

Team Code: 115C

12th GNLU INTERNATIONAL LAW MOOT COURT COMPETITION 2020

IN THE WORLD TRADE ORGANISATION PANEL



ANDUIN – CERTAIN MEASURES AFFECTING SOCIAL MEDIA SERVICES

WT/DSXXX

BARANDUIN

(Complainant)

v.

ANDUIN

(Respondent)

-WRITTEN SUBMISSION FOR THE COMPLAINANT-

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LIST OF ABBREVIATIONS

AB/R	Appellate Body/Report
Annex	Annexure
Art.	Article
CPC	Central Product Classification
Doc.	Document
EC	European Communities
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights,
ICSID	International Centre for Settlement of Investment Dispute
<i>Id.</i>	<i>Ibidem</i>
MFN	Most Favored Nation
NLG	National Liberation Group
NT	National Treatment
No.	Number
SCM	Subsidies and Countervailing Measures
UDHR	Universal Declaration of Human Right
UN	United Nation
US	United State
v.	<i>Versus</i>
VCLT	Vienna Convention on Law of Treaty
WTO	World Trade organization

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STATEMENT OF FACTS

Prologue

A significant influx of refugees from Endor, a least developed country, caused a “refugee crisis” in Anduin, a neighboring developed economy. It resulted in the victory of a nationalist political party with anti-globalization sentiments. After victory, the party rolled out the ‘Rehabilitation Settlement Process’, which stipulated that refugees from Endor were only permitted to reside in demarcated land zones in Anduin with access to basic civic amenities.

As a response to this policy, the refugee youths formed an informal political group called the National Liberation Group (“NLG”) that galvanized the international community to support their demands of better facilities and removal of mobility restrictions, by uploading videos demanding for those rights on a social media platform called *B-Connected*. After recommendations from an independent fact-finding committee, Anduin efficiently agreed to all the demands except for ease of transit request, against which the NLG chapters continued protesting.

The President of Anduin declared that Anduin would not accept any more Endorian refugees after warnings of terrorist attacks from international terrorists posing as refugees. Upon hearing this, General Radol perpetrated an all-out attack, called the *Drina Massacre*, at the border followed by the detonation of explosives in front of eminent political institutions, leading to several casualties, and the discovery of live high-grade explosives in hospitals and schools. Subsequently, NLG was deemed a terrorist organization by Anduin despite NLG’s vehement denial of the connection through *B-Connected*.

B-Connected

B-Connected is a well-known international social media platform with an internal messaging system, which generates revenues through advertising. It stores its data in four large data farms in Baranduin and has a robust internal data protection philosophy. Its consistent denial of providing information on its users, even to enforcement authorities has brought it appraisal in the international community, while receiving flak from various governments, including Anduin. Even though *B-Connected* provided immense assistance to Anduin in the aftermath of the terrorist attack, the ‘*#DeleteBConnect*’ campaign was initiated and *B-Connected* lost nearly 10% of its active users in Anduin as a result.

Let's Talk

The Trust Group, a major domestic business empire rolled out its own social media platform called *Let's Talk* after the terrorist attack. Unlike on *B-Connected*, anyone could follow anyone on *Let's Talk* and it did not have an internal messaging system. The Trust Group cross-subsidized from its pre-existing business ventures, *WhatsUp* and *MadMedia*, resulting in the exodus of users from *B-Connected* to *Let's Talk*. The founder of *Let's Talk*, a notable supporter of the current President's political party, had the belief that data should be traded. Renowned economists note that the strategies used by *Let's Talk* could result in the monopolization of the e-commerce infrastructure in Anduin.

Imposing Data Localization Laws

After the terrorist attack, consultations were held by Ministry of Information and Technology with *B-Connected* and *Let's Talk*, where *Let's Talk* pressing for mandatory imposition of localization requirements, was met with dissent by *B-Connected*. The "Social Media Regulation Act" was enacted, which restricts the trade, rent and transfer of data and requires social media platforms to store data in Anduin. The Official Notification No. 21/2019 was then released which exempted 5% of the annual electricity bill and provided the land with cold climatic conditions only to data centers using at least 50% of technology equipment developed in Anduin. *B-Connected*'s efficiency and user friendliness reduced and it was unable to meet the requirements.

The Social Credit Plan

The President of Anduin announced that Anduin, through its 'Social Credit Plan', would monitor the social behavior of refugees and assign credit scores so that refugees with a good 'social standing' could acquire Anduinian citizenship. It required the foreign social media firms to mandatorily provide their source code to the Anduin Government.

***B-Connected* exits Anduin**

Claiming that Anduin Government's actions were violation of right to privacy of their customers, *B-Connected* ceased its operations in Anduin immediately.

MEASURES AT ISSUE

1. THE IMPOSITION OF DATA LOCALIZATION REQUIREMENTS UNDER THE SOCIAL MEDIA REGULATIONS ACT VIOLATES ANDUIN'S MARKET ACCESS OBLIGATIONS UNDER ARTICLE XVI (1) OF THE GATS RELATING TO CPC 7523 UNDER GATS.

1.1 Anduin has undertaken full Market Access Commitment for Telecommunication Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS.

1.2 Anduin's data localization requirements prohibits mode 1 and 3 of supply, contrary to its specific market access commitments for telecommunication services for the modes, within the meaning of Article I:2 of the GATS.

1.3 The data localization requirement accords "less favorable" treatment than provided for under the terms, limitations and conditions specified in its Schedule within the meaning of Art. XVI (1) of GATS.

2. THE REQUIREMENT TO SHARE SOURCE CODE WITH ANDUIN IN ACCORDANCE WITH THE SOCIAL CREDIT PLAN IS IN VIOLATION OF ARTICLE XVII (1) OF THE GATS.

2.1 Anduin has undertaken a national treatment commitment in the sector of Telecommunication services in compliance with Article XX: 1(b) of GATS.

2.1.1 Anduin has committed to a full national treatment commitment in its schedule of specific commitments in the context of Article I:2 (c).

2.1.2 *B-Connected* and *Let's Talk* are like service suppliers within the context of Article XVII of the GATS.

2.2 The requirement for disclosure of source code from foreign social media firms by Anduin is a measure affecting trade in services of *B-Connected* in contravention to Article XVI(c) (ii) of GATS.

2.2.1 *B-Connected's* telecommunication services constitutes trade in services within the meaning of Article I:2(a) of the GATS.

2.2.2 The requirement to share source code with Anduin in accordance with the Social Credit Plan clearly affects trade in services as it violates Article XVI(c)(iii) of GATS.

2.3 The requirement to share source code under The Social Credit Plan accords less favorable treatment to *B-Connected* than it does to *Let's Talk* within the meaning of Article XVII of the GATS.

3. THE REDUCTION OF ANNUAL ELECTRICITY BILLS BY 5% AND LAND ALLOCATION POLICY VIDE NOTIFICATION NO. 21/2019 CONSTITUTED LESS FAVORABLE TREATMENT TO FOREIGN PRODUCERS AS COMPARED TO DOMESTIC PRODUCERS OF EQUIPMENT FOR DATA CENTERS AS PER ARTICLE III: 4 OF THE GATT.

3.1 The Notification is a measure that affects trade in goods within the meaning of Article III:4 of the GATT.

3.1.1 The provisions under Official Notification No. 21/2019 are anti-competitive and disrupt conditions for fair competition.

3.1.2 The requirements under official Notification 21/2019 are against the legitimate expectation of foreign services suppliers.

3.2 The reduction of annual electricity bill by 5% and land allocation policy, is a prohibited subsidy within the meaning of Article 3.1(b) of the SCM Agreement.

3.2.1 The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are subsidies in the form of 'income or price support'.

3.2.2 The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are prohibited subsidies.

3.3 The measures required under Official Notification No. 21/2019 confer 'less favorable treatment' to foreign producers of technological equipment as compared to 'like' domestic producers thereby violating Article III:4 of GATT.

3.3.1 Anduin has not provided equality of competitive opportunities to the like products of domestic and foreign product developers.

3.3.2 Official Notification No. 21/2019 is violative of Article III:4 of the GATT even though it is a non-mandatory measure.

3.3.3 The measure confers 'less favorable treatment' to foreign producers of technological equipment as compared to like domestic producers.

SUMMARY OF PLEADINGS

ARGUMENT 1

The imposition of data localization requirements under the Social Media Regulations Act violates Anduin's market access obligations under Article XVI (1) of the GATS. This violation is established based on three grounds:

Firstly, Anduin has undertaken full Market Access Commitment for Telecommunication Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS. By inscribing the word "None" under the market access column for the modes, cross-border and commercial presence, in its Schedule of Specific Commitments and not specifying any limitations therein, Anduin has committed to undertake full Market Access Obligations.

Secondly, Anduin's data localization requirements prohibits mode 1 and 3 of supply, contrary to its specific market access commitments for telecommunication services for the modes, within the meaning of Article I:2 of the GATS. Telecommunication services fall under the Cross Border and Commercial Presence Mode of Supply. Anduin prohibits both the modes through its requirement of storing data and establishing data centers in Anduin. The requirements further restrict the cross-border transfer of data and reinstates the monopoly of *Let's Talk*. All these requirements limit both the modes of supply for foreign suppliers like *B-Connected*.

Thirdly, the data localization requirement accords "less favorable" treatment than provided for under the terms, limitations and conditions specified in its Schedule within the meaning of Art. XVI:1 of GATS. Through the requirements of data storage and establishment of data centers in Anduin, the data localization requirements intrinsically favor national companies like *Let's Talk* over foreign companies like *B-Connected*, that supply their service from their origin countries. This treatment provided is against the minimum treatment Anduin committed in its Schedule. Furthermore, it distorts the competitive market conditions, raises the costs of operations significantly for suppliers operating outside of Anduin and hence the consists of an unfavorable treatment for foreign suppliers.

ARGUMENT 2

GATS stipulates that members must accord to both domestic and foreign service suppliers of like services treatment no less favorable on the basis of origin. The source code sharing requirement imposed by Anduin on the Foreign Service suppliers of social media is a violation of this national treatment obligation for the following reasons:

Firstly, Anduin has made a full national treatment commitment to all its service suppliers by marking “None” under the column for service supply via both modes of cross-border supply and commercial presence. This limits Anduin from imposing on ‘like services and service suppliers’, any regulatory measure that contradicts the principle of free trade. However, the requirement to share source code is a measure that goes against what has been provided in its Schedule of specific commitments for Telecommunication services, that is, to impose no regulatory barriers on the distribution of services.

Secondly, the requirement made by Anduin affects the trade in services of a Foreign Service supplier. The release of source code by *B-Connected* goes against the primary business policy of *B-Connected* making its competitive position in the market feeble as compared to its domestic counterpart *Let’s Talk*. The operational success of *B-Connected* was built on the foundation of user’s trust that their privacy is secured by the platform. Going against their policy would create detrimental effects to the reliance of users upon the platform. Thus, the measure immediately restricts *B-Connected* to competitively participate in the distribution of its services in the Anduinian market.

Thirdly, the measure requiring the source code from social media platform confers a less favorable treatment to Foreign Service suppliers as it is not applied to domestic service suppliers. The measure at hand remains coherent with the policy of the domestic supplier *Let’s Talk*, whose business objective is to use personal data in commercialization. Therefore, the domestic supplier of the similar service remains unaffected by such measure. However, even upon realizing that the measure directly affects *B-Connected*’s supply of services, the requirement of such a measure establishes a less favorable treatment to *B-Connected* leading it to cease its operations in Anduin.

ARGUMENT 3

The reduction of annual electricity bills by 5% and land allocation policy *vide* Notification No. 21/2019 violates Article III:4 of the GATT by providing less favorable treatment to foreign producers as compared to domestic producers of technological equipment. This claim can be based on three grounds:

Firstly, being a Member State of the GATT, Anduin has undertaken the national treatment commitment that stipulates that laws and regulations that differentiate between ‘like’ products based on their origin shall not be formulated. However, Anduin violates its national treatment commitment through Official Notification No. 21/2019 as such measures affect trade in goods within the meaning of Article III:4 of the GATT since such measures are anti-competitive and disrupt the fair and competitive market conditions. Such measures are also against the legitimate expectation of foreign service suppliers.

Secondly, as a contracting party is under the obligation to limit such subsidies that are even indirectly prejudicial to the interests of another contracting party and have an effect of reducing imports of any like products, the reduction of annual electricity bill by 5% and land allocation policy *vide* Official Notification No. 21/2019 are prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement. The measures are subsidies in the form of ‘income or price support’ as stipulated by Article XVI:1 of the GATT and are contingent upon the use of domestic products instead of imported products, qualifying them to be prohibited subsidies.

Thirdly, the measures under Official Notification No. 21/2019 provide concessions to data centers which confer less favorable treatment to foreign producers of technological equipment as compared to like domestic producers. Even though the measure is non-mandatory, it still amounts to be a discriminatory treatment as it is a government measure that fails to provide equality of competitive opportunities to like products of different origins.

LEGAL PLEADINGS

1. THE IMPOSITION OF DATA LOCALIZATION REQUIREMENTS UNDER THE SOCIAL MEDIA REGULATIONS ACT VIOLATES ANDUIN’S MARKET ACCESS OBLIGATIONS UNDER ARTICLE XVI (1) OF THE GATS RELATING TO CPC 7523 UNDER GATS.

1. A violation of Market Access obligation is established if three conditions are met: (a) Existence of market access commitment in the member’s schedule¹, (b) Prohibition of supply through the modes of supplies specified under Article I:2,² and (c) the measure accords less favorable treatment to a service or service supplier.³

1.1. Anduin has undertaken full Market Access Commitment for Telecommunication Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS.

2. Article XX:1(a) of the GATS requires that a member’s Schedule of specific commitments, with respect to the service sectors in which specific commitments are undertaken, must specify the terms, limitations and conditions on market access. The Panel Report in *Mexico—Telecoms*, defines ‘specify’ as requiring an entry that describes each measure concisely, indicating the elements that make it inconsistent with the market access disciplines in the form of exceptions, if the member wishes to retain any.⁴

3. Article XVI:1 encompasses market access commitments guaranteed by a member through any of the modes of supply inscribed in Article I:2.⁵ ‘Service supplier’ within the meaning of the GATS covers a juridical person that supplies a service.⁶ A member’s specific commitment in any sector is a guarantee that the whole of that sector including all services are covered by

¹ Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 143, WTO Doc. WT/DS285/AB/R (adopted Apr.20, 2005) [hereinafter, “Appellate Report, *US – Gambling*”].

² Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.285, WTO Doc. WT/DS285/R (adopted Apr.20, 2005) [hereinafter, Panel Report, *US – Gambling*].

³ Panel Report, *Argentina— Measures Relating to Trade in Goods and Services*, ¶ 7.391-7.392, WTO Doc. WT/DS453/12 (adopted May 9, 2016) [hereinafter Panel Report, *Argentina – Financial Services*].

⁴ Panel Report, *Mexico — Measures Affecting Telecommunications Services*, ¶ 7.76, WTO Doc. WT/DS204/R (adopted on Jun.1, 2004) [hereinafter Panel Report, *Mexico—Telecoms*].

⁵ RÜDIGER WOLFRUM, PETER-TOBIAS STOLL, CLEMENS FEINÄUGLE, WTO – TRADE IN SERVICES, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 88 ¶ 11, 372 (VOL.6 2008) [hereinafter, RÜDIGER WOLFRUM].

⁶ Appellate Body Report, *US – Gambling*, *supra* note 1, ¶ 6.321.

the commitment.⁷ The coverage of a service transaction is only ensured when there are commitments in each relevant mode of supply.⁸ The commitment is thereby indicated in a member's Schedule of Specific Commitments by having marked the word 'None' under the relevant column of the Schedule intending that there are no limitations in the specified sector.⁹

4. Anduin has enlisted Telecommunications sector in its Schedule of Specific Commitments.¹⁰ The Telecommunications sector is identified in the Secretariat Services Sectoral Classification list¹¹ by the Corresponding Central Product Classification Number¹² (CPC) 7523. It is also established that Anduin has undertaken a full market access commitment in relation to the supply of Telecommunication Services through the modes, Cross Border and Commercial Presence in its Schedule by having marked 'None' in the Market Access column of its schedule for the modes.

5. The market access obligation is exhibited by the relevant "terms, limitations and conditions" inscribed in Members' Schedules.¹³ Members are thereby required to specify in the schedule any limitations falling under Art. XVI:2.¹⁴ The Appellate body in *US-Gambling*, establishes that a member cannot go against the terms, limitations and conditions inscribed in its Schedule.¹⁵ A member's schedule is a record of legal commitments. Consequently, everything in the schedule is legally binding.¹⁶ This establishes the primary intention of Anduin to allow no limitations on market access to its telecommunication service suppliers.

7. Anduin has not specified any limitations on its market access commitment in its schedule and has thereby consented to a full market access commitment in the modes, Cross Border and Commercial Presence. The Social Media Regulation Act requires all social media platforms to

⁷ Panel Report, *US—Gambling*, *supra* note 2, ¶ 6.290; RÜDIGER WOLFRUM, *supra* note 5, ¶ 20, 551.

⁸ Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS) adopted by the Council for Trade in Services On 23 March 2001, ¶ 35 [hereinafter 2001 Scheduling Guidelines].

⁹ GNS, Scheduling Of Initial Commitments In Trade In Services: Explanatory Note, Gatt Doc. Mtn.Gns/W/164, ¶ 24; Appellate Report, *US – Gambling*, *supra* note 1, ¶ 215.

¹⁰ Moot Problem, Annex 1.

¹¹ Services Sectoral Classification List, MTN.GNS/W/120, dated 10 July 1991, Special Distribution.

¹² 2001 Scheduling Guidelines, *supra* note 8, ¶ 23.

¹³ Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 134, WTO Doc. WT/DS103/33 (adopted Oct.27, 1999) [hereinafter Appellate Report, *Canada—Dairy*]; General Agreement on Tariffs and Trade, 1994, Apr. 15, 1994, 1867 U.N.T.S. 187, Art. II:1 lit. b [hereinafter 'GATT'].

¹⁴ Panel Report, *US—Gambling*, *supra* note 2, WT/DS285/R, ¶ 6.294.

¹⁵ Appellate Body Report, *US—Gambling*, *supra* note 1, ¶ 214.

¹⁶ 2001 Scheduling Guidelines, *supra* note 8, ¶ 3.

store data, establish data servers in Anduin and restricts the cross-border transfer of data, all of which are extra obligations, not specified in its Schedule. Hence the data localization requirements go against the full market access commitment specified in its Schedule.

1.2. Anduin’s data localization requirements prohibits mode 1 and 3 of supply, contrary to its specific market access commitments for telecommunication services for the modes, within the meaning of Article I:2 of the GATS.

8. The Panel Report in *Mexico-Telecoms* confirms that cross-border services encompass services beginning in one country’s telecommunication network and ending in the network of another country.¹⁷ It includes the various technologically possible means of delivery under mode 1.¹⁸ Hence, telecommunications services provided by social media platforms like *Let’s Talk* and *B-Connected* fall under the cross-border mode of supply.

9. The scheduled commitment for mode 1 allows service suppliers of a member, to supply service through cross border via any means of delivery, for the relevant sector. If any of the means of delivery of cross border is prohibited, the services using those means will be limited. This is a prohibition on means of delivery included in mode 1 which constitutes a limitation on mode 1.¹⁹

10. Data protection laws, and more specifically cross-border data transfer rules, should not create significant compliance burdens, and cross-border data transfer rules should allow organizations some flexibility in how they comply, usually by providing a variety of approved mechanisms.²⁰ The main barriers that confront services supplied by means of cross border supply are the domestic regulations of national telecommunications authorities and the questionable practices of dominant national telecommunications operators.²¹ Telecommunication monopolies could abuse their dominant status to undermine commitments the telecommunications sector.²²

¹⁷ Panel Report, *Mexico—Telecoms*, *supra* note 4, ¶ 7.45; 2001 Scheduling Guidelines, *supra* note 8, ¶ 19.

¹⁸ Panel Report, *Mexico—Telecoms*, *supra* note 4, ¶ 6.281.

¹⁹ *Id.* at ¶ 6.335.

²⁰ UNCTAD, DATA PROTECTION REGULATIONS AND INTERNATIONAL DATA FLOWS: IMPLICATIONS FOR TRADE AND DEVELOPMENT, UNITED NATIONS PUBLICATION, UNCTAD/WEB/DTL/STICT/2016/1/IPUB, 50 (2016) [hereinafter UNCTAD].

²¹ L. Tuthill, *Users’ Rights? The Multilateral Rules on Access to Telecommunications*, 20 TELECOMM’N POL’Y 2, 89, 90 (1996).

²² *Id.*

11. In our case, *Let's Talk* is an “in effect” monopoly in the ecommerce infrastructure of Anduin that has gained its dominant position by leveraging its major domestic business empire and cross-subsidizing it with its other business ventures, *MadMedia* and *WhatsUp*. The Social Media Regulation Act allows for data, except sensitive personal data to be used by the family of companies. This provision favors the cross subsidization of *Let's Talk* and creates anti-competitive market conditions for other suppliers like *B-Connected*.

12. The Social Media Regulation Act further reinstates this monopoly through its data localization requirements. It requires social media platforms to store data and establish data servers in Anduin. This provision is intrinsically in support of national companies like *Let's Talk* in comparison to foreign suppliers like *B-Connected*. It also restricts the cross-border transfer of data. This is a clear prohibition of a means of delivery under mode 1 and hence is a limitation in the cross-border mode of supply.

13. Commercial presence is defined as services delivered within the territory of the Member, through the commercial presence of the supplier. This mode covers not only the presence of juridical persons, but also that of legal entities which share some of the same characteristics. It thus includes, inter alia, representative offices and branches.²³ Art. XXVIII lit. g makes it clear that when a service is provided through a representative office, it should be treated as a service supplier under the GATS.²⁴ Article XVI:2 treats representative offices as equivalent to juridical persons, even though the juridical person behind the office is not located in the territory of that Member, which means that full incorporation of a foreign supplier in the host state is not required.²⁵

14. Article XVI:2 prohibits measures that limit the means of establishment of foreign services providers when they wish to provide services through commercial presence. It prohibits the exclusion of representative offices under commercial presence.²⁶

²³ 2001 Scheduling Guidelines, *supra* note 8, ¶ 32; Article XXVIII, GATS.

²⁴ Footnote 12 to Art. XXVIII lit.g; RÜDIGER WOLFRUM, *supra* note 5, 378, ¶ 25

²⁵ W Zdouc, *WTO dispute settlement practice relating to the GATS*, 2(2) J. INT'L ECO. L. 295 ¶ 324–325 (1999).

²⁶ *Id.*

15. Therefore, *B-Connected's* local office is a representative office that provides telecommunication services in the territory of Anduin through the mode of Commercial Presence. The act limits the operation of the local office by requiring foreign suppliers like *B-Connected* to mandatorily store data in Anduin, which is different to providing service and requires for the establishment of data servers which is an extra obligation that puts a strain on the local office's resources. This is a clear limitation on the means of establishment of representative offices that wish to provide services through commercial presence.

1.3. The data localization requirement accords "less favorable" treatment than provided for under the terms, limitations and conditions specified in its Schedule within the meaning of Art. XVI (1) of GATS.

16. Article XVI obliges Members to accord services and service suppliers of other Members no less favorable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.²⁷

17. To determine whether the 'no less favorable' treatment standard of Art. XVI:1 is violated, the minimum treatment set out in Member's specific market access commitments must be juxtaposed with the actual treatment, the member offers.²⁸

18. Article XVI defines the scope of the obligation laid down in Article XVI:1 to provide 'no less favorable treatment', by comparing it with the benchmark of 'the terms, limitations and conditions agreed and specified' in a Member's Schedule.²⁹ When a member makes market access commitments under GATS, GATS restricts the right of that member to impose trade-distorting qualitative regulations that discriminate against foreign service suppliers.³⁰ Data localization requirements cannot be adopted by a Member if it acts as a restriction in trade.³¹

²⁷ WTO Analytical Index, GATS – Article XVI (Jurisprudence) ¶ 1.
https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art16_jur.pdf

²⁸ Appellate Body Report, *US -Gambling*, *supra* note 1, ¶ 6.263.

²⁹ The Interaction Between GATS Articles VI, XVI, XVII and XVIII after the US – Gambling Case Working Paper No 2006/9 June 2006, 7.

³⁰ GATS Art XVI.

³¹ UNCTAD, *supra* note 20.

19. Domestic law cannot be used as an excuse for the non-fulfilment of an international legal obligation.³² Article VI:5 states that a domestic regulation of a Member is prohibited if the application of that measure amounts to the nullification or impairment of a specific commitment. A specific commitment is said to be nullified or impaired if there is a. existence of a specific commitment and b. establishment of a connection between the challenged domestic regulation and the value of the commitment.³³

20. The Social Media Regulation Bill, which included data localization provisions, was signed into law without any amendments or debate.³⁴ Anduin passed this bill without following a due process and is Anduin's agenda to support the national monopoly and restrict trade. Anduin has committed to a full market access obligation in its Schedule and hence has ensured a minimum treatment of no restrictions in market access by enlisting no terms or limitations in the Schedule. However, Anduin's actual treatment does not confer with the minimum treatment. The data localization laws require all social media platforms to store data, establish data servers in Anduin. This constitutes a less favorable treatment for foreign suppliers like *B-Connected* who supply the service through the cross-border mode of supply. The requirements are a trade distorting qualitative regulation that establishes an anticompetitive market conditions in favor of national service suppliers imposing a restriction in trade for foreign suppliers.

21. The limitation imposed by the act allowing copies of data to be taken outside the country only with the Anduin government's discretionary approval is a clear restriction in the cross-border transfer of data. The Act allows for data, except sensitive personal data, to be used by the family of companies.³⁵ This directly favors the monopolistic act of cross subsidization done by *Let's Talk* and constitutes a less favorable treatment for other suppliers.

22. Furthermore, it raises foreign suppliers' operation costs significantly.³⁶ In the case of *B-connected*, it already operates through the servers of Baranduin. The costs for the transfer are an unfair burden on the company. The requirements also directly clash with the *B-Connected's* policy of user data protection. *Let's Talk* has always pressed for mandatory imposition of

³² RÜDIGER WOLFRUM, *supra* note 5, 175 ¶ 22.

³³ *Id.* at 193 ¶ 67.

³⁴ Moot Problem, ¶ 26.

³⁵ Moot Problem, ¶ 26.

³⁶ Moot Problem, ¶ 29.

localization requirements and made it clear of its disregard for users' data protection³⁷ while user data protection has been in the forefront of *B-Connected's* business policy.³⁸ Therefore, the data localization requirements provide foreign service suppliers like *B-Connected* with less favorable treatment than that specified in the market access column of its Schedule and is against Anduin's market access commitments.

2. The requirement to share source code with Anduin in accordance with the Social Credit Plan is in violation of Article XVII (1) of the GATS.

23. The national treatment clause under Article XVII:1³⁹ ensures that services admitted within a member's schedule cannot be discriminated against on the basis of their origin.⁴⁰ The *raison d'être* of this clause in GATS is to capture a wide range of trade barriers to trade in services and establish a mechanism for scheduling specific commitments on them.⁴¹

24. A violation of national treatment is established if three cumulative conditions are fulfilled. They are a) existence of a national treatment commitment towards 'like' foreign services b) the domestic measure at hand affects supply in services, and, c) the measure accords less favorable treatment to a service or service supplier.⁴²

2.1. Anduin has undertaken a national treatment commitment in the sector of Telecommunication services in compliance with Article XX: 1(b) of GATS.

2.1.1. Anduin has committed to a full national treatment commitment in its schedule of specific commitments in the context of Article I:2 (c).

25. A member is prohibited from maintaining any measure that violates the national treatment obligations unless it specifies in its Schedule, with absolute clarity, the limitations and

³⁷ Moot Problem, ¶ 25.

³⁸ Moot Problem, ¶ 15.

³⁹ Art. XVII:1, GATS.

⁴⁰ RÜDIGER WOLFRUM, *supra* note 5, 88.

⁴¹ COMMITTEE ON SPECIFIC COMMITMENTS, ADDITIONAL COMMITMENTS UNDER ARTICLE XVIII OF THE GATS, NOTE BY THE SECRETARIAT, GATT Doc. S/CSC/W/34, ¶ 3, (16 July 2002).

⁴² Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.944, WTO Doc. WT/DS363/R (adopted Jan.19, 2010) [hereinafter Panel Report *China — Publications and Audiovisual Products*]; Panel Report, *Argentina—Financial Services*, *supra* note 3, ¶ 7.448.

restrictions on national treatment it wishes to retain.⁴³ The absence of any reservations on national treatment by Anduin is clear by the “NONE” marked in the national treatment column for commercial presence of services.⁴⁴ Hence, Anduin is prohibited from maintaining any retention on national treatment limitations by the application of a regulatory measure that contradicts its specifications in the schedule.

26. The national treatment commitment is violated when the member adopts measures that alters the competitive relationship between service suppliers to the detriment of a foreign services supplier.⁴⁵ Anduin is therefore obliged to provide similar treatment to both foreign services suppliers and domestic service suppliers of social media services. However, it is clear that Anduin demanded the source code from foreign social media firms only and not from domestic firms.⁴⁶ This resulted in the creation of unequal competitive opportunities detrimental to its operational capacity for *B-Connected* as compared to its domestic counterpart.⁴⁷ This concludes Anduin’s failure to comply with its national treatment obligations under the GATS.

27. The Panel in *US-Gambling* established that members undertaking a full national treatment commitment must not apply any measure that would be inconsistent with the provisions enlisted in its schedule of specific commitments.⁴⁸ Thus, the Anduin government’s formally different treatment to foreign social media firms undermines the primary objective of Article XVII that is the elimination of domestic regulations that restrict trade.

2.1.2. *B-Connected* and *Let’s Talk* are like service suppliers within the context of Article XVII of the GATS.

28. The ordinary meaning of ‘supplier’ suggests that the entity is currently supplying the service. Hence, to the extent that the entities provides like service, they are like service

⁴³ BIRGITTE EGELUND OLSEN, MICHAEL STEINICKE, KARSTEN ENGSIG SORENSEN, *WTO LAW – FROM A EUROPEAN PERSPECTIVE*, 279-317 (ed. 2006) [hereinafter BIRGITTE EGELUND OLSEN].

⁴⁴ Moot Problem, Annex I at 13-14.

⁴⁵ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 97, WTO Doc. WT/DS135/AB/R (adopted Apr.5, 2001) [hereinafter Appellate Body Report *EC-Asbestos*].

⁴⁶ Moot Problem, ¶ 31.

⁴⁷ Moot Problem, ¶ 23.

⁴⁸ Panel Report, *US-Gambling*, *supra* note 2, ¶ 6.311; Nancy J. King; Kishani Kalupahana, *Choosing between Liberalization and Regulatory Autonomy under GATS: Implications of U.S.-Gambling for Trade in Cross Border E-Services*, 40 VAND. J. TRANSNAT’L L. 1189 (2007) [hereinafter Nancy J. King].

suppliers.⁴⁹ Art. XVII of the GATS lays down the preliminary consideration of supplier-related facts when determining the likeness of services. Two services are deemed to be like services if the characteristics of their suppliers reflect the competitive relationship between foreign and domestic suppliers.⁵⁰

29. In the present case, the domestic service supplier *Let's Talk* and the foreign service supplier *B-Connected* are like service suppliers as they bear the same functional characteristics and are considered to have equal competitive stance in the social media space of Anduin.⁵¹ Similarly, consumer tastes and end-uses are also pertinent in determining 'likeness' in the services context.⁵² Two or more services offered in a generally competitive environment or in an identifiable market to the same group of consumers services, are ascertained to remain 'like' by determining whether there is cross service elasticity in demand of the consumers.⁵³ Hence, the services provided by *Let's Talk* and *B-Connected* are 'like' as there is a supply of the same service and there existed a condition of substitutability when one service couldn't perform up to the mark expected by the consumers and eventually ceased to exist.⁵⁴

2.2. The requirement for disclosure of source code from foreign social media firms by Anduin is a measure affecting trade in services of *B-Connected* in contravention to Article XVI(c) (ii) of GATS.

30. According to the Appellate Body in *Canada - Autos*, the determination of whether a measure is one affecting trade in services, requires the examination of two key issues.⁵⁵ First, it is examined whether there is a 'trade in services' as defined by Article I:2 of the GATS. Second, it needs to be determined whether the measure 'affects' such trade in services within the meaning of Article I:1.⁵⁶

2.2.1. *B-Connected*'s telecommunication services constitutes trade in services within the meaning of Article I:2(a) of the GATS.

⁴⁹ Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.322, WTO Doc. WT/DS27/ R/USA (adopted May 22, 1997) [hereinafter Panel Report *EC—Bananas III*].

⁵⁰ RÜDIGER WOLFRUM, *supra* note 5, at 402.

⁵¹ Moot Problem, ¶ 22.

⁵² Appellate Body Report *EC—Asbestos*, *supra* note 45, at ¶ 101.

⁵³ A. Mattoo, *National Treatment and the GATS, Corner-Stone or Pandora's Box?*, 31 J.W.T. 1, 107, 128 (1997).

⁵⁴ Moot Problem, ¶ 29.

⁵⁵ Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, ¶ 155, WTO Doc. WT/DS I39/AB/R, WT/DS 142/AB/R (adopted Jun.19, 2000) [hereinafter Appellate Body Report *Canada - Autos*].

⁵⁶ *Id.* ¶ 155.

31. Article I:2(a) covers the supply of a service from the territory of one Member into the territory of any other Member. For a service product, this situation arises when the service can be sent across borders through telecommunications channels, in particular by the internet.⁵⁷ ‘Telecommunications’ means the transmission and reception of signals by any electromagnetic means and includes *inter alia*, voice, data and images.⁵⁸

32. In the present case, the Telecommunication services provided by *B-Connected* constitutes ‘trade in services’ within the meaning of Article I:2 of the GATS as the delivery of such services is done through a cross-border medium.⁵⁹ *B-Connected* used to receive considerable percentage of its annual profits from Anduin⁶⁰ that depicts the prominence of its service supply in Anduin. The telecommunication services provided by *B-Connected* to its users have been enlisted in Anduin’s Schedule of Specific Commitments.

33. The most important element for defining ‘service suppliers’ is the term ‘service’ which, however, is not defined in the entire GATS. With regard to national treatment, the definition of what constitutes a ‘service’ is found in the positive list of the Members’ schedule of commitments. Members, therefore, use the revised Services Sectoral Classification List⁶¹ and the corresponding CPC description for drawing up their schedule of commitments.⁶² These documents constitute supplementary means of interpretation in accordance with Article 32 VCLT.⁶³

34. The Annex on Telecommunications is applied once a WTO Member offers specific commitments in a given service sector.⁶⁴ For a service product, the main objective of the annex is to elaborate the rules of GATS for services that can be sent across borders through

⁵⁷ S. Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US—Gambling*, World Trade Rev. 5 (2006), at 319, 324–327.

⁵⁸ GATT - Annex on Telecommunications, 3(a).

⁵⁹ Moot Problem, Annex I at 13-14.

⁶⁰ Moot Problem 5, ¶ 17.

⁶¹ Services Sectoral Classification List, *supra* note 11.

⁶² Group of Negotiations on Services, SCHEDULING OF INITIAL COMMITMENTS IN TRADE IN SERVICES: EXPLANATORY NOTE, GATT Doc. MTN.GNS/W/164, ¶ 16, (Sept. 3. 1993).

⁶³ Appellate Body Report, *US – Gambling*, *supra* note 1, ¶ 197.

⁶⁴ GATT, Annex on Telecommunications, ¶ 5(a).

telecommunications channels, in particular by the internet⁶⁵ for measures that affect access to and use of public telecommunications transport networks and services.

35. *B-Connected* is an international social media platform where users can post their feelings along with photographs or videos. In addition to commenting on such feelings, users can also connect with each other through an internal messaging system which functions like email. In the present case, Anduin's commitments on Telecommunication services refers to CPC 7523⁶⁶ according to which Telecommunication services consist of email and thereby constitutes 'trade in services'.

2.2.2. The requirement to share source code with Anduin in accordance with the Social Credit Plan clearly affects trade in services as it violates Article XVI(c)(iii) of GATS.

36. According to Art. XIV *lit. c*, any laws or regulations made by a member to the GATS must take into account, the protection of the privacy of individuals in relation to the processing of personal data and individual records. Art. XIV *lit. c (ii)* in particular, stipulates the significance of ensuring the privacy of individuals and acknowledges the protection of sensitive personal data. The provisions of GATS are not to be construed to require either disclosure of information relating to the affairs of individuals or disclosure of other confidential information in the possession of a public entity.⁶⁷

37. *B-Connected* should not be treated as an agent for law enforcement or surveillance. A test for achieving legitimate surveillance power involves the key principle that surveillance should be limited to specific national security objectives.⁶⁸ The political party leading the Anduin government emerges from a background of anti-globalization and anti-refugee rhetoric⁶⁹ followed by its 'Rehabilitation Settlement Process' policy that stipulated discriminatory provisions including demarcated residential areas and restrictions on free movement, towards Endorian refugees residing in Anduin. The Social Credit Plan enacted by Anduin therefore, does not aim to protect its national security. Instead, it is anti-refugee in its implementation

⁶⁵ PATRICK F. J. MACRORY, ARTHUR E. APPLETON, MICHAEL G. PLUMMER, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, 799, 823 (Vol. I, 2005) [hereinafter, PATRICK F. J. MACRORY]

⁶⁶ Services Sectoral Classification List, *supra* note 11.

⁶⁷ Panel Report, *US – Gambling*, *supra* note 2, ¶ 6.540.

⁶⁸ UNCTAD, DATA PROTECTION REGULATIONS AND INTERNATIONAL DATA FLOWS: IMPLICATIONS FOR TRADE AND DEVELOPMENT, *supra* note 20.

⁶⁹ Moot Problem, ¶ 3.

because it only demands refugees' data⁷⁰ although it was clear from evidence that Anduin nationals were also involved in the terrorist attack.⁷¹ The risk of being unaccountable, despite having shared data in good faith, can be a strong deterrent in sharing data to the government. The reference of government only mentioning the refugees as terrorists while some of its own citizens were involved proves this. The government's close nexus with *Let's Talk*, their coherent objective also defines the potential compromise of the integrity of the data.

38. Article 12 of the UDHR, prohibits subjecting anyone to arbitrary interference with their privacy.⁷² The UN General Assembly affirmed that the rights held by people offline must also be protected online. States are expected to respect and protect the right to privacy in digital communication. This has further been enforced by Article 17 of the ICCPR.⁷³ The notion of inhabiting refugees also includes protecting their personal data as refugees are often in a vulnerable position and their information is highly sensitive.⁷⁴ Surveillance of online information and interception of communications may have serious negative impact on the human rights of those individuals.⁷⁵

39. The surveillance policy opted by the Anduin government results in the privacy rights of the refugees being eroded. While Anduin is a permanent member of the UN, its policy however violates the basic principles of International Law as Anduin government did not make any attempt to address the privacy and security issues of refugees in their collection of refugee data. A member must ensure that the supply of services allowed under the Schedule of a Member is not frustrated by restrictions on such access and use. Members cannot force operators to disclose to the authorities, personal data of private individuals transmitted by means of the telecommunications network.⁷⁶

⁷⁰ Moot Problem, ¶ 30.

⁷¹ Moot Problem, ¶ 11.

⁷² Universal Declaration of Human Rights, Art 12, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 [hereinafter UDHR].

⁷³ International Covenant on Civil and Political Rights, Article 17, Mar. 23, 1976, 999 U.N.T.S. 171, [hereinafter ICCPR].

⁷⁴ UNHCR, *Data protection is part and parcel of refugee protection*, (May 23, 2018), <https://www.unhcr.org/blogs/data-protection-part-parcel-refugee-protection/>.

⁷⁵ UN, Resolution adopted by the General Assembly, A/RES/68/167, *The right to privacy in the digital age*, (Dec. 18, 2013) http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167.

⁷⁶ BOB JOSEPH MATHEW, *THE WTO AGREEMENTS ON TELECOMMUNICATIONS*, 95, (2003).

40. The Appellate Body in *EC-Bananas III* ruled that the scope of the GATS encompasses any measure of a member to the extent it affects the supply of a service even if it does not directly regulate the supply of services but regulates other matters that nevertheless affects trade in services.⁷⁷ Such measures defined by its provisions cannot be excluded *a priori* from the scope of the GATS.

41. In the present case, it can be concluded that the regulatory practice in Anduin has revealed an ineffective oversight which contributes to a lack of accountability for arbitrary or unlawful interference in the right to privacy. The functional effect of the Social Credit Plan creates a burdensome impact on the operation of *B-Connected*. It restricts the course of operation through which *B-Connected* has thrived in the social media space. It deteriorates the rapport the firm has built with its customers for a long time. Hence, the scheme requiring data to monitor the behavior of refugee remains in absolute contravention to *B-Connected's* business policy, that is, ensuring the protection and privacy of the users.

2.3. The requirement to share source code under The Social Credit Plan accords less favorable treatment to *B-Connected* than it does to *Let's Talk* within the meaning of Article XVII of the GATS.

42. Article XVII:3 of the GATS serves the function of prohibiting discrimination against foreign services and service suppliers *vis-à-vis* like services and service suppliers.⁷⁸ Any measure which is more burdensome than necessary for foreign services and service suppliers should be regarded as discrimination.⁷⁹ In *EC – Bananas III*⁸⁰ the Panel noted that Article XVII is meant to provide for no less favorable conditions of competition achieved through the application of formally different measures. Less favorable treatment constitutes the kind of treatment that modifies the conditions of competition in favor of domestic services and suppliers in comparison to foreign like services and suppliers.⁸¹

⁷⁷ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 217, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997) [hereinafter, *EC-Bananas III*].

⁷⁸ WTO Analytical Index, GATS – Article II (Jurisprudence).

⁷⁹ A. Mattoo, *supra* note 53.

⁸⁰ Panel Report, *EC – Bananas III*, *supra* note 77, ¶ 7.301.

⁸¹ GATT, Art. XVII:3; Mireille Cossy, *Determining "likeness" under the GATS: Squaring the Circle?* 4, World Trade Org., Econ. Research & Statistics Div., Working Paper ERSD2006-08, (2006); Panel Report, *United States-Section 337 of the Tariff Act of 1930*, at 345, WTO Doc. L/6439 (adopted on Nov. 7, 1989) [hereinafter Panel Report, *United States-Section*].

43. The fact that a measure modifies the conditions of competition to the detriment of service suppliers of any other Member is, in itself, sufficient for a finding of less favorable treatment under Article XVII of the GATS.⁸²The basic principle of the national treatment obligation provides that a state must accord to imported service suppliers the same treatment as to its domestic service suppliers.⁸³

44. In the present case, Anduin's underlying objective of the Social Credit Plan is of no relevance when there exists a modification in the conditions of competition. The dominance of *B-Connected* in the social media space relies solely on their robust data protection philosophy. On the contrary, the domestic social media platform *Let's Talk* believes that dataset of users can be used to determine the choices and desires of consumers. This policy objective of *Let's Talk* remained parallel to the Anduin Government's decision to monitor the activities of the refugees and track down their behavior.

45. This resulted in creating a favorable circumstance for *Let's Talk* to continue their business operations in order to meet its objective. However, the same regulatory requirement to share source code created a hindrance in *B-Connected*'s perceived corporate social responsibility, as a violation of trust. It also created a potential reputational risk for *B-Connected* leading the company to cease its business operations in Anduin.

46. The requirement of source code by the Anduin government clearly creates difficult operating environment for foreign services supplier *B-Connected* placing it on an unequal footing as compared to the domestic service supplier *Let's Talk*. Hence, the source code requirement is a treatment less favorable to Foreign Service suppliers that circumvents the national treatment commitment undertaken by Anduin under Article XVII of the GATS.

3. **The reduction of annual electricity bills by 5% and land allocation policy *vide* Notification No. 21/2019 constituted less favorable treatment to foreign producers as compared to domestic producers of equipment for data centers as per Article III: 4 of the GATT.**

⁸² Panel Report, *Argentina – Financial Services*, *supra* note 3, ¶ 6.105 - 6.106.

⁸³ NICOLAS F. DIEBOLD, *NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES: 'LIKENESS' IN WTO/GATS*, *CAMBRIDGE INTERNATIONAL TRADE AND ECONOMIC LAW*, 17, (2010).

47. The Official Notification⁸⁴ No. 21/2019 which requires the data centers to use at least 50% of technology equipment from domestic producers in order to get a 5% exemption on the annual electricity bill constitutes all elements of a violation of Article III:4, namely- (a) the Notification is a regulatory measure that affects trade in goods, affecting their internal sale or distribution, and (b) the foreign producers of technological equipment are conferred ‘less favorable treatment’ which remains in violation of Article III:4.⁸⁵

3.1. The Notification is a measure that affects trade in goods within the meaning of Article III:4 of the GATT.

48. Specifically dealing with internal laws and regulations under the national treatment principle, Article III:4 of the GATT stipulates that a Member State shall not formulate such laws and regulations that differentiate between ‘like’ products based on their origin. Article III:4 of the GATT covers the measures which indirectly have an effect on the imported products.⁸⁶ The intention of the drafters of the Article III:4 of the GATT covers even the laws or regulations which might alter the competitive conditions for imported products in the domestic market.⁸⁷

49. The Appellate Body in *EC—Asbestos* with regard to Art. III:4, stated that ‘Like’ means having the same characteristics or qualities as some other things.⁸⁸ The ‘likeness’ of the products under GATT can be determined based on the extent and nature of the competitive relationship between the products.⁸⁹ The Appellate Body⁹⁰ upon using criteria developed in the famous *Border Tax Adjustment Report*⁹¹ states that the competitive environment is driven by the physical properties of the products, its end-uses and consumer perception and their behavior towards the products.

⁸⁴ Moot problem 8, ¶ 27.

⁸⁵ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter Appellate Body Report *Korea-Various Measures on Beef*]; Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, ¶ 7.519 WTO Doc. WT/DS476/R (circulated Aug. 10 2018) [hereinafter Panel Report *EU-Energy Package*].

⁸⁶ Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, ¶ 5.20, WTO Doc. WT/DS31/AB/R (adopted July 30 1997) [hereinafter Appellate Body Report *Canada-Periodicals*].

⁸⁷ Panel Report, *U.S. Tariff Act of 1930*, *supra* note 81, ¶ 12.

⁸⁸ Appellate Body Report *EC-Asbestos*, *supra* note 45, ¶ 90.

⁸⁹ *Id.* ¶ 99.

⁹⁰ *Id.* ¶ 101.

⁹¹ Working Party Report, *Border Tax Adjustments*, GATT Doc. L/3464, adopted 2 December 1970, BISD 18S/97 [hereinafter Working Party Report *Border Tax Adjustments*].

50. Considering this criterion, the technological equipment developed by foreign producers and those developed by domestic producers are in direct competition with each other. Their only distinguishing factor is their origin, which cannot be considered as a factor to treat the products as unlike products within the meaning of Article III:4.⁹²

51. By requiring the data centers to use at least 50% of technology equipment developed in Anduin⁹³, it imposes trade barriers on the foreign suppliers of technological equipment to supply their goods to those telecommunication service providers, as it decreases their sales. Creating such an obligation upon the data centers thereby interferes with the principle of fair trade and creates an imbalance in the competitive environment for domestic and foreign goods suppliers.

52. Hence, the measure laid out by Anduin affects trade in goods by: a) promoting anti-competition and disrupting fair trade practices, and b) by going against the legitimate expectations of suppliers that such regulatory measures would not be enacted.

3.1.1. The provisions under Official Notification No. 21/2019 are anti-competitive and disrupt conditions for fair competition.

53. When a member state passes a law promoting discriminatory practices, it becomes anti-competitive.⁹⁴ The basic policy of Article III is the economic policy to eliminate market distortions caused by internal measures, which is compelling with respect to National-Treatment-type discrimination.⁹⁵

54. In *Japan – Film*, the Panel reiterated the standard of equality of competitive conditions as a benchmark for establishing “no less favorable treatment”.⁹⁶ The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products⁹⁷ by examining whether a measure

⁹² Panel Report, *India – Measures Affecting the Automotive Sector*, ¶ 7.174, WTO Doc. WT/DS146/R, WT/DS175/R (adopted 5 April 2002) [hereinafter Panel Report *India-Autos*].

⁹³ Moot Problem, ¶ 27.

⁹⁴ Panel Report, *Mexico – Measures Affecting Telecommunications Services*, *supra* note 4, ¶ 7.239–7.245.

⁹⁵ ROBERT E. HUDEC, “LIKE PRODUCT”: THE DIFFERENCES IN MEANING IN GATT ARTICLES I AND III 108, in COTTIER AND MAVROIDS (EDS), (2010) [hereinafter ROBERT E. HUDEC].

⁹⁶ Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.379, WTO Doc. WT/DS44/R (adopted 22 April 1998) [hereinafter Panel Report on *Japan – Film*].

⁹⁷ Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 627, WTO Doc. WT/DS161/R, WT/DS169/R (adopted Jan. 10, 2001) [hereinafter Panel Report on *Korea- Various Measures on Beef*].

modifies the conditions of competition in the relevant market to the detriment of imported products.⁹⁸

55. The Notification released by the Anduin government aims at providing a discriminatory treatment to the foreign producers of technological equipment by promoting unfair trade practices. Such a provision which provides certain benefits only to those data centers who comply with the regulations under the Notification compel the data centers to purchase technological equipment from domestic producers provide an unfair advantage to domestic producers, and deprive the foreign producers of a chance at fair competition. Thus, the provisions under Notification No. 21/2019 are anticompetitive and disrupt conditions for fair competition.

3.1.2. The requirements under official Notification 21/2019 are against the legitimate expectation of foreign services suppliers.

56. Article III of the GATT contains implicit recognition of protection of legitimate expectations.⁹⁹ The national treatment principle has been adopted as one of the cornerstones of the GATT to ensure the stability and predictability of trading conditions.¹⁰⁰ The Member States are thus required to create favorable circumstances for foreign suppliers in order to meet their legitimate expectation that the Member State will not enforce such regulatory requirements that go against the anticipation of the foreign producers to trade under fair market conditions. Protection of legitimate expectations, being a part of the basic principle of national treatment under GATT, requires that the treaty obligations should be upheld in good faith.¹⁰¹

57. This regulatory requirement under the Notification disrupts the stability and predictability of trading conditions by creating unfavorable conditions for foreign producers. In the present case, the exemption of electricity bills followed by the provision of favorable land on the condition of conducting transactions with the domestic suppliers only, results in creating unequal competitive opportunities to them, violating the national treatment commitment undertaken by Anduin under the GATS. As the foreign producers of technological equipment

⁹⁸ Appellate Body Report, *Korea-Various Measures on Beef*, *supra note* 85. ¶¶ 135–137.

⁹⁹ MARION PANIZZON: GOOD FAITH IN THE JURISPRUDENCE OF THE WTO, THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT, OXFORD AND PORTLAND, OREGON 131 (2006).

¹⁰⁰ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 82, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted Jun. 22, 1998) [hereinafter *EC – Computer Equipment*].

¹⁰¹ Michael Byers, *Custom, Power, and the Power of RULES* 17 MICH. J. INT'L L. 107 (1995).

legitimately expected that Anduin would abide by its national treatment obligations that it had undertaken being a member to the WTO, the notification released by Anduin is a form of a measure that violates such legitimate expectations of foreign producers by adopting measures that provide a less favorable treatment to them.

3.2. The reduction of annual electricity bill by 5% and land allocation policy, is a prohibited subsidy within the meaning of Article 3.1(b) of the SCM Agreement.

3.2.1. The 5% exemption in the annual electricity bill and land allocation policy vide Notification No. 21/2019 are subsidies in the form of ‘income or price support’.

58. A contracting party is under the obligation to limit such subsidies that are, directly or indirectly, prejudicial to the interests of any other contracting party and have an effect of reducing imports of any like products, as stipulated by Article XVI:1 of the GATT. If a contracting party provides any financial support in the form of income or price support with the intention of conferring benefit to specific domestic producers¹⁰², it amounts to a subsidy.¹⁰³ The provision of items and services could also amount to be a “financial contribution”.¹⁰⁴

59. If a government measure directly or indirectly affects the income of the industry who is receiving the benefits, such measures would fall under ‘any form of income support’ even if it does not involve direct financial contribution.¹⁰⁵ It could also be in the form of immovable property.¹⁰⁶ In addition to being an income or price support in order to be a subsidy, the government support should also confer a benefit, as stipulated by Article 1:1(a)(2) of the SCM Agreement. This requirement implies that there should be actual recipients of benefits. In the present case, the beneficiaries are the data centers who comply with the conditions set out in the Notification.

60. As a consequence of subsidization, the requirements under the Notification violate the fundamental principles of the WTO of promoting international trade by promoting

¹⁰² Agreement on Subsidies and Countervailing Measures art. 1. 1 (b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

¹⁰³ World Trade Report, *Exploring the Links between Subsidies, Trade and the WTO* (WORLD TRADE ORGANIZATION ED., 2006), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf.

¹⁰⁴ Meti Journal, Ministry of Economy, Trade and Industry, Chapter 7, Subsidies and Countervailing Measures. (https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_09.pdf).

¹⁰⁵ Prof. Dr. Jan Wouters & Dominic Coppens, *An Overview of the Agreement on Subsidies and Countervailing Measures – Including a Discussion on the Agreement on Agriculture* (Institute for International Law Working Paper No. 104, (2007), <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP104e.pdf>).

¹⁰⁶ Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 7.23–7.30, ¶ 58–60, WTO Doc. WT/DS257/R (adopted Feb.17 2004) [hereinafter *Panel Report, U.S. – Lumber CVDs Final*].

protectionism and hindering progressive liberalization. Anduin, as a Member State, is obligated to create a competitive environment and not discriminate between domestic and foreign producers of equipment by affording protection to domestic production.¹⁰⁷

3.2.2. The 5% exemption in the annual electricity bill and land allocation policy vide Notification No. 21/2019 are prohibited subsidies.

61. As subsidies may create unfavorable environment for foreign producers and thus may have a negative impact on trade, the SCM Agreement imposes strict disciplines on their use.¹⁰⁸ Article 3:1(b) of the SCM Agreement covers the subsidies that are contingent upon the use of domestic products instead of imported products. Such subsidies are import substitution or local content subsidies.¹⁰⁹

62. The contingency upon the use of domestic over imported goods was deemed to exist if there was a requirement to be fulfilled in order to receive the subsidy by the Appellate Body in *US – Tax Incentives*¹¹⁰. This necessarily means that the subsidy must be conditional. The Panel in *United States — Tax Treatment for ‘Foreign Sales Corporations’* also laid down a similar view that a subsidy is contingent upon the use of domestic over imported products if the recipient of the benefits fulfils certain conditions.¹¹¹

63. A de jure prohibited subsidy is deemed to exist if the conditions to grant subsidies are laid down in the very words of the relevant regulation.¹¹² If subsidies are provided in a discriminatory manner on the basis of the origin of the products, they are ‘preferential subsidies for domestic products’.¹¹³

64. In the present case, Anduin explicitly lays down in the Notification that only those data centers that would purchase more than 50% of the technological equipment from the domestic producers were to get benefits from the state. The benefits were 5% exemption in the annual

¹⁰⁷ Appellate Body Report, *EC- Asbestos*, *supra* note 45, ¶ 93 & 98.

¹⁰⁸ Meti Journal, Ministry of Economy, Trade and Industry, Chapter 2, National Treatment Principle (<https://www.meti.go.jp/english/report/downloadfiles/gCT0322e.pdf>).

¹⁰⁹ Appellate Body Report, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.6, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013) [hereinafter Appellate Body Report, *Canada – Renewable Energy*].

¹¹⁰ Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, ¶ 5.7, WTO Doc. WT/DS487/AB/R (adopted Sept. 22, 2017) [hereinafter Appellate Body Report, *US – Tax Incentives*].

¹¹¹ Panel Report, *United States — Tax Treatment for “Foreign Sales Corporations”*, ¶ 5.7, WTO Doc. WT/DS108/R, adopted Jan. 29, 2002, [hereinafter Panel Report, *US – FSC (Article 21.5 – EC)*].

¹¹² Appellate Body Report, *US – Tax Incentives*, *supra* note 110, at 115, ¶ 5.12.

¹¹³ Meti Journal, Ministry of Economy, Trade and Industry, Chapter 7, Subsidies and Countervailing Measures. (https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_09.pdf).

electricity bills and provision of land in the eastern part of Anduin where the climate was more favorable to build data centers. These benefits amount to import substitution subsidies that are de jure contingent upon the use of domestic over imported goods and are thus prohibited subsidies under Article 3:1(b).

3.3. The measures required under Official Notification No. 21/2019 confer ‘less favorable treatment’ to foreign producers of technological equipment as compared to ‘like’ domestic producers thereby violating Article III:4 of GATT.

3.3.1. Anduin has not provided equality of competitive opportunities to the like products of domestic and foreign product developers.

65. The applicability of Article III:4 extends to the conditions that an enterprise has to fulfill in order to receive a benefit, in addition to binding requirements.¹¹⁴ In the present case too, Anduin enacts similar regulatory requirements which give concessions to the data centers which purchase technological equipment from domestic producers while not providing similar benefits to the purchasers of imported technological equipment. This distorts consumer choice between these categories of technology equipment and consequently creates an imbalance in the competitive environment. In the determination of whether a measure is applied with the intention of affording protection to domestic products, the regulatory purpose of the measure should also be considered.¹¹⁵

66. A treatment may be less favorable even if it is from the application of ‘formally identical’ legal provisions if such treatment does not effectively provide equality of opportunities.¹¹⁶ The Notification published by Anduin is a formally identical measure. However, it still does not provide effective equality of opportunities because it is evident that the requirements set out in the Notification are more difficult to comply for foreign producers than it is for the domestic producers. Therefore, it creates problems for foreign like products to sustain in the market.

3.3.2. Official Notification No. 21/2019 is violative of Article III:4 of the GATT even though it is a non-mandatory measure.

67. The measures that are accepted by an enterprise voluntarily in order to obtain a government-provided benefit are also included within the term “laws, regulations or requirements” under

¹¹⁴ Panel report, *European Economic Community - Regulation on Imports of Parts and Components*, ¶ 5.20–5.21, WTO Doc. L/6657 (adopted May 16, 1990) [hereinafter Panel Report, *EEC- Parts and Components*].

¹¹⁵ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, ¶ 62, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted Jan. 12 2000) [hereinafter Appellate Body Report, *Chile-Alcoholic Beverages*].

¹¹⁶ Panel Report, *US – Section 337*, *supra* note 81, ¶ 5.11.

Article III:4 of the GATT.¹¹⁷ Even if an obligation is voluntarily accepted by an enterprise in order to obtain a benefit from the government, such an obligation falls within the meaning of the term ‘requirement’.¹¹⁸ Thus, a measure need not be binding in order to fall within the meaning of Article III:4 of the GATT.

68. The Notification laid down the condition that the data centers must purchase more than 50% of the technological equipment from the developers of Anduin. The fulfillment of this condition would make the data centers eligible to get 5% exemption from the annual electricity bill and land in the colder part of Anduin that has a suitable environment for building data centers. Here, even though the fulfillment of the condition is not a mandatory measure, it is still violative of Article III:4 of the GATT because it has to be followed by the data centers in order to get advantages from the government of Anduin.

3.3.3. The measure confers ‘less favorable treatment’ to foreign producers of technological equipment as compared to like domestic producers.

69. The internal regulations which seek to exclude the possibility of purchase of imported products without any qualifications clearly provide less favorable treatment to imported products and are thus inconsistent with Article III:4.¹¹⁹ A treatment is deemed to be less favorable if it is not equivalent to the best treatment accorded to like products.¹²⁰ A National Treatment breach occurs when less favorable treatment is accorded to foreign goods in a discriminatory manner as compared to the domestic goods.¹²¹

70. In the present case, the measure under the Notification goes against the standard that any preferential treatment provided to the domestic product supplier shall also be provided to the foreign product supplier in like circumstances.¹²² The Panel Report on *Italian Discrimination against Imported Agricultural Machinery* laid down that the GATT was clearly drafted with the intention of treating imported products in the same manner as the like domestic products,

¹¹⁷ Panel Report, *EEC- Parts and Components*, *supra* note 114, ¶ 5.21.

¹¹⁸ Panel Report *India-Autos*, *supra* note 92, ¶ 7.190–7.191.

¹¹⁹ Panel Report, *Canada - Administration of the Foreign Investment Review Act*, ¶ 5.8, WTO Doc. L/5504 (adopted Feb.7, 1984) [hereinafter *Canada – FIRA*].

¹²⁰ International Convention on the Settlement of Investment Disputes Reports Volume 7.

¹²¹ ROBERT E. HUDEC, *supra* note 95.

¹²² *Pope & Talbot Incorporated v. Government of Canada*, Interim Award, Ad Hoc Tribunal (UNCITRAL), IIC (2000), ¶ 42; *Methanex Corporation v. Unites States*, Final Award on Jurisdiction and Merits, Ad Hoc Tribunal (UNCITRAL), (2005) 44 ILM 1345 (2005) at Part IV-Chapter B ¶ 21.

or otherwise providing indirect protection to them in order to provide similar opportunities to the foreign like products.¹²³

71. The major requirement for providing equivalent treatment to like products of foreign and domestic origin is providing equality of opportunities.¹²⁴ The Panel Report on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* has reiterated that in order to accord imported products competitive opportunities no less favorable than those provided to domestic products, Article III:4 shall be interpreted in a manner so as to accord equivalent treatment to imported products and domestic products.¹²⁵

72. Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.¹²⁶ In order to have equality of competitive opportunities, it is necessary for imported like products to get similar treatment as the domestic products through regulatory requirements. Through the enactment of regulatory requirements that treat foreign and domestic like products discriminatorily, Anduin fails to create a fair competitive environment for foreign like products. Thus, the Notification fails to provide equality in competitive opportunities for the foreign producers of technological equipment.

¹²³ Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, WTO Doc. L/833, adopted 23 October 1958, BISD 7S/60, ¶ 11.

¹²⁴ GATT Analytical Index 171, ¶ 265.

¹²⁵ Panel Report, *US- Section 377*, *supra note* 81; Panel Report, *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, ¶ 5.12, WTO Doc. DS17/R (adopted Feb. 18 1992) [hereinafter *Canada – Provincial Liquor Boards (EEC)*].

PRAYER

For the above-mentioned reasons, the complainant respectfully requests that this Court DECLARE that:

1. The imposition of data localization requirements under the Social Media Regulations Act violates Anduin's market access obligations under Article XVI (1) of the GATS relating to CPC 7523 under GATS.
2. The requirement to share source code with Anduin in accordance with the Social Credit Plan is in violation of Article XVII (1) of the GATS.
3. The reduction of annual electricity bills by 5% and land allocation policy *vide* Notification No. 21/2019 constituted less favorable treatment to foreign producers as compared to domestic producers of equipment for data centers as per Article III: 4 of the GATT.