

**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 RESPONDENT**

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**SIXTH INTERNATIONAL GNLU MOOT COURT COMPETITION,**

**2014**

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## LIST OF ABBREVIATIONS

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Annex.	ANNEXURE
Art.	ARTICLE
BBC	BRITISH BROADCASTING CORPORATION
CARDOZO J. INT'L & COMP. L.	CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW
COMP. AND INT'L L. J. OF S. AFR.	COMPETITION AND INTERNATIONAL LAW JOURNAL OF SOUTH AFRICA
CRIM. JUST. & BEHAV.	CRIMINAL JUSTICE AND BEHAVIOR
DS	DISPUTE SETTLEMENT
ed.	EDITOR
EC	EUROPEAN COMMUNITIES
E.C.R.	EUROPEAN COURT REPORTS
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
IEEE	INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS
I.L.M	INTERNATIONAL LEGAL MATERIALS
J. ADVERTISING	JOURNAL OF ADVERTISING
J. EXPERIMENTAL SOC. PSYCHOL.	JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY

J. WORLD TRADE	JOURNAL OF WORLD TRADE
Kiwi	KIWI INCORPORATED
Nat'l Ctr. of Competence in Research Trade Regulation	National Centre of Competence in Research Trade Regulation
PSYCHOL. SCI.	PSYCHOLOGICAL SCIENCE
PSYCHOL. SCI. PUB. INT'L.	PSYCHOLOGICAL SCIENCE PUBLICATIONS INTERNATIONAL
Supp.	SUPPLEMENT
U.N.	UNITED NATIONS
U. PA. J. INT'L ECON. L.	UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW
VA. J. INT'L L	VIRGINIA JOURNAL OF INTERNATIONAL LAW
VA. J. INT'L	VIRGINIA JOURNAL OF INTERNATIONAL LAW
WHO	WORLD HEALTH ORGANIZATION
WTO	WORLD TRADE ORGANIZATION
WORLD TRADE REV.	WORLD TRADE REVIEW
¶	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 COMPLIANCE WITH ARTICLE XVI OF THE GATS?

### II.

WHETHER THE BAN ON IMPORT OF REALITY GP IS IN COMPLIANCE WITH 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 COMPLIANCE WITH 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 COMPLIANCE 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 REALITY GP IS CONSISTENT WITH ARTICLE XVI OF THE GATS**

1.1. The ban is a measure affecting trade in *goods* and thus cannot be challenged under Article XVI. The ban was only on the Head Mounted Display Reality GP, which qualifies as a good.

1.2. Randornzk has not scheduled market access commitments for online gaming services as it has specific commitments only under the sub-sector “Audiovisual Service”. Online gaming service does not come under the ambit of this sector and, in any case, the supply of the games is cross-border, for which Randornzk has not scheduled commitments.

1.3. In any case, the ban does not constitute a limitation under Article XVI as the ban amounts to a technical standard and not a restriction of a quantitative nature. Moreover, Reality GP is merely an input to the gaming service as the games could be played even without the device.

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

2.1. Randornzk has not scheduled national treatment commitments for online gaming services.

2.2. The ban is not a National Treatment limitation. This is because it is a measure affecting consumption, not the supply of services. Furthermore, the domestic and foreign services are not ‘like’, both by origin based and traditional tests. Moreover, the foreign services are not granted less favourable treatment than domestic services.

### **3. IN ANY CASE, THE BAN ON REALITY GP IS PROTECTED UNDER ARTICLE XIV OF THE GATS**

3.1. The measure is justified under Article XIV (a) as it is designed to protect public morals and maintain public order as the possibility of desensitization to violence and reducing human dignity constituted a risk to the same. Moreover, the ban was *necessary* as the objective was of great importance and the ban materially contributed to its fulfillment. Furthermore, there were no less restrictive alternatives.

3.2. The measure is also justified under Article XIV (b) as it is designed to protect human health and life, to which there was a substantial risk. Moreover, the ban was necessary for the same as protecting human health is of great importance to which the ban did contribute, and was not more trade restrictive than necessary as there were no reasonable alternatives.

3.3. The measure is justified under the chapeau to Article XIV. This is because, given the differences between the domestic and foreign games, like conditions do not exist and the measure does not amount to arbitrary and unjustifiable discrimination anyway. Also, being a publicized measure without protectionist intent, it does not form a disguised restriction to trade in services.

#### **4. THE RBB POLICY DIRECTIVE 2024 DOES NOT VIOLATE ARTICLE VI**

4.1. Randornzk has not undertaken specific commitments in online gaming or banking services. Thus, Randornzk is free to take any measures it deems fit in these sectors.

4.2. Article VI covers only measures of general application and not those that address specific situations. As the RBB Policy Directive applies to an identifiable set of users and merchants, it is not a measure of general application.

4.3. Article VI applies only to the administration of a measure and not its substantive content. Furthermore, the administration as well as the substantive content of the RBB Policy Directive 2024 are reasonable, objective and impartial.

#### **5. THE RBB POLICY DIRECTIVE 2024 DOES NOT VIOLATE ARTICLE XVI:1 OR XVI: 2 OF THE GATS**

5.1. The credit card services which have allegedly been affected by the RBB Policy Directive are electronic payment services for payment card transactions. These services fall under the category of financial services.

5.2. Randornzk has not undertaken specific commitments for either financial services or online gaming services. Thus, Randornzk is free to take measures in these sectors as it deems fit.

5.3. Even if it is argued that Randornzk had undertaken specific commitments in online gaming services, Randornzk has not imposed any limitations under Article XVI:2 as the RBB Policy Directive is a qualitative restriction.

## **6. THE RBB POLICY DIRECTIVE DOES NOT VIOLATE ARTICLE XI OF THE GATS**

6.1. Poland has not undertaken specific commitments for online gaming services and is free to take measures relating to this sector as it deems fit.

6.2. Further, the RBB Policy Directive does not restrict international transfers and payments as it merely makes provisions for a warning to users, which does not in any way affect the transfer itself.

6.3. In any case, the RBB Policy Directive 2024 was issued for prudential reasons. The high level of financial fraud was affecting the integrity as well as stability of the financial system and thus, the RBB Policy Directive is essential.

## **7. THE ISSUANCE OF THE WARNING IS PROTECTED UNDER ARTICLE XIV OF THE GATS**

7.1. The warning is justified under Article XIV (c) of the GATS as it secures compliance with the RBB policy directive, which is a GATS consistent law. The measure was necessary for the same as prevention of online fraud is an important interest, which the warning contributed to. Furthermore, it was no more trade restrictive than necessary.

7.2. The measure is justified under chapeau to Article XIV as it does not discriminate in an arbitrary and unjustifiable manner. It is not a disguised restriction to trade either as it applies to all sectors and hence cannot be said to be protectionist.

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## LEGAL PLEADINGS

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### 1. THE BAN ON REALITY GP IS CONSISTENT WITH ARTICLE XVI OF THE GATS

Randornzk has imposed a ban on the import of the head mounted display, Reality GP, which can be used for the viewing of video games produced by Kiwi Inc.<sup>1</sup> It is submitted that this ban is consistent with Randornzk's Market Access obligations under the GATS. This is because the ban merely affects the supply of a *good* and thus cannot be challenged under Article XVI [1.1]. *Furthermore*, Randornzk has not scheduled market access commitments for the services in question [1.2], and *in any case* the ban does not constitute a limitation under Article XVI:2 [1.3].

#### *1.1. THE BAN IS A MEASURE AFFECTING TRADE IN GOODS AND CANNOT BE CHALLENGED UNDER ARTICLE XVI OF THE GATS*

The ban has been imposed on the head-mounted display and not on the associated video gaming service.<sup>2</sup> Reality GP is a good, and since the ban only affects the supply of Reality GP, it cannot be challenged under Article XVI that pertains to services. The UN Central Product Classification (CPC) has been recognized as an important classification of goods and services under the WTO.<sup>3</sup> The CPC classifies display screens and other such equipment as goods.<sup>4</sup> However, Article XVI seeks to protect foreign *services* and *service suppliers* from market access limitations.<sup>5</sup> The impugned ban does not extend to the video game service supplied by Kiwi,<sup>6</sup> nor does it affect Kiwi in its capacity as a video game supplier.

#### *1.2. RANDORNZK HAS NOT SCHEDULED MARKET ACCESS COMMITMENTS FOR ONLINE GAMING SERVICES*

Randornzk has only scheduled specific commitments under the sub-sector "Audiovisual Service."<sup>7</sup> Only a prohibition on the supply of services in respect of which a full market

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<sup>1</sup> Fact on Record, ¶ 18.

<sup>2</sup> Fact on Record, ¶ 18.

<sup>3</sup> SIMON LESTER, WORLD TRADE LAW 598 (2008).

<sup>4</sup> U. N. Statistics Division, Central Product Classification Version 2.0, at 67 (Dec. 31, 2008), [http://unstats.un.org/unsd/cr/registry/docs/CPCv2\\_structure.pdf](http://unstats.un.org/unsd/cr/registry/docs/CPCv2_structure.pdf). [hereinafter CPC 2].

<sup>5</sup> General Agreement on Trade in Services art. XVI:1, Apr. 15, 1994, 1869 UNTS 183, 33 I.L.M. 1167. [hereinafter GATS].

<sup>6</sup> Fact on Record, ¶ 18.

<sup>7</sup> Fact on Record, Annexure 1.

access commitment has been undertaken is a quantitative limitation on their supply.<sup>8</sup> It is submitted that Randornzk has not undertaken such commitments since the gaming service in question does not fall under the ambit of “Audiovisual Service” [1.2.1], and *in any case*, the supply of the games is cross border, for which Randornzk has not scheduled commitments [1.2.2].

### **1.2.1. The online gaming service does not fall under the ambit of “Audiovisual Service”**

The service purportedly affected by the ban is that of online games. Since online games are relatively new services, there is currently no single and specific GATS sub-category available for their classification.<sup>9</sup> However, since the scheduled sectors are exhaustive and mutually exclusive, the online gaming service can only fall into one category.<sup>10</sup> Since these schedules record the legally enforceable commitments of each member, they should be clear, precise and based on a common terminology.<sup>11</sup>

The Central Product Classification (CPC) forms an important directory for understanding the classification of schedules, as it is the main point of reference for the Services Sectoral Classification List (W/120).<sup>12</sup> The latest version of the CPC includes a provision for online games,<sup>13</sup> which also encompasses Role-Playing Games such as Agency Z and Roderlam Gangsters.<sup>14</sup> Online games in the CPC are distinct from the Audiovisual group.<sup>15</sup> The 1993 Scheduling Guidelines state that a member choosing to depart from the CPC should provide reference to the CPC or a detailed explanation of the sectors in its Schedules.<sup>16</sup> Since Randornzk has done neither, it cannot claim that online games were included under the ambit of “Audiovisual Services.”

### **1.2.2. In any case, the supply of online games is cross-border, for which Randornzk has not scheduled commitments.**

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<sup>8</sup> Appellate Body Report; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 250, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter US - Gambling Appellate Body Report].

<sup>9</sup> Thomas Steiner, *Online Games under WTO law: Unresolved classification issues* 9 (Nat'l Ctr. of Competence in Research Trade Regulation, Working Paper No. 3, 2009).

<sup>10</sup> Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.63, WT/DS285/R (Nov. 10, 2004) [hereinafter US - Gambling Panel Report].

<sup>11</sup> Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, ¶ 22, S/L/92 (Mar. 28, 2001) [hereinafter 2001 Scheduling Guidelines].

<sup>12</sup> 2001 Scheduling Guidelines, *supra* note 11, ¶ 23.

<sup>13</sup> CPC 2, *supra* note 4, at 100.

<sup>14</sup> Fact on Record, ¶ 11.

<sup>15</sup> CPC 2, *supra* note 4, at 114.

<sup>16</sup> Group of Negotiations on Services, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, ¶ 16, MTN.GNS/W/164 (Sept. 3, 1993) [hereinafter 1993 Scheduling Guidelines].

Randornzk has not undertaken commitments for the cross-border supply of Other Audiovisual Services.<sup>17</sup> Even if it is argued that the online games fall under “Other Audiovisual Services,” it is submitted that the supply of the games is cross-border. Cross-border supply occurs when the service supplier and the consumer are located in territories of different members.<sup>18</sup> This condition is sufficiently established here since the service supplier Kiwi Inc. is based in Roderlam,<sup>19</sup> while the consumers are located in Randornzk.<sup>20</sup> In *US-Gambling*, the Panel limited its analysis of online betting services under Article XVI to the cross-border mode of supply.<sup>21</sup> The Appellate Body also found no fault in treating the electronic supply of services as cross-border.<sup>22</sup> Randornzk is uncommitted in the Market Access column for cross-border supply of “Other Audiovisual Services.”<sup>23</sup> Thus Randornzk remains free to apply any measure inconsistent with Article XVI in the relevant sub-sector.<sup>24</sup>

*1.3. IN ANY CASE, THE BAN ON REALITY GP DOES NOT CONSTITUTE A LIMITATION UNDER ARTICLE XVI*

The limitations prescribed under Article XVI:2 form an *exhaustive list* of measures that constitute violations of Article XVI.<sup>25</sup> These measures are primarily quantitative in nature.<sup>26</sup> It is submitted that the ban on Reality GP does not amount to a quantitative limitation under XVI:2 [1.3.1], and *in any case* it is not covered by XVI:2 (c) since Reality GP is an *input* to a service [1.3.2].

**1.3.1. The ban does not amount to a quantitative limitation**

The government imposed a ban on Reality GP due to its high level of player immersion in addition to the high degree of violence in Kiwi games.<sup>27</sup> The market access disciplines encompassed by Article XVI of the GATS cover quantitative restrictions and measures equivalent to them.<sup>28</sup> These criteria do *not* relate to the quality of the service supplied.<sup>29</sup> Qualitative restrictions such as technical standards are those which are covered by Article VI,

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<sup>17</sup> Fact on Record, Annexure 1.

<sup>18</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.32.

<sup>19</sup> Fact on Record, ¶ 7.

<sup>20</sup> Fact on Record, ¶ 15.

<sup>21</sup> Sasha Wunsch-Vincent, *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, 5(3) WORLD TRADE REV. 319, 326 (2006).

<sup>22</sup> *Id.*

<sup>23</sup> Fact on Record, Annexure 1; Fact on Record, ¶ 12.

<sup>24</sup> NELLIE MUNIN, LEGAL GUIDE TO GATS 137 (2010).

<sup>25</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 84 (2003).

<sup>26</sup> 1993 Scheduling guidelines, *supra* note 16, ¶ 4; MUNIN, *supra* note 24, at 205.

<sup>27</sup> Fact on Record, ¶ 17.

<sup>28</sup> MUNIN, SUPRA NOTE 24, at 183.

<sup>29</sup> 1993 Scheduling guidelines, *supra* note 16, ¶ 4.

not Article XVI of the GATS.<sup>30</sup> Technical standards include those governing the design and performance of a good.<sup>31</sup> It is submitted that the ban on import of Reality GP is a technical standard that seeks to regulate the degree of immersiveness of the online gaming services supplied in Randomzrk. Such restrictions which are covered by Article VI are not regarded as market access limitations.<sup>32</sup>

### **1.3.2. Reality GP is an input to the gaming service**

Even if it is argued that Reality GP is a service, Randomzrk submits that it is merely an *input* to the online gaming service. Footnote 9 to Article XVI.2(c) states that Members are free to maintain or adopt measures that limit inputs for the supply of a service. An input for the supply of services suggests a partial contribution to the production of the service that, in addition to other inputs, leads to the supply of services.<sup>33</sup> The Head Mounted Device was merely an input to the supply of the online gaming service. This is substantiated by the fact that players could still play Roderlam Gangsters and Agency Z in the absence of Reality GP.<sup>34</sup> The market access commitments do not imply a right for the supplier of a committed service to supply uncommitted services that are inputs to committed service.<sup>35</sup> Hence, Randomzrk is entitled to restrict the supply of Reality GP.

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

National Treatment obligations arise only in committed sectors of a Member's schedules.<sup>36</sup> It is submitted that the ban does *not* violate Article XVII since Randomzrk has not scheduled National Treatment commitments for online gaming services [2.1], and *in any case*, the ban does not amount to a limitation on National Treatment [2.2].

### *2.1. RANDORNZK HAS NOT SCHEDULED NATIONAL TREATMENT COMMITMENTS FOR ONLINE GAMING SERVICES*

It has already been established in Section 1.1 that Randomzrk has not scheduled Market Access commitments for the supply of online gaming services. Since Randomzrk's commitments for National Treatment exactly mirror those for Market Access,<sup>37</sup> it is

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<sup>30</sup> MUNIN, SUPRA NOTE 24, at 214.

<sup>31</sup> Anita Blair, *Prospects for Implementation of the GATT Standards Agreement in the United States*, 20 VA. J. INT'L L. 699, 699 (1980).

<sup>32</sup> MUNIN, SUPRA NOTE 24, at 140; 2001 Scheduling Guidelines, *supra* note 11, Annexure 2.

<sup>33</sup> 6 MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, WTO- TRADE IN SERVICES 381 (Rüdiger Wolfrum et al. eds., 2008).

<sup>34</sup> Fact on Record, ¶ 20.

<sup>35</sup> 2001 Scheduling Guidelines, *supra* note 11, ¶ 25.

<sup>36</sup> MUNIN, SUPRA NOTE 24, at 147.

<sup>37</sup> Fact on Record, Annexure 1.

submitted that Randornzk has not scheduled National Treatment commitments for the service in question.

## 2.2. THE MEASURE IS NOT A LIMITATION ON NATIONAL TREATMENT

The ban does not amount to a National Treatment measure since it is not a measure affecting the supply of services [2.2.1], the foreign gaming services are not “like” their domestic counterparts [2.2.2], and *in any case*, the foreign services have not been granted less favourable treatment [2.2.3].

### 2.2.1. The ban does not amount to a ‘measure affecting supply of services’

The ban on Reality GP prevents the online games from being viewed in a 3-D format.<sup>38</sup> Article XXVIII defines the “supply of a service” to include the production, distribution, marketing, sale and delivery of a service.<sup>39</sup> Measures affecting supply have a narrower scope than measures affecting trade because they do *not* include those measures affecting the *use* of a service.<sup>40</sup> The ban on Reality GP merely affects the manner of *consumption* of the online gaming service, which is outside the scope of Article XVII.<sup>41</sup> The ban does not hamper the supply of online games in any manner. It merely modifies the manner in which the games are viewed at the time of consuming the gaming service.

### 2.2.2. The foreign and domestic services affected by the measure are not ‘like’

The online virtual games produced by Kiwi are violent games which offer a unique 3-dimensional, highly immersive experience.<sup>42</sup> The domestic online games have a cultural and religious theme and are in a digital, not virtual format.<sup>43</sup> Randornzk submits that the foreign and domestic games are not like services, because the distinction is not merely origin based [2.2.2.1], and furthermore, the two games are not directly substitutable [2.2.2.2].

#### 2.2.2.1. There is no origin based distinction

Products can be characterised as ‘like services’ when it can be established that the difference in treatment between domestic and imported services is based exclusively on the origin of the service.<sup>44</sup> Randornzk does not discriminate between the Kiwi games and domestic games based on origin. Instead, Randornzk discriminates between the games based on the *degree of desensitization towards violence*,<sup>45</sup> irrespective of origin. The high degree of desensitization

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<sup>38</sup> Fact on Record, ¶ 18.

<sup>39</sup> GATS art. XXVIII (b).

<sup>40</sup> GATS art. XXVIII (b); GATS, art. XXVIII (c).

<sup>41</sup> MAX PLANCK, *supra* note 33, at 399.

<sup>42</sup> Fact on Record, ¶ 17.

<sup>43</sup> Fact on Record, ¶ 4.

<sup>44</sup> MUNIN, *supra* note 24, at 167.

<sup>45</sup> Fact on Record, ¶ 17.

towards violence is unique to the 3-D Kiwi games due to the high degree of immersiveness provided by the Head-Mounted Display. It cannot be said that the Kiwi games are *like* the Gen-X games, due to the high degree of immersiveness of virtual 3-D games as opposed to that of digital games. There exists no parallel in use in the nascent video games industry of Randornzk.<sup>46</sup>

#### 2.2.2.2. *The foreign and domestic games are not directly substitutable*

Consumer tastes and habits and end-uses are of particular relevance in determining likeness among services.<sup>47</sup> The end-uses test in the GATT context is an objective concept that takes into account the universal utility of a product.<sup>48</sup> However, for determining likeness, it is necessary to examine the existence of *different* end-uses for a product.<sup>49</sup> In the instant case, the domestic online games offer different end uses than their foreign equivalents.

The most popular imported Kiwi games can only be used for recreational purposes, since they are strategy and action games without any historical or cultural context. Conversely, domestic video game developer GenX produces gaming content inspired by Randornzk mythology.<sup>50</sup> Such games additionally serve the purpose of cultural and religious education for their consumers. This affects the *substitutability* of the two gaming services. A consumer who purchases GenX games for cultural and educational purposes will not be willing to substitute it with an unlike Kiwi game. Thus there is a lack of uniformity in consumer preferences for the two gaming services.

#### **2.2.3. The foreign services are not granted less favourable treatment than domestic like services**

Randornzk advances that, *arguendo*, if the services are considered like, the treatment accorded to the foreign games is not less favourable than that provided for under Article XVII. Even if Randornzk has accorded differential treatment, it is not less favourable treatment [2.2.3.1], and it does not modify the conditions of competition [2.2.3.2] in favour of domestic suppliers [2.2.3.3].

#### 2.2.3.1. *Foreign games are accorded different treatment, not less favourable treatment*

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<sup>46</sup> Fact on Record, ¶ 4.

<sup>47</sup> MAX PLANCK, *supra* note 33, at 403.

<sup>48</sup> DANIEL C. K. CHOW AND THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 188 (2008).

<sup>49</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 119, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC - Asbestos Appellate Body Report].

<sup>50</sup> Fact on Record, ¶ 4.

Even if we consider the services to be alike, it is well settled that treatment of foreign services need not be *identical* to that of domestic like services.<sup>51</sup> Different treatment accorded by Randornzk to the foreign virtual games is not sufficient to constitute “less favourable treatment.” Article XVII:2 allows for formally identical or formally different treatment of like foreign services.<sup>52</sup>

The Panel in *EC-Bananas* also clarified that it is imperative that the entire *group* of like foreign services be accorded different treatment, in order to constitute de facto discrimination.<sup>53</sup> Here, the differential treatment has only been accorded to those online gaming services which have a high risk of desensitization towards violence because of their 3-D nature. Differential treatment has not been accorded to the entire *group* of foreign online gaming services. Non 3-D digital games of foreign origin which are “like” the domestically produced video games continue to be sold in the Randornzk market.

#### ***2.2.3.2. The ban does not alter conditions of competition in the online gaming market***

The competitive relationship between services has to be examined in a *market-specific* manner.<sup>54</sup> It is contended that there is no common market for the domestic and foreign services in question. This is because *firstly*, the consumer base is different. Kiwi Inc. caters to only those consumers who have an internet connection. The games, features and updates can only be purchased through an *online* market,<sup>55</sup> and multiplayer games are connected to servers abroad.<sup>56</sup> On the other hand, domestic gaming companies such as GenX cater to even those consumers without an internet connection. The games are sold on Blue-Ray disks and cannot be downloaded from the internet.<sup>57</sup> Furthermore, an internet connection is not a prerequisite for all multiplayer video games.<sup>58</sup> *Offline* multiplayer games can be played by gamers in the same physical space.<sup>59</sup>

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<sup>51</sup> Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1130, WT/DS363/R (Aug. 12, 2009) [hereinafter China - Audiovisual Panel Report].

<sup>52</sup> GATS, art. XVII:2.

<sup>53</sup> Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.332–7.338, WT/DS27/R/USA (May 22, 1997) [hereinafter EC - Bananas Panel Report].

<sup>54</sup> WON-MOG CHOI, ‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW 27 (John H Jackson ed., 2003).

<sup>55</sup> Fact on Record, ¶ 12.

<sup>56</sup> Fact on Record, ¶ 11.

<sup>57</sup> Fact on Record, ¶ 4.

<sup>58</sup> Aaron May et al., *A Mixed-Methods Evaluation of Nonverbal Communication in Collaborative Video Games*, 169 (Sept. 23-25, 2013) at IEEE Games Innovation Conference.

<sup>59</sup> *Id.*

*Secondly*, the characteristics of the domestic and foreign games are distinctly different. A great majority of the domestically produced games are inspired by Randomzk mythology.<sup>60</sup> These games follow a storyline based on Timor religion.<sup>61</sup> The games produced by Kiwi Inc provide a virtual reality for gamers to form violent street gangs and engage in killing sprees, or to form military teams and engage in torturous interrogation techniques.<sup>62</sup> The HMD provides a uniquely immersive gaming experience to users of these foreign games, who do not even feel like they are actually playing a game.<sup>63</sup>

*2.2.3.3. The ban does not accord a competitive advantage to domestic suppliers*

Less favourable treatment occurs when the measure modifies the conditions of competition in favour of services of the Member compared to like services of another Member.<sup>64</sup> It is submitted that the ban on Reality GP does *not* alter the conditions of competition in favour of domestic gaming services over those provided by Kiwi Inc.

While the demand for GP consoles may have fallen after implementation of the measure,<sup>65</sup> there is no evidence to suggest that consumer preferences would have shifted towards *domestic* gaming services. It cannot therefore be claimed that the measure effected a competitive advantage to domestic services.

**3. IN ANY EVENT, THE BAN ON REALITY GP IS PROTECTED UNDER ARTICLE XIV OF GATS**

Randomzk submits that the ban on Reality GP is justified under Article XIV of the GATS. Evaluating a defence under Article XIV involves a *two tiered* analysis of whether the measure falls within the scope of a specific paragraph under Article XIV and whether it satisfies the requirements of the chapeau.<sup>66</sup>

Randomzk submits that the measure is justified under Art. XIV (a) [3.1], *in any case*, the measure is also justified under Article XIV (b) [3.2] and *further*, the measure is justified under the chapeau of Article XIV [3.3].

*3.1. THE MEASURE IS 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 can be protected

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<sup>60</sup> Fact on Record, ¶ 4.

<sup>61</sup> Fact on Record, ¶ 4.

<sup>62</sup> Fact on Record, ¶ 10.

<sup>63</sup> Fact on Record, ¶ 8.

<sup>64</sup> GATS, art. XVII:3.

<sup>65</sup> Fact on Record, ¶ 20.

<sup>66</sup> US - Gambling Appellate Body Report, *supra* note 8, ¶ 292; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* 22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter US - Gasoline Appellate Body Report].

under this article as it falls within the range of policies designed to protect public morals and maintain public order [3.1.1] and it is necessary to achieve this objective [3.1.2].

### **3.1.1. The measure falls within the range of policies designed to protect public morals and maintain public order**

This would entail analysing whether the interest sought to be protected by the measure falls under one of the listed exceptions and then analysing whether the trade in the services actually puts at risk the concerned interest.<sup>67</sup>

The panel in *US-Gambling* has interpreted public morals and order in a dynamic and flexible manner, leaving open the possibility of a very relativistic approach.<sup>68</sup> It has been established that “*Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories according to their own systems and scales of values*” as they may “*vary in time and space, depending on a range of factors, including prevailing social, cultural, ethical and religious values.*”<sup>69</sup> Public order is a much wider term than public morals.<sup>70</sup> The analysis of a measure under this article would involve checking for its applicability under public morals [3.1.1.1] and testing its applicability under the wider ambit of public order [3.1.1.2].<sup>71</sup>

#### *3.1.1.1. Reality GP presented a risk to the Public Morals 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>72</sup>

Randornzk submits that desensitization to violence would cause damage to the public morals of Randornzk. Since most of the population follows the Timor religion,<sup>73</sup> it would be pertinent to note that Raga, the last prophet of Timor, preached that his followers should *give up violence*.<sup>74</sup> Religious values have been recognized as a constituent of public morals by the panel as well as scholars.<sup>75</sup> Hence, the ban on Reality GP sought to protect public morals by

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<sup>67</sup> Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.170, WT/DS135/R (Sept. 18, 2000) [hereinafter EC - Asbestos Panel Report].

<sup>68</sup> Tyler M. Smith, *Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(A) "Public Morals" Framework, Resulting from China - Audiovisual*, 19 CARDOZO J. INT'L & COMP. L. 733, 752 (2011).

<sup>69</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.461; China - Audiovisual Panel Report, *supra* note 51, ¶ 7.763.

<sup>70</sup> MAX PLANCK, *supra* note 33, at 300.

<sup>71</sup> MAX PLANCK, *supra* note 33, at 300.

<sup>72</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.465.

<sup>73</sup> Fact on Record, ¶ 3.

<sup>74</sup> Fact on Record, ¶ 4.

<sup>75</sup> US - Gambling Panel Report, *supra* note 10, at ¶ 6.461; Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L 689, 709 (1998).

preventing consumers from becoming desensitized to violence, which is against the principles of the Timor religion.

There exists a risk to public morals as Randornzk's team of psychologists identified the games and the immersive nature of Reality GP to be a complete desensitization towards violence.<sup>76</sup> Moreover, violent video games have been identified as a cause for desensitization to violence by the scientific community at large.<sup>77</sup> Desensitization can be understood to be a reduction in emotion related psychological reactivity to real violence. Experiments have shown that even as little as 20 minutes of exposure could lead to desensitization, which leads to reduction in attention given to violent incidents involving other persons, lesser likelihood of perceiving an event as an emergency and reduction of sympathy to victims of violence.<sup>78</sup> Studies have proven the fact that persons desensitized to violence after playing violent video games are less likely and take a longer time to identify and help out victims of violence.<sup>79</sup> They are hence numbered to the pain and suffering of others.<sup>80</sup>

*3.1.1.2. In any case, Reality GP also presented a risk to the Public Order of Randornzk*

Public order has been defined as “*the preservation of the fundamental interests of a society, as reflected in public policy and law*”, which can relate, inter alia, to standards of law, security and morality.<sup>81</sup>

Given the nature of the head-mounted device, there was a threat to public order of Randornzk. The games *Roderlam Gangsters* and *Agency Z* had exceptionally violent content such as performing hits against rival gangs, fighting both with and without weapons, and using methods such as sleep deprivation in extracting information from enemies, all of which was exacerbated by Reality GP.<sup>82</sup> By allowing the performance of such simulated acts of violence on human beings, it allowed the derogation to human dignity, which has been held to form a part of public policy.<sup>83</sup> Protection of human rights, including protection of human dignity,

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<sup>76</sup> Fact on Record, ¶ 12.

<sup>77</sup> Nicholas L. Carnagey et al., *The Effect of Video Game Violence on Physiological Desensitization to Real-life Violence*, 43(3) J. EXPERIMENTAL SOC. PSYCHOL. 489, 494 (2007).

<sup>78</sup> *Id.*

<sup>79</sup> Brad J. Bushman et al., *Comfortably Numb: Desensitizing Effects of Violent Media on Helping Others*, 20(3) PSYCHOL. SCI. 273, 274 (2009).

<sup>80</sup> *Id.*

<sup>81</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.467; US - Gambling Appellate Body Report, *supra* note 8, ¶ 298.

<sup>82</sup> Fact on Record, ¶ 10.

<sup>83</sup> Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R I-9609.

should form a part of the public order exception.<sup>84</sup> Therefore, Randornzk submits that the virtual games are derogatory to human dignity and form a threat to public order.

Every member invoking Article XIV has the right to determine its own level of protection against the risk sought to be addressed.<sup>85</sup> Accordingly, Randornzk submits that it seeks to reduce to risk to desensitization to violence and derogation to human dignity to an acceptably low level.

### **3.1.2. The measure is necessary to protect public morals and maintain public order**

The analysis of the necessity of a measure involves a weighing and balancing process of three considerations.<sup>86</sup> Randornzk submits that these conditions are fulfilled, as the common interests and values sought to be protected were of great importance [3.1.2.1], the measure makes a material contribution to its objective [3.1.2.2], and the measure is not more trade restrictive than necessary [3.1.2.3].

#### *3.1.2.1. The interests and values protected were of great importance*

With regards to the importance of the common interests and values protected, it is submitted that the panel of psychologists recognize the fact that desensitization to violence is undesirable from a societal point of view.<sup>87</sup> It has also been established that the Timor religion is against violence.<sup>88</sup> It is well settled that protection of public morals is “*a highly important value and interest*”.<sup>89</sup>

#### *3.1.2.2. The measure makes a material contribution to the objective*

With regards to the contribution of the measure to the object pursued, a means-end analysis must be used to determine the contribution of a measure to the objective pursued.<sup>90</sup> This can be based on qualitative reasoning based on a sufficient set of hypotheses that are tested and supported by sufficient evidence.<sup>91</sup> Reality GP has clearly been shown to present a risk to public morals by contributing to the desensitization to violence, being a device that immerses

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<sup>84</sup> Markus Krajewski, *Balancing Trade and Non-Trade Policy Objectives in GATS: Potentials and Limits of Article XIV*, in WTO LAW AND PROCESS 22, 32 (Federico Ortino and Sergey Ripinsky eds., 2007); U.N. High Commissioner for Human Rights, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights 10, U.N. Doc. HR/PUB/05/5 (2005).

<sup>85</sup> Appellate Body Report, *Korea – Measures Affecting the Import of Fresh, Chilled and Frozen Beef*, ¶¶ 176-178, WT/DS161,169/AB/R (Dec. 11, 2000) [hereinafter Korea - Beef Appellate Body Report].

<sup>86</sup> Korea - Beef Appellate Body Report, *supra* note 85, at ¶ 164.

<sup>87</sup> Fact on Record, ¶ 12.

<sup>88</sup> Fact on Record, ¶ 3.

<sup>89</sup> China - Audiovisual Panel Report, *supra* note 51, ¶ 7.759.

<sup>90</sup> Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶¶ 145-151, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Brazil - Tyres Appellate Body Report].

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

the user into a universe of his own. A ban on such a product would certainly contribute to protection from desensitization to violence.

### 3.1.2.3. *The measure is not more trade restrictive than necessary*

Although it may be argued that the measure is trade restrictive, the Appellate Body has held that even an import ban can be justified if it brings about a material contribution to the objective.<sup>92</sup> Degree of trade restrictiveness should also be seen in the light of the importance of the objectives pursued.<sup>93</sup> Both these elements have been established in the arguments of Randornzk. Randornzk submits that it has made a prima facie case of necessity on the Ban of Reality GP and the burden now rests on Roderlam to prove that Randornzk did have recourse to less WTO inconsistent alternatives.<sup>94</sup> *Nevertheless*, Randornzk submits that there were no less trade restrictive alternatives available.

An alternative measure must be weighed and balanced taking three considerations.<sup>95</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.

It may be argued that Randornzk should have employed means such as mandating labels of graphic violence or imposed age restrictions on the games. However, studies have found that including warnings in the games might actually increase their attractiveness.<sup>96</sup> Putting age restrictions on games can actually make them more attractive to gamers, especially young gamers.<sup>97</sup> This shows that such measures only prove to have the opposite effect and hence are not contributory to the objective. Hence, there are no less inconsistent means available to meet the objective.

*In any case*, such alternative measures would have been futile by dint of the fact that 75% of the gamers in Randornzk already had a GP console.<sup>98</sup> Such warnings would only serve to prevent *further sales* of the game, which may not be very effective in achieving the objective given the number of people who already owned it.

## 3.2. *THE MEASURE FALLS WITHIN THE SCOPE OF ARTICLE XIV (B)*

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<sup>92</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 151.

<sup>93</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 156.

<sup>94</sup> US - Gambling Appellate Body Report, *supra* note 90, ¶¶ 309-311.

<sup>95</sup> Panel Report, *Canada- Measures Relating to the Export of Wheat and Treatment of Imported Grain*, ¶ 6.226, WT/DS276/R (April 6, 2004).

<sup>96</sup> Karen L. Becker-Olsen and Patricia A. Norberg, *Caution, Animated Violence*, 39(4) J. ADVERTISING 83, 93 (2010).

<sup>97</sup> M. N. Bijvank, *Age and Violent-Content Labels Make Video Games Forbidden Fruits for Youth*, 123(3) PAEDIATRICS 870, 875 (2009).

<sup>98</sup> Fact on Record, ¶ 15.

Article XIV (b) of the GATS justifies the adoption of measures that are necessary to protect human life or health. The ban on Reality GP is justified under this article as it falls within the range of policies designed to protect human health and life [3.2.1] and it is necessary to meet this objective [3.2.2].

### **3.2.1. The measure falls within the range of policies designed to protect human health and life**

#### *3.2.1.1. The Objective of the Measure is to Protect Human Health and Life*

The measure of banning Reality GP seeks to protect human health. The World Health Organization defines health as “*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*”.<sup>99</sup> Desensitization to violence would undoubtedly affect the mental well-being of a person. The panel of experts also considered it to be undesirable from a societal point of view,<sup>100</sup> undoubtedly affecting the social well-being of people.

The measure also sought to protect human life. The measure reduces aggressive tendencies and violent behaviour in people, which could result out of the use of Reality GP, in order to protect human life.

#### *3.2.1.2. There was a risk to Human Health and Life*

A three member committee constituted by the Randornzk government has determined Reality GP to be instrumental in causing desensitization to violence.<sup>101</sup> The Appellate Body has recognized that governments may act on the basis of what may even be a divergent opinion coming from qualified and respected sources<sup>102</sup> and that “*a member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.*”<sup>103</sup> The chairman and the members of the committee were qualified psychiatrists and psychologists.<sup>104</sup> Therefore, Randornzk’s decision was based on a qualified and respected opinion and should be held to be consistent even if contrary evidence exists.

Further, Reality GP would cause increased aggression and violent behaviour among people. Studies have been conducted on first-person shooter games, which, like Reality GP, serve to incorporate elements of realism by providing players a first-person perspective, immersing

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<sup>99</sup> *Health Definition*, WHO.COM, <http://www.who.int/about/definition/en/print.html> (last visited Jan. 5, 2013).

<sup>100</sup> Fact on Record, ¶ 17.

<sup>101</sup> Fact on Record, ¶ 17.

<sup>102</sup> Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, ¶ 194, WT/DS26,48/AB/R (Jan. 16, 1998).

<sup>103</sup> EC - Asbestos Appellate Body Report, *supra* note 49, ¶ 178.

<sup>104</sup> Fact on Record, ¶ 17.

them into their surroundings.<sup>105</sup> Strong evidence does exist to show that such games increase the likelihood of aggressiveness and violent behaviour.<sup>106</sup> They can form a part of social learning for the youth, which can form behavioural models for their interactions with the environment.<sup>107</sup>

Such an outcome would clearly indicate a risk to human life. This risk is further evidenced by the fact that nearly 75% of the gamers in Randornzk had a console by the end of 2023.<sup>108</sup> Such an extensive use of the game would surely put great persons at risk of being desensitized.

Although contrary research and evidence might be provided by the complainant, it is to be noted that the panel has stated that it is not a forum for the settling of scientific debate and be an arbiter of the opinions expressed by the scientific community.<sup>109</sup> It is to merely “*make a pragmatic assessment of the scientific assessment and the measures available, as would the decision-makers responsible for the adoption of a health policy.*”<sup>110</sup> In *EC-Asbestos*, the panel accepted the existence of a health risk despite the fact that Canada had expressed doubts with regards to the direct effects of asbestos on lung cancer, ruling that an official responsible for public policy would not conclude based on the evidence that there was no risk to public health.<sup>111</sup> Along these lines, Randornzk submits that the evidence is too strong to be dismissed by an official formulating public policy.

There is also state practice to this effect with a number of countries, like Germany, having recognized video games to be a significant contributor to incidents of violence involving children taking part in shootings.<sup>112</sup> Other countries that have banned video games for excessively violent content include Ireland,<sup>113</sup> United Kingdom<sup>114</sup> and Venezuela,<sup>115</sup> which had imposed a complete ban on violent video games.

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<sup>105</sup> Nicholai Diamond, *Killer Games and GATS*, 45 GEO. WASH. INT’L. L. REV. 539, 541 (2013).

<sup>106</sup> Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4(3) PSYCHOL. SCI. PUB. INT’L. 81, 90 (2003).

<sup>107</sup> Christopher J. Ferguson et al., *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Motivation Violence?*, 35(3) CRIM. JUST. & BEHAV. 311, 314 (2008).

<sup>108</sup> Fact on Record, ¶ 15.

<sup>109</sup> EC-Asbestos Panel Report, *supra* note 67, ¶ 8.183.

<sup>110</sup> EC-Asbestos Panel Report, *supra* note 67, ¶ 8.183.

<sup>111</sup> EC-Asbestos Panel Report, *supra* note 67, ¶ 8.188.

<sup>112</sup> Diamond, *supra* note 104, at 539.

<sup>113</sup> Shawn Pogatchnik, *Ireland bans its 1st video game, calling it ‘gross’*, NBCNEWS.COM, June 20, 2007, available at <http://www.nbcnews.com/id/19332572/#.Usb9g2SvHKw>.

<sup>114</sup> *Censors Ban ‘Brutal’ Video Game*, BBC, June 19, 2007, available at [http://news.bbc.co.uk/2/hi/uk\\_news/england/leicestershire/6767623.stm](http://news.bbc.co.uk/2/hi/uk_news/england/leicestershire/6767623.stm).

<sup>115</sup> Christopher Toothaker, *Venezuela to Outlaw Violent Video Games, Toys*, NBCNEWS.COM, Oct. 4, 2007, available at <http://www.nbcnews.com/id/33165079#.UscFfGSvHKy>.

Having established that there is a risk to life and health, Randornzk submits that the measure was necessary to the objective of protecting human life and health.

### **3.2.2. The measure is necessary to protect human health and life**

#### *3.2.2.1. The interests and values protected were of great importance*

The measure in question seeks to protect people from being victims of desensitization and aggression. The Appellate Body has recognized that a measure would be more likely deemed to be necessary if the common interests advanced by the measure are of utmost importance.<sup>116</sup> It is submitted that the interest sought to be protected is important to the highest degree since it relates to the protection human health and life.

#### *3.2.2.2. The measure makes a material contribution to the objective*

Contribution of a measure to the objective can be proven through quantitative as well and qualitative means.<sup>117</sup> Quantitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence could be used in this test of contribution.<sup>118</sup> Although quantitative projections may not be available given the nature of the risk, it can clearly be established, given the scientific evidence at hand, that banning Reality GP would contribute to the objective of preventing desensitization to violence. Moreover, Randornzk has even gone to the efforts of removing any sources of the threat within the country by ordering a recall of Reality GP and imposing a fine on those who do not return the device.<sup>119</sup>

#### *3.2.2.3. The measure is no more trade restrictive than necessary*

Although the measure is trade restrictive, it can be justified as the objective sought to be protected, namely the protection of life and health, is an important objective. The need for the trade restrictiveness and unavailability of alternatives has been discussed in section 3.1.2.3.

### *3.3. THE MEASURE IS JUSTIFIED UNDER THE CHAPEAU TO ARTICLE XIV*

The standards of the chapeau address the nature of the application of the measure rather than its content.<sup>120</sup> These standards balance the right of the members to avail of the exception and those of other countries defined under the GATS agreement.<sup>121</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>122</sup> For a measure to be acceptable chapeau, it must not be

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<sup>116</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 178.

<sup>117</sup> EC - Asbestos Appellate Body Report, *supra* note 49, ¶ 167.

<sup>118</sup> Brazil -Tyres Appellate Body Report, *supra* note 90, ¶ 151.

<sup>119</sup> Fact on Record, ¶ 19.

<sup>120</sup> US - Gambling Panel Report, *supra* note 10, ¶ 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>121</sup> US - Gambling Appellate Body Report, *supra* note 8, ¶ 339.

<sup>122</sup> US - Shrimp Appellate Body Report, *supra* note 124, ¶ 160.

applied in a manner that forms a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail [3.3.1] or form a disguised restriction to trade [3.3.2].

### **3.3.1. The measure does not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail**

Roderlam may argue that Randornzk has discriminated between its own services and those provided by Kiwi Industries based in Roderlam. Randornzk submits that it does not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail.

#### *3.3.1.1. Like conditions do not prevail between Randornzk and Roderlam*

At the outset, Randornzk submits that like conditions do not prevail in the two countries. These are to be compared on the basis of the likeness of the products in question.<sup>123</sup> Products can be considered to be like only if they do not differ with respect to the policy pursued. The declared objectives of the measure are hence relevant in deciding the relevant conditions for comparison.<sup>124</sup> The same should be extended to services under the GATS as well.

Likeness of the products has already been established in 2.2.2.1 of the submissions.

#### *3.3.1.2. The measure does not form arbitrary or unjustifiable discrimination*

Arbitrary and unjustifiable discrimination exist where the reasons given for the discrimination bear no rational connection with the objective falling within the paragraphs.<sup>125</sup> With respect to the present case, Reality GP actually contributed to the violence of the Kiwi Games through its immersiveness.<sup>126</sup> This in the main factor of differentiation between GenX Games and Kiwi games, which is directly relevant with respect to desensitization to violence.

### **3.3.2. The measure does not form a disguised restriction on trade in services**

The term disguised restriction has been given a narrow reading in the case of *US-Automotive Spring Assemblies* to merely mean that the measure was not duly publicized.<sup>127</sup> It can be inferred from the door-to-door campaign of the Randornzk government<sup>128</sup> and the market survey conducted on the effects of the ban that the measure was widely publicized.<sup>129</sup>

The measure cannot be said to have been enacted with a protectionist objective to the benefit of the domestic suppliers of video games. Evidence shows that the aim of preventing

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<sup>123</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>124</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>125</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 227.

<sup>126</sup> Fact on Record, ¶ 17.

<sup>127</sup> Report of the Panel, *United States - Imports of Certain Automotive Spring Assemblies*, ¶ 56, L/5333 (June 11, 1982), GATT B.I.S.D. (30th Supp.) at 125 (1983).

<sup>128</sup> Fact on Record, ¶ 19.

<sup>129</sup> Fact on Record, ¶ 20.

desensitization to violence is the overriding objective. The government of Randornzk had initially imposed a ban on the domestically produced game *Mystical Assassins* for its violent content,<sup>130</sup> so it could not have had a protectionist intent. Even after the judiciary overturned the ban, the government of Randornzk recognized that given that there was no effective ban on *Mystical Assassins*, a complete ban on both *Kiwi Games* and Reality GP would not be equitable.<sup>131</sup> This is despite the fact that the experts had recommended a ban on both.<sup>132</sup>

#### **4. THE RBB POLICY DIRECTIVE DOES NOT VIOLATE ARTICLE VI:1 OF THE GATS.**

The RBB Policy Directive 2024 was issued by the RBB in order to address the high level of financial fraud.<sup>133</sup> The Directive laid down a mechanism for the enforcement of high data protection levels for both foreign as well as domestic merchants.<sup>134</sup> The RBB Policy Directive is a measure affecting trade in services under Article XXVIII: C as it relates to the purchase, payment of a service.<sup>135</sup>

Article VI:1 requires Members to ensure that a measure is administered in a reasonable, objective and impartial manner.<sup>136</sup> It is submitted that there has been no violation of Article VI:1. because Randornzk has not made any specific commitments in Online Gaming or Banking Services [4.1]. Further, the RBB Policy Directive, not being a measure of general application, does not fall under Article VI:1 [4.2]. Even if it is held that the RBB Policy Directive 2024 is covered by Article VI:1, it is submitted that it has been administered in a reasonable, objective and impartial manner [4.3].

##### *4.1. RANDORNZK HAS NOT UNDERTAKEN SPECIFIC COMMITMENTS FOR ONLINE GAMING SERVICES OR BANKING SERVICES*

Roderlam has alleged that Randornzk through the RBB Policy Directive has violated its obligations under Article VI: 1.<sup>137</sup> The online purchase of games through GP Market Live was alleged to have been affected by the measure.<sup>138</sup> However, it has been established in Section 1.1 and Section 2.1 that Randornzk has not undertaken any specific commitments relating to online gaming.

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<sup>130</sup> Fact on Record, ¶ 6.

<sup>131</sup> Fact on Record, ¶ 18.

<sup>132</sup> Fact on Record, ¶ 17.

<sup>133</sup> Fact on Record, ¶ 21.

<sup>134</sup> Fact on Record, ¶ 21.

<sup>135</sup> GATS, art. XXVIII (c) (i).

<sup>136</sup> GATS, art. VI:1.

<sup>137</sup> Fact on Record, ¶ 25.

<sup>138</sup> Fact on Record, ¶ 22.

The RBB Policy Directive 2024 lays down rules for the use of credit cards for online transactions for both, foreign as well as domestic merchant websites.<sup>139</sup> Credit card transactions fall under Financial Services in the sub-category of Banking and Other Financial Services.<sup>140</sup> Randornzk has not undertaken any specific commitments in the Financial Services sector.<sup>141</sup> Hence, Randornzk is free to take measures as it deems fit.

*4.2. SECTION 4 OF THE RBB POLICY DIRECTIVE IS NOT A MEASURE OF GENERAL APPLICATION*

Article VI: 1 applies only to measures of ‘general application’ and not when a measure applies only to a specific situation or category of services. In other words, the measure must apply to an unidentified number of cases.<sup>142</sup>

**4.2.1. Foreign online merchant site transactions constitute an ‘identifiable set of cases’**

In the present case, Section 4 of the RBB Policy Directive 2024 applies solely to credit card transactions occurring on *foreign merchant websites*. Since foreign merchants constitute an identifiable class of service providers, it is submitted that the measure in question is not of general application.

**4.2.2. Alternatively, online users of credit cards constitute an ‘identifiable set of cases’**

*In any case*, most merchant websites include multiple modes of payment like debit cards, net banking and PayPal. Section 4 of the Directive has exclusive application to online credit card transactions. When this is taken in conjunction with the fact that each user is mandated to have a *unique* ten-digit password, it is clear that the set of users carrying out online transactions constitutes an identifiable set of cases. Therefore, Section 4 of the RBB Policy Directive inasmuch as it applies to foreign merchants is not a ‘measure of general application’. As a result, the RBB Policy Directive does not fall under the ambit of Article VI of the GATS.

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<sup>139</sup> Fact on Record, ¶ 21.

<sup>140</sup> Group of Negotiations on Services, *Note by the Secretariat: Services Sectoral Classification List*, ¶ 22, MTN.GNS/W/120 (July 10, 1991); GATS, Annex on Financial Services, § 5 (viii); Panel Report, *China - Certain Measures Affecting Electronic Payment Services*, ¶¶ 7.201- 7.204, WT/DS413/R (July 16, 2012) [hereinafter *China - Electronic Payment Services Panel Report*].

<sup>141</sup> Fact on Record, Clarification 22.

<sup>142</sup> GATS, art. VI:1; Panel Report, *United States - Anti Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 7.268, WT/DS/184/R (Feb. 28, 2011); Appellate Body Report, *European Communities - Measures Affecting the Importation of Certain Poultry Products*, ¶ 220, WT/DS69/AB/R (Jul. 13, 1998) [hereinafter *EC - Poultry Appellate Body Report*]; MAX PLANCK, *supra* note 33, at 169.

*4.3. THE RBB POLICY DIRECTIVE HAS BEEN ADMINISTERED IN A REASONABLE, OBJECTIVE, AND IMPARTIAL MANNER*

Even if the Panel were pleased to hold that Randomzck made specific commitments in online gaming and that the RBB Policy Directive is a general measure, it is submitted that it has been administered in a reasonable, objective and impartial manner. Article VI: 1 of the GATS, being a procedural provision,<sup>143</sup> applies solely to the administration of a measure and not its substantive content.<sup>144</sup> The reasonability or objectivity or impartiality of the administration of the RBB Policy Directive alone can be questioned.<sup>145</sup>

**4.3.1. The RBB Policy Directive is ‘Reasonable’**

The term ‘reasonable’ means ‘*sensible*’ or ‘*not irrational or absurd*’.<sup>146</sup> Here, the RBB Policy Directive 2024 only makes provision for a warning when accessing merchants abroad. This is because physical inspection cannot be carried out in case of foreign merchants.<sup>147</sup> Not only is data protection a measure on which a sovereign state is entitled to and required to legislate on,<sup>148</sup> the measure in question is inextricably linked to the objective of ensuring high levels of data protection.<sup>149</sup> Thus, the Policy Directive is linked to the broader objective of data protection and is neither ‘insensible’ nor ‘not irrational or absurd’.

**4.3.2. The RBB Policy Directive is ‘Objective’**

The term objective, in the ordinary meaning of the term, requires a process free from irrational, emotional, personal opinions, feelings or intentions.<sup>150</sup> In the present case, the measure is circumscribed by the strict and clear wording of the Directive. In other terms, there is no evidence to suggest that there was any extraneous influence involved in decision-making.

**4.3.3. The RBB Policy Directive is ‘Impartial’**

The Panel in *Argentina- Hides and Leather*, held that when a party with a contrary commercial interest is given special consideration or privileges while making a decision, it

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<sup>143</sup> MAX PLANCK, *supra* note 33, at 168.

<sup>144</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]; EC - Poultry Appellate Body Report, *supra* note 141, ¶ 115.

<sup>145</sup> Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.806, WT/DS384,386/R (Nov. 18, 2011) [hereinafter US- COOL Panel Report].

<sup>146</sup> Panel Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.385, WT/DS302/R (Nov. 26, 2004) [hereinafter DR - Cigarettes Panel Report].

<sup>147</sup> Fact on Record, ¶ 21.

<sup>148</sup> Anneliese Roos, *Core Principles of Data Protection Law*, 39(1) COMP. AND INT’L L. J. OF S. AFR.

<sup>148</sup> 102, 103 (2006).

<sup>149</sup> Fact on Record, ¶ 21.

<sup>150</sup> MAX PLANCK, *supra* note 33, at 171; COMPACT OXFORD REFERENCE DICTIONARY 579 (Catherine Soanes ed., 6th ed. 2003).

leads to impartiality.<sup>151</sup> Here, the RBB has no commercial interest in online gaming. Nor has any party been given special privileges. The RBB Policy Directive applies to all online merchants based on objective criteria. Moreover, there is a mechanism in place for both domestic as well as foreign merchants.<sup>152</sup>

## **5. THE RBB POLICY DIRECTIVE DOES NOT VIOLATE ARTICLE XVI:1 OR XVI:2 OF THE GATS**

The Directive affects electronic payment services on foreign merchant sites, which are financial services [5.1]. Since Randornzk has not undertaken specific commitments for financial services [5.2], no Market Access obligations arise in that sector. In any case, the RBB Directive does not amount to a market access limitation under Article XVI:2 [5.3].

### *5.1. THE ELECTRONIC PAYMENT SERVICE AMOUNTS TO A FINANCIAL SERVICE*

The service affected by the RBB Directive is that of electronic payment services for payment card transactions.<sup>153</sup> The Panel in *China-Electronic Payment Services* defined EPS as involving those services through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated.<sup>154</sup> The Panel included credit cards within the definition of payment cards.<sup>155</sup> The instant case concerns the transfer of funds from Randornzk nationals to a foreign-based merchant site (GP Live Market) through credit card transactions. Hence the Service at issue is an EPS. Furthermore, the Panel found that such Electronic Payment Services came under the ambit of a sub sector in China's Schedule which was corresponding to Section 5 (viii) of the Annex on Financial Services.<sup>156</sup> Section 5 (viii) of the Annex includes all payment and money transmission services, including credit, charge and debit cards, travellers' cheques and bankers' drafts.<sup>157</sup> It is thus submitted that the service supplied from Roderlam is an Electronic Payment Service and that it falls under the Ambit of Financial Services.

### *5.2. RANDORNZK HAS NOT UNDERTAKEN MARKET ACCESS COMMITMENTS FOR FINANCIAL SERVICES OR FOR ONLINE GAMING SERVICES*

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<sup>151</sup> Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.00, WT/DS155/R (Dec. 19, 2000) [hereinafter Argentina - Hides Panel Report].

<sup>152</sup> Fact on Record, ¶ 21.

<sup>153</sup> Fact on Record, ¶ 22.

<sup>154</sup> China - Electronic Payment Services Panel Report, *supra* note 139, ¶ 7.25.

<sup>155</sup> China - Electronic Payment Services Panel Report, *supra* note 139, ¶ 7.12.

<sup>156</sup> China - Electronic Payment Services Panel Report, *supra* note 139, ¶ 7.201-7.204.

<sup>157</sup> GATS, Annex on Financial Services, § 5 (viii).

Article XVI:1 of the GATS authorizes treatment to other Members no less favourable than that provided for under the terms, limitations and conditions agreed and specified in a Member's Schedule.<sup>158</sup> Randornzk has not scheduled commitments for any sub-sector other than Audiovisual Services.<sup>159</sup> Hence, since Randornzk has not undertaken commitments for financial services, it remains free to impose restrictions on that sector.<sup>160</sup> Further, even if the measure is said to affect online gaming services, it has already been established in Section 1.1. that Randornzk has not undertaken market access commitments for online gaming services. Therefore, the RBB Directive does not affect services in a committed sector.

*5.3. IN ANY CASE, RANDORNZK HAS NOT IMPOSED ANY OF THE LIMITATIONS LAID DOWN IN ARTICLE XVI.2.*

Even if Randornzk has undertaken specific commitments relating to the service in question, the RBB Directive is not a limitation under Article XVI:2. The limitations laid down in Article XVI.2 cover *quantitative* restrictions and measures equivalent to them.<sup>161</sup> It is submitted that the RBB Directive does not have the effect of a quantitative restriction. The Directive in no way limits the number of merchant sites allowed to transact with Randornzk nationals. Nor does it limit the number of credit card transactions on such sites. It merely requires a warning to be displayed before a user enters a foreign merchant site.<sup>162</sup> Randornzk submits that this is a *qualitative* restriction to protect Randornzk nationals from the risk of financial fraud.<sup>163</sup>

Even if a Member has promised market access in particular sector, it is not required to lower its *standard of risk* for foreign services or service suppliers.<sup>164</sup> The high standard of risk maintained by Randornzk is evident from the collection of quality control data as well as the physical inspections conducted on domestic online merchant sites.<sup>165</sup> Hence, it cannot be contended that the RBB Directive amounts to a Market Access Measures.

## **6. THE RBB POLICY DIRECTIVE DOES NOT VIOLATE ARTICLE XI OF THE GATS**

Article XI of the GATS prevents a Member from applying restrictions to international transfers and payments pursuant to its specific commitments.<sup>166</sup> It prevents members from

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<sup>158</sup> GATS, art. XVI:1.

<sup>159</sup> Fact on Record, Clarification 22.

<sup>160</sup> MUNIN, at 137.

<sup>161</sup> MUNIN, at 183.

<sup>162</sup> Fact on Record, ¶ 21.

<sup>163</sup> Fact on Record, ¶ 21.

<sup>164</sup> DOUGLAS A. IRWIN AND JOSEPH WEILER, MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES 43 (2008).

<sup>165</sup> Fact on Record, ¶ 21.

<sup>166</sup> GATS, art. XI.

applying restrictions to transfers and payments in current transactions. It is submitted that Article XI has not been violated by Randornzk as no specific commitment has been undertaken in online gaming [6.1] nor does it restrict transfers and payments for the same [6.2]. *Further*, the RBB Policy Directive falls under the exception to Article XI given in Para 2 lit. (a) of the Annex on Financial Services as it has been issued for ‘prudential reasons’ [6.3]. Thus, Randornzk has not violated Article XI of the GATS.

*6.1. RANDORNZK HAS NOT UNDERTAKEN SPECIFIC COMMITMENTS FOR ONLINE GAMING SERVICES*

This has already been sufficiently established in Section 1.1 and Section 2.1.

*6.2. THE RBB POLICY DIRECTIVE DOES NOT RESTRICT TRANSFERS AND PAYMENTS FOR ONLINE GAMING SERVICES*

Restrictions can be defined as ‘*any measure that could negatively affect international transfers and payments.*’<sup>167</sup> The RBB Policy Directive in no way affects transfers and payments. The transfers and payments are permitted in the same manner. There is only a warning notice, that too before access to the transfers. This warning only informs people of the location of the merchant and does not amount to an actual restriction. It makes no allusions to the level of data protection employed by the site. Thus, the RBB Policy Directive cannot be said to be a restriction to international transfers and payments.

*6.3. IN ANY CASE, THE RBB POLICY DIRECTIVE HAS BEEN ISSUED FOR ‘PRUDENTIAL REASONS’*

Paragraph 2 lit. a of the Annex. on Financial Services provides a broad exception to the obligation under Article XI.<sup>168</sup> A measure restricting transfers and payments may be justified for prudential reasons. The Annex. consists a non exhaustive list of such situations: when the government owes a fiduciary duty to someone and when it is taken to ensure the stability and integrity of the financial system.<sup>169</sup> The high level of financial fraud hurts the integrity of the financial system. ‘Integrity’, in the ordinary meaning of the term, means ‘*the quality of being morally upright*’, ‘*soundness*’, ‘*honesty*’<sup>170</sup> The financial fraud makes the financial system unsound and fraud as such is immoral. This is also clearly in contravention of honesty. Thus, the level of financial fraud is affecting the integrity of Randornzk’s financial system. Also,

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<sup>167</sup> MUNIN, *supra* note 24, at 210.

<sup>168</sup> MAX PLANCK, *supra* note 33, at 634.

<sup>169</sup> GATS, Annex on Financial Services, § 2 (a).

<sup>170</sup> COMPACT OXFORD REFERENCE DICTIONARY 431 (Catherine Soanes ed., 6th ed. 2003).

financial fraud takes away faith in the financial system.<sup>171</sup> This is negative for the stability of Randornzk's financial system. As the list is non-exhaustive, other prudential reasons may be given to justify the measure. It is submitted that preventing online financial fraud is in the interest of the financial system as well as consumers and this in itself is a prudential reason. Thus, the RBB Policy Directive is imperative for prudential reasons.

**7. IN ANY EVENT, THE WARNING ISSUED ON FOREIGN SITES IS PROTECTED UNDER ARTICLE XIV OF THE GATS**

Randornzk submits that the issuance of the warning on non-Randornzk online merchant websites is justified under Article XIV(c) of the GATS as being necessary to secure compliance with a GATS consistent law. To this end, a member must prove that the measure secures compliance with other laws and regulations which are not inconsistent with the GATS [7.1], the measure was necessary to secure compliance with the said law or regulation [7.2] *further*, the measure was justified under the chapeau of Article XIV [7.3].

*7.1. THE MEASURE SECURES COMPLIANCE WITH THE RBB DIRECTIVE, WHICH IS A GATS CONSISTENT LAW*

The GATS recognizes certain interests to which the concerned laws may relate, which would render an otherwise inconsistent law consistent within the GATS. They relate to laws aimed at the prevention of deceptive and fraudulent practices<sup>172</sup> as well as protection of privacy of individuals.<sup>173</sup> The RBB Policy Directive was made in the backdrop of high levels of online fraud.<sup>174</sup> Since the policy aims at protecting consumers from being victims of deceptive and fraudulent practices and protecting their personal data, it is consistent under the provisions of the GATS.

The issuance of the warning on online websites based outside Randornzk secures compliance with the RBB Policy Directive. Although in the context of GATT 1947, this exception was given a narrower reading as to be allowing only compliance with laws and regulations and not merely the attainment of the same objectives,<sup>175</sup> the panel has recognized even partial compliance to be sufficient to "secure compliance" under the GATS.<sup>176</sup>

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<sup>171</sup> Dr. K. C. Chakrabarty, Deputy Governor, Reserve Bank of India, Inaugural Address at the National Conference on Financial Fraud: Frauds in the Banking Sector: Causes, Concerns and Cures (July 26, 2013).

<sup>172</sup> GATS, art. XIV (c) (i).

<sup>173</sup> GATS, art. XIV (c) (ii).

<sup>174</sup> Fact on Record, ¶ 21.

<sup>175</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.538; Report of the Panel, *EEC - Regulation on Imports of Parts and Components*, L/6657 (May 16, 1990), GATT B.I.S.D. (37<sup>th</sup> Supp.) at 132 (1990).

<sup>176</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.539.

In *US-Gambling*, the Panel found the Wire Act and the Travel Act to be securing compliance with the RICO as it addressed problems related to the suppliers of unlawful gambling services operating from abroad.<sup>177</sup> Similarly, just as the RBB Policy Directive addresses problems on online fraud of consumers domestically, the warning ensures they are wary of fraudsters operating from online websites outside Randornzk. This secures at least partial, if not complete compliance with the RBB Policy Directive.

*7.2. THE MEASURE IS NECESSARY TO SECURE COMPLIANCE WITH THE RBB POLICY DIRECTIVE*

**7.2.1. The interests and values sought to be protected were of great importance**

In this regard, Randornzk submits that the interests sought to be protected are of immense importance, namely the protection of consumers from online fraud and protection of data. The measure was made in response to a high degree of online financial fraud in Randornzk.<sup>178</sup> Needless to say, these are issues of acute importance to Randornzk, which seeks to reduce the incidence of fraud to an acceptably low level.

**7.2.2. The measure makes a material contribution to the objective**

The warning does contribute to securing compliance with the RBB Policy Directive. In *US-Gambling*, the panel accepted that the Travel act and the Wire Act secure compliance with the RICO statute, as they ensure that the statute is *not undermined*.<sup>179</sup> They did so by applying to betting and wagering services across interstate and international barriers.<sup>180</sup> Similarly, the warning ensures that the RBB Policy Directive is not undermined by fraudsters working from countries outside Randornzk. The directive would not offer sufficient protection to citizens of Randornzk without the warning.

**7.2.3. The measure is no more trade restrictive than necessary**

Although it may be argued that the measure is trade restrictive, the Appellate Body has held that even an import ban can be justified if it brings about a material contribution to the objective.<sup>181</sup> Degree of trade restrictiveness should also be seen in the light of the importance of the objectives pursued.<sup>182</sup> Given the fact that the measure does make a material contribution to the objective, which is one of utmost importance, this should outweigh any potential trade restrictiveness this measure imposes.

*7.2.3.1. Analysis of Alternative Measures*

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<sup>177</sup> US - Gambling Panel Report, *supra* note 10, ¶¶ 6.554-6.555.

<sup>178</sup> Fact on Record, ¶ 21.

<sup>179</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.560.

<sup>180</sup> US - Gambling Panel Report, *supra* note 10, ¶ 6.560.

<sup>181</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 151.

<sup>182</sup> Brazil - Tyres Appellate Body Report, *supra* note 90, ¶ 178.

With regard to the possibility of adoption of alternative, less inconsistent measures, Randornzk submits that there are none available. Roderlam cannot claim that negotiations or consultations should have taken place with them before the warning was imposed as an alternative measure, as it is a process the results of which are uncertain and cannot be compared with the measures at issue.<sup>183</sup> Moreover, actual conduction of physical inspections in foreign jurisdictions was not a reasonably available alternative. Although it may serve to contribute equally to the present measure, it would impose an undue burden on Randornzk, involving unreasonably high costs and technical difficulties. Such factors have been deemed to render an alternative unavailable.<sup>184</sup>

### *7.3. THE MEASURE IS JUSTIFIED UNDER THE CHAPEAU TO ARTICLE XIV*

Roderlam submits that the measure is justified under the chapeau as it is not applied in a manner that forms arbitrary or unjustifiable discrimination between countries where like conditions prevail [7.3.1] and it is not a disguised restriction to trade [7.3.2].

#### **7.3.1. The measure does not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail**

##### *7.3.1.1. Like conditions do not prevail between Randornzk and other countries*

It is also submitted that like conditions do not prevail between countries outside Randornzk and Randornzk. The RBB Policy Directive employs strict measures to ensure the highest standards of data protection in the country.<sup>185</sup> The existence of a high level of online fraud within Randornzk has necessitated the adoption of such a strict measure.<sup>186</sup> Hence, consumers have to be warned about the possibility of risk to their data safety. It serves merely as a warning to the user, in light of the different conditions that may exist in the other country.

##### *7.3.1.2. The measure does not constitute arbitrary or unjustifiable discrimination*

The measure does not constitute a means of arbitrary and unjustifiable discrimination as there is a rationale behind the discrimination, namely the impossibility of conducting a physical inspection of the online merchant sites. Such sites are not bound by Randornzk's strict regulatory regime which includes measures such as maintenance of quality control data, filing of compliance reports and issuance of the unique ten digit password.<sup>187</sup> It was held by the Appellate Body in US-Shrimp that the policy goal of a measure cannot provide its

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<sup>183</sup> US - Gambling Appellate Body Report, *supra* note 8, ¶ 317.

<sup>184</sup> EC - Asbestos Panel Report, *supra* note 67, ¶¶ 8.207-8.217.

<sup>185</sup> Fact on Record, ¶ 21.

<sup>186</sup> Fact on Record, ¶ 21.

<sup>187</sup> Fact on Record, ¶ 21.

rationale under the standards of the chapeau.<sup>188</sup> Therefore, this measure cannot be said to constitute arbitrary or unjustifiable discrimination.

### **7.3.2. The measure does not form a disguised restriction to trade in services**

The measure was a part of the RBB Policy Directive and there is no indication of the fact that it was not publicized. It was applied generally for all online transactions, not merely the gaming sector, and to for all countries outside Randornzk.<sup>189</sup> Such an overarching measure can scarcely be called a disguised restriction to trade in services in the gaming sector from Roderlam.

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<sup>188</sup> US - Shrimp Appellate Body Report, *supra* note 124, ¶ 149.

<sup>189</sup> Fact on Record, ¶ 21.

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## REQUEST FOR PLEADINGS

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

1. Find that the ban on the import of Reality GP is in compliance with Randornzk's obligations under Article XVI of the GATS;
2. Find that the ban on the import of Reality GP is in compliance with Randornzk's obligations under Article XVII of the GATS;
3. Find that the ban on the import of Reality GP is justified under Article XIV of the GATS;
4. Find that the RBB Policy Directive 2024 is in compliance with Randornzk's obligations under Articles VI:1;
5. Find that the RBB Policy Directive 2024 is in compliance with Randornzk's obligations under Articles XVI:1 and XVI:2;
6. Find that the RBB Policy Directive 2024 is in compliance with Randornzk's obligations under Articles XI;
7. Find that the RBB Policy Directive 2024 is justified under Article XIV.

*All of which is respectfully affirmed and submitted,*

Counsel for the Respondent,  
Randornzk.