENT TRANSACTIONS*

Since current transactions have not been defined within the GATS, it is submitted that the definition under the IMF Articles of Agreement should be used.<sup>157</sup> The GATS prohibits restriction on both, current as well as capital transactions.<sup>158</sup> The distinction is significant in cases where the IMF takes precedence as the IMF Agreement permits restrictions on capital transactions.<sup>159</sup> Thus, the definition given in the IMF Agreement may be used.<sup>160</sup> Payment for services is included under current transactions under the IMF Agreement.<sup>161</sup> Thus, payment for online gaming falls under the ambit of Article XI of the GATS as it is a current transaction.

*6.4. THE RBB POLICY DIRECTIVE AMOUNTS TO A RESTRICTION*

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<sup>155</sup> Panel Report, *China - Certain Measures Affecting Electronic Payment Services*, ¶¶ 7.201- 7.204, WT/DS413/R (July 16, 2012) [hereinafter *China - Electronic Payment Panel Report*]; GATS, Annex on Financial Services, § 5 9viii).

<sup>156</sup>D. E. Siegel, *Legal Aspects of the IMF/ WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96(3) AM. J. INT’L L. 561, 561 (2002).

<sup>157</sup> MUNIN, *supra* note 13, at 209; MAX PLANCK, *supra* note 26, at 249.

<sup>158</sup> GATS, art. XI; GATS, art. XVI:1, n. 8.

<sup>159</sup>Group of Negotiations on Services, *Communication from the International Monetary Fund: The Role of the Fund in the Area of Services Under its Articles of Agreement*, ¶ 21, MTN.GNS/W/91 (Jan. 10, 1990); Siegel, *supra* note 155, at 561; United Nations Conference on Restrictive Trade Practices, Apr. 8-22, 1980, *The United Nations set of Principles and Rules on Competition*, 12, U.N. Doc. TD/RBP/CONF/10/Rev.2 (Dec. 5, 1980).

<sup>160</sup>MAX PLANCK, *supra* note 26, at 249.

<sup>161</sup> Articles of Agreement of the International Monetary Fund, art. XXX (d) (1), Dec. 27, 1945, 60 Stat. 1401; 2 UNTS 39.

The term ‘restriction’ must be interpreted broadly in this context.<sup>162</sup> Restrictions can be defined as ‘any measure that could negatively affect international transfers and payments.’<sup>163</sup> It includes direct as well as indirect measures.<sup>164</sup> Direct measures include approval procedures.<sup>165</sup> Here, Section 4 of the RBB Policy Directive made it mandatory for people who wanted to access foreign merchant sites to give their consent to undertake a certain risk. This is a sort of approval. Furthermore, indirect measures include anything that discourages transactions.<sup>166</sup> In the present case, users became circumspect of using their credit cards to make purchases.<sup>167</sup> The effect of this can be seen as the sales through GP Live fell by 90% after the introduction of the Policy.<sup>168</sup> Thus, the RBB Policy Directive 2024 amounts to a restriction on international transfers and payments.

*6.5. FURTHER, RANDORNZK CANNOT CLAIM AN EXCEPTION UNDER THE ANNEX ON FINANCIAL SERVICES OR UNDER ARTICLE XII*

Article XII provides an exception to Article XI as a safeguard to the balance of payments.<sup>169</sup> In the present case, Randornzk is not facing any balance of payment difficulties.<sup>170</sup> Thus, the exception under Article XII does not apply.

The Annex on Financial services is not applicable in the present case. The Annex on Financial Services applies only to measures affecting ‘supply of financial services.’<sup>171</sup> Here, the specific commitment affected is online gaming services. Thus, the exception to Art. XI under the Annex is not applicable.

Even if it is held that this exception may be invoked, this provision allows countries to take measures in financial services only for prudential reasons under Paragraph 2 lit. a.<sup>172</sup> However, it cannot be used by Members to avoid their obligations or commitments.<sup>173</sup> It also sets out an obligation of good faith.<sup>174</sup> Here, the measure was taken when Kiwi was the major supplier of gaming in Randornzk.<sup>175</sup> Roderlam has a well developed banking sector.<sup>176</sup> Alternatives like consultations with other Members to comply with similarly high levels of

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<sup>162</sup> MAX PLANCK, *supra* note 26, at 251.

<sup>163</sup> MUNIN, *supra* note 13, at 210.

<sup>164</sup> MAX PLANCK, *supra* note 26, at 251; EC - Bananas Appellate Body Report, *supra* note 34, ¶ 194.

<sup>165</sup> MAX PLANCK, *supra* note 26, at 252.

<sup>166</sup> MAX PLANCK, *supra* note 26, at 252.

<sup>167</sup> Fact on Record, ¶ 22.

<sup>168</sup> Fact on Record, ¶ 22.

<sup>169</sup> GATS art. XI, XII.

<sup>170</sup> Fact on Record, Clarification 27.

<sup>171</sup> GATS, Annex on Financial Services, § 1.

<sup>172</sup> GATS, Annex on Financial Services, § 2 (a).

<sup>173</sup> *Id.*

<sup>174</sup> Max Planck; US - Shrimp Appellate Body Report, *supra* note 88, ¶ 158.

<sup>175</sup> Fact on Record, ¶ 15.

<sup>176</sup> Fact on Record, ¶ 1.

online security were available. Also, the warning notice need not have been applied uniformly without a complaint mechanism. Similar to Section 3 of the RBB Policy Directive,<sup>177</sup> which sets out a procedure for inspection after complaints have been received, there could have been provisions for blocking foreign merchant sites only after complaints had been received. The RBB Policy Directive has been used to avoid by Randornzk to avoid their commitments. This measure is not ‘prudential’ as there were several other less trade restrictive alternatives. Hence, it is submitted that the measure was undertaken merely in order to avoid their specific commitments for online gaming.

## **7. RANDORNZK CANNOT TAKE THE DEFENCE OF ARTICLE XIV OF THE GATS FOR THE MANDATORY WARNING**

Roderlam submits that the issuance of the warning on non-Randornzk online merchant websites is not justified under Article XIV(c) of the GATS as being necessary to secure compliance with a GATS consistent law. Roderlam submits that the measure does not fall within the scope of Article XIV (c) [7.1] and *in any case*, the measure cannot be justified under the chapeau to Article XIV [7.2].

### *7.1. THE MEASURE IS NOT JUSTIFIED UNDER ARTICLE XIV (C)*

*Firstly*, the measure does not secure compliance with other laws and regulations which are not inconsistent with the GATS [7.1.1], *secondly*, the measure was not necessary to secure compliance with the said law or regulation [7.1.2] *further*, the measure was not justified under the chapeau of Article XIV [7.1.3].

#### **7.1.1. The measure does not secure compliance with the RBB Policy Directive**

The RBB Policy Directive merely provides for mandatory physical inspection on online merchant websites with more than five complaints against it,<sup>178</sup> and mandates this warning on foreign websites out of the inability to perform physical inspections in a foreign jurisdiction.<sup>179</sup> A measure purported to secure compliance with a GATS consistent law must enforce the laws and regulations rather than merely ensure attainment of the objectives of the laws and regulations.<sup>180</sup> A warning worded to convey that the host country need not comply with the strict financial data protection laws of Randornzk cannot be justified by inability to perform physical inspection. It clearly cannot be said to be enforcing the law.

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<sup>177</sup> Fact on Record, ¶ 21.

<sup>178</sup> Fact on Record, ¶ 21.

<sup>179</sup> Fact on Record, ¶ 21.

<sup>180</sup> US - Gambling Panel Report, *supra* note 7, ¶ 6.538; Report of the Panel, *EEC - Regulation on Imports of Parts and Components*, ¶¶ 5.14-5.18, L/6657 (Mar. 22, 1990), GATT B.I.S.D. (32nd Supp.) at 132 (May 16, 1990).

**7.1.2. In any case, the measure is not necessary to secure compliance with the RBB Policy Directive**

Even if the measure is deemed to secure compliance with the directive, it cannot be deemed to be necessary for the same.

*7.1.2.1. The measure does not make a significant contribution to securing compliance with the law*

A warning so strongly worded can hardly be said to be indispensable to securing compliance with a law which merely mandates it out of the inability to perform physical inspections. The warning states that the concerned online merchant need not “comply with Randornzk’s strict financial protection laws”,<sup>181</sup> giving a user the impression of lack of safety.

*7.1.2.2. The measure is more trade restrictive than necessary*

Roderlam also submits that the measure was more trade restrictive than necessary to secure compliance with the law. The consequent trade restrictiveness was significant, reducing online transactions to 100 a month from the previous 10,000 per month.<sup>182</sup> Such trade restrictiveness was not necessary as much less trade restrictive measures could have been employed.

The criteria that alternative measures need to follow have been mentioned in Section 3.1.2.2. The wording of the warning is more severe than necessary and conveys a false message. It gives an impression to the user of low levels of data protection in the host country, whereas the real reason for the warning is the impossibility of conducting a physical inspection. This could be the main reason why users are wary before entering into transactions.<sup>183</sup> Hence, the wording must be altered to convey the fact that it is solely due to the physical impossibility of conducting inspections in foreign jurisdictions that the warning is being effected.

Moreover, Randornzk mandates a physical inspection on an online merchant site within its territory only if there are more than five complaints against it.<sup>184</sup> However, the warning would flash before a user enters into a transaction with any non-Randornzk online merchant site. Roderlam submits that Randornzk could have mandated warnings only if the online merchant site had more than five complaints against it.

Putting these two together, the alternative suggested would fulfil all three conditions necessary for an alternative measure. The measure is more in line with the letter of the RBB Policy directive and hence makes a better contribution to securing compliance with it.

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<sup>181</sup> Fact on Record, ¶ 21.

<sup>182</sup> Fact on Record, ¶ 22.

<sup>183</sup> Fact on Record, ¶ 22.

<sup>184</sup> Fact on Record, ¶ 21.

Moreover, it is certainly not difficult to implement; a complaint system on domestic online merchant websites could easily be extended to foreign sites.

*7.2. IN ANY CASE, THE MEASURE IS NOT JUSTIFIED UNDER THE CHAPEAU TO ARTICLE XIV*

A measure would fail under the chapeau if it is applied in a manner that forms arbitrary or unjustifiable discrimination between countries where like conditions prevail.<sup>185</sup>

**7.2.1. Conditions existing in Roderlam were never assessed**

The Appellate Body in US-Shrimp held that discrimination results “*when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.*”<sup>186</sup> The Appellate Body found the inflexible approach of the United States impermissible not because it discriminated between countries where the same conditions prevail but because it refused to grant differential trade treatment to countries where different conditions may prevail.<sup>187</sup> Roderlam already has a well-developed banking sector.<sup>188</sup> Therefore, it stands to reason that this would not have been possible without reasonably strict and effective regulations and online transactions. However, Randomzck never took these factors into consideration and imposed the same measure on every state.

**7.2.2. In any case, there exists arbitrary and unjustifiable discrimination**

There exists *prima facie* discrimination on the part of Randomzck. This is because the warning applies to all non-Randomzck merchant sites without affecting sites in Randomzck.<sup>189</sup> Moreover, merchant sites based in Randomzck are liable for physical inspection only when more than five complaints are filed against them, but non-Randomzck sites have to apply the warning irrespective.<sup>190</sup>

An analogy can be drawn between the present situation and the case US-Gasoline. One of the reasons the United States gave for its choice of a statutory baseline rather than an individual baseline for the foreign suppliers of Gasoline was the difficulty to enforce such individual baselines in a foreign country. United States had recognized the fact that in the absence of cooperation of the foreign governments, it was unlikely that auditors would be able to conduct on-site audit reviews necessary to establish the overall quality of refiners’ 1990 gasoline.<sup>191</sup>

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<sup>185</sup> GATS, art. XIV.

<sup>186</sup> US - Shrimp Appellate Body Report, *supra* note 88, ¶ 165

<sup>187</sup> Gaines, *supra* note 92, at 784.

<sup>188</sup> Fact on Record, ¶ 1.

<sup>189</sup> Fact on Record, ¶ 21.

<sup>190</sup> Fact on Record, ¶ 21.

<sup>191</sup> US - Gambling Appellate Body Report, *supra* note 8, ¶ 292; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 27, WT/DS2/AB/R (Apr. 29, 1996)

The Appellate Body held that “*The United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, not to the point where it encountered governments that were unwilling to cooperate.*”<sup>192</sup> Randornzk had not even attempted to enter into any cooperative arrangements with Roderlam with regards to arriving at any other solution. Therefore the measure is arbitrarily and unjustifiably discriminatory.

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<sup>192</sup> *Id.*

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## REQUEST FOR FINDINGS

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Wherefore in light of the Measure of Issues, Legal Pleadings, Reasons given and Authorities cited, Roderlam, the Complainant, respectfully requests the Panel to:

1. Find that the ban on the import of Reality GP is in violation of Article XVI of the GATS;
2. Find that the ban on the import of Reality GP is in violation of Article XVII of the GATS
3. Find that the ban on the import of Reality GP is not justified under Article XIV of the GATS;
4. Find that the RBB Policy Directive is in violation of Article VI:1 of the GATS;
5. Find that the RBB Policy Directive is in violation of Article XVI:1 and Article XVI:2 of the GATS;
6. Find that the RBB Policy Directive is in violation of Article XI of the GATS;
7. Find that the RBB Policy Directive is not justified under Article XIV of the GATS.

*All of which is respectfully affirmed and submitted,*

Counsel for the Claimant,

Roderlam.