

**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 RESPONDENT-

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LIST OF ABBREVIATIONS

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
<i>Id.</i>	<i>Ibidem</i>
NLG	National Liberation Group
No.	Number
SCM	Subsidies and Countervailing Measures
UN	United Nation
US	United State
v.	<i>Versus</i>
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 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*.

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 IS IN LINE WITH ANDUIN'S GATS SCHEDULE OF COMMITMENTS.

- 1.1. Anduin has not undertaken Market Access Obligations for Computer and Related Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS.
- 1.2. Anduin's data localization requirements does not prohibit mode 1 and mode 3 of supply, for Computer and Related Services within the meaning of Article I:2 of the GATS.
- 1.3. The data localization requirements do not accord "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 B-CONNECTED IN ACCORDANCE WITH THE SOCIAL CREDIT PLAN IS NOT IN VIOLATION OF ARTICLE XVII (1) OF THE GATS.

- 2.1 Anduin has not undertaken a national treatment commitment in the sector of Computer and related services within the meaning of Article XX: 1(b) of GATS.
 - 2.1.1 Anduin has not committed to a full national treatment commitment for Computer and Related services in the context of Article I:2 (c).
 - 2.1.2 The services provided by B-Connected and *Let's Talk* are not 'like' services.
- 2.2 Anduin was within the limits of WTO law for seeking source code from foreign social media firms in accordance with Article XIV (c)(2) of GATS.
 - 2.2.1 The measure falls within one of the legitimate non-trade interests outlined in XIV (c) (iii).
 - 2.2.2 The measure was applied in the facts of the dispute in a manner consistent with the *chapeau* of Article XIV of the GATS.

2.3 Anduin had the right to implement measures which it considered necessary for maintaining public order as well as for the protection of its essential security interests under Article XIV of the GATS.

2.3.1 Anduin had the right to implement measures which it considered necessary for maintaining public order under Article XIV (a) of GATS.

2.3.2 Anduin had the right to implement measures which it considered necessary for the protection of its essential security interests under Article XIV bis of GATS.

3. THE REDUCTION OF ANNUAL ELECTRICITY BILLS BY 5% AND LAND ALLOCATION POLICY *VIDE* NOTIFICATION NO. 21/2019 DID NOT CONSTITUTE 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 released by Anduin is a measure is necessary to achieve a purported legitimate policy under the Social Credit Plan.

3.1.1 The provisions under Official Notification No. 21/2019 are not anti-competitive and do not disrupt conditions for fair-competition.

3.1.2 The requirements under official Notification 21/2019 are not against the legitimate expectation of foreign services suppliers.

3.2 The reduction of annual electricity bill by 5% and land allocation policy, is a not prohibited subsidy within the meaning of Article 3.1(b).

3.2.1 The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are not subsidies in the form of income or price support within the meaning of Article XVI of GATT 1994.

3.2.2 The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are not prohibited subsidies within the meaning of 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 Official Notification No. 21/2019 is not in violation of Article III:4 of the GATT as it is a non-mandatory measure.

3.3.2 Anduin is may accord more favorable treatment to data centers using domestic technology under Article III:8(a) of GATT.

SUMMARY OF PLEADINGS

ARGUMENT 1

The imposition of data localization requirements under the Social Media Regulations Act is in line with Anduin's GATS schedule of commitments. This is based on three grounds:

Firstly, Anduin has not undertaken Market Access Obligations for Computer and Related Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS. Baranduin had mischaracterized the classification of services provided by social media platforms like *B-Connected* and *Let's Talk*, which fall within the sub-sector 'Computer and Related Services.' Although Anduin has undertaken a market access commitment in relation to Computer and Related Services through cross-border mode of supply, it retains its rights to enforce limitations through the Commercial Presence mode of supply.

Secondly, Anduin's data localization requirements do not prohibit mode 1 and mode 3 of supply, for Computer and Related Services within the meaning of Article I:2 of the GATS. The data localization requirements under the Social Media Regulation Act are a WTO-consistent alternative measure, necessary for the maintenance of public order and national security, in the aftermath of a terrorist attack and does not constitute a prohibition in cross border mode of supply. Anduin's lack of commitment in Computer and Related Services through Commercial Presence gives it the right to introduce any measures that might restrict or limit the ability of other service suppliers, so the requirements do not constitute a prohibition in commercial presence mode of supply.

Thirdly, The data localization requirements do not accord "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 because they are necessary measures for the maintenance of public order and national security and do not impose any restriction in cross border supply of service. It is not against Anduin's Schedule of Commitments that Anduin enact a WTO-consistent alternative measure in order to achieve a necessary objective.

ARGUMENT 2

The requirement for Foreign Social Media firms to provide their source code to the Anduin Government is not in violation of Article XVII: 1 of GATS for the following reasons:

Firstly, Anduin has not undertaken a national treatment commitment in the sector of Computer and related services under GATS and thus there exists no obligation upon Anduin to limit itself from regulating the companies established within its territory. Moreover, the services provided by *B-Connected* and *Let's Talk* are not like services within the meaning of GATS. Without the establishment that two services are not like services, similar national treatment cannot be required. *Secondly*, Anduin was well within the limits of WTO law for seeking source code from foreign social media firms in accordance with Article XIV:2(c) of GATS. The people who were involved in previous attacks in Anduin were members of NLG living in the demarcated zones. The monitoring of these people was thus essential to integrate them into the Anduinian society. It is done purely in good faith as the government simply wishes to monitor the data of the refugees and has not expressed any intention of processing or manipulation of the data at all and therefore does not infringe the privacy rights of the refugees.

Thirdly, Anduin had the right to implement measures which it considered necessary for maintaining public order as well as for the protection of its essential security interests under Article XIV of the GATS. Anduin had the right to implement measures which it considered necessary for maintaining public order under Article XIV (a) of GATS. The measure requiring the source code is a legitimate non-trade interest initiated primarily to bring into effect a government policy that seeks to establish social order in Anduin. The Social Credit Plan aims to limit the activities of embezzlement, engagement of individuals in criminal activities inside the zones and to prevent fraudulent activities. Moreover, Anduin had the right to implement measures necessary for the protection of its security interests under Article XIV *bis* of GATS. Earlier situations of the attacks created a turmoil in Anduin. This required the Anduin government to remain vigilant and thus the background check of the refugees is deemed necessary to protect security of Anduin. This led the Anduin government to consider the monitoring of refugees as the best alternative for status quo as there had been speculations that terrorists had entered the land of Anduin under the veil of refugee.

ARGUMENT 3

The reduction of annual electricity bills by 5% and land allocation policy *vide* Notification No. 21/2019 did not constitute less favorable treatment to foreign producers as compared to domestic

producers of equipment for data centers as per Article III: 4 of the GATT. This claim is based on the following arguments.

Firstly, the Notification released by Anduin is a measure is necessary to achieve a purported legitimate policy under the Social Credit Plan. The measures are not anti-competitive and do not disrupt conditions for fair-competition as it seeks to achieve the mandate of promoting domestic products to enable them to compete with imported products. The requirements under the Notification are also not against the legitimate expectation of foreign services suppliers as legitimate expectations only protect the price effect of the regulatory measures and the Notification does not have a price effect on the foreign producers.

Secondly, the reduction of annual electricity bill by 5% and land allocation policy, is a not prohibited subsidy within the meaning of Article 3.1(b). The 5% exemption in the annual electricity bill and land allocation policy under the Notification are not subsidies in the form of income or price support within the meaning of Article XVI of GATT 1994 as the Notification does not confer any form of financial contribution to specific data centers. The concessions under the Notification are also not prohibited subsidies within the meaning of Article 3:1(b) of the SCM Agreement as the Notification is not a law in itself, rather it is a scheme to facilitate the Social Credit Plan.

Thirdly, the measures required under the Notification No. 21/2019 do not confer ‘less favorable treatment’ to foreign producers of technological equipment as compared to ‘like’ domestic producers, thus do not vioalte Article III:4 of GATT. The Notification is a non-mandatory measure that does not fall under the purview of Article III:4 of GATT. Anduin is may accord more favorable treatment to data centers using domestic technology under Article III:8(a) of GATT as the Notification was a measure adopted under the data localization plan and was thus for government procurement purposes.

LEGAL PLEADINGS

1. THE IMPOSITION OF DATA LOCALIZATION REQUIREMENTS UNDER THE SOCIAL MEDIA REGULATIONS ACT IS IN LINE WITH ANDUIN'S GATS SCHEDULE OF COMMITMENTS.

1.1 Anduin has not undertaken Market Access Obligations for Computer and Related Services in its Schedule of Specific Commitments under Article XX:1(a) of the GATS.

1. 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.

2. A member's specific commitment in any sector is a guarantee that the whole of that sector including all services are covered by the commitment.¹ The coverage of a service transaction is only ensured when there are commitments in each relevant mode of supply.² A member's schedule is a record of legal commitments. Consequently, everything in the schedule is legally binding.³

3. Article XVI:1 encompasses market access commitments guaranteed by a member through any of the modes of supply inscribed in Article I:2.⁴ A full market access 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.⁵ Whereas the term 'unbound' indicates an absence of commitment and obligation. The

¹ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.290, WTO Doc. WT/DS285/R (adopted on 20 April 2005) [hereinafter, Panel Report, *US – Gambling*]

² 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]

³ *Id.* ¶ 3.

⁴ 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].

⁵ GNS, Scheduling Of Initial Commitments In Trade In Services: Explanatory Note, Gatt Doc. Mtn.Gns/W/164, ¶ 24; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 215, WTO Doc. WT/DS285/AB/R (adopted on 20 April 2005) [hereinafter, Appellate Report, *US – Gambling*]

Scheduling Guidelines makes it clear that inscribing the word ‘unbound’ in its GATS Schedule retains the freedom of a Member to introduce measures inconsistent with market access.⁶

4. Baranduin mischaracterized the classification of supplied service, which should fall within the sub-sector ‘Computer and Related Services.’ Even though the sector excludes data and message transmission services, the posting of photos and videos, a feature shared by most social media platforms like *B-Connected* and *Let’s Talk* alike, all happen through the structured databases located in their respective countries through a common communication network, the Internet. Hence, social media platforms, *B-Connected* and *Let’s Talk* are data base services⁷ and fall under ‘Computer and Related Services’.

5. Anduin has enlisted Computer and Related Services in its Schedule of Specific Commitments.⁸The Computer and Related Services sector is identified in the Secretariat Services Sectoral Classification list⁹ by the Corresponding Central Product Classification Number¹⁰ (CPC) 844 which includes data base services.

6. It is established that Anduin has undertaken a market access commitment in relation to Computer and Related Services through cross-border mode of supply by having marked ‘None’ in the Market Access column of its schedule.

7. However, Anduin retains its rights to enforce limitations through the Commercial Presence. Anduin has not undertaken any market access commitment through the mode Commercial Presence in its Schedule by having marked ‘Unbound’ in the Market Access column of its schedule. This establishes the primary intention of Anduin to retain limitations on market access to its Computer and Related Services suppliers. Therefore, Anduin is under no constraint or obligation to grant market access within the terms of Article XVI:2." This also implies the right for Anduin to implement any regulatory measure it deems necessary for the services provided through Commercial Presence, which includes data localization requirements.

⁶ 2001 Scheduling Guidelines, *supra* note 2, ¶ 18.

⁷ Moot Problem, Annex 2

⁸ Moot Problem, Annex 2.

⁹ Services Sectoral Classification List, MTN.GNS/W/120, Special Distribution (July 10 1991).

¹⁰ 2001 Scheduling Guidelines, *supra* note 2, ¶ 23.

1.2 Anduin’s data localization requirements do not prohibit mode 1 and mode 3 of supply, for Computer and Related Services within the meaning of Article I:2 of the GATS.

8. The ordinary meaning of 'cross-border' indicates a service supplied from the territory of one Member into the territory of another Member.¹¹ Hence the computer and related service provided by B-Connected is a service supplied from Baranduin into the territory of Anduin and falls under the cross-border mode of supply.

9. The Appellate Body in *Korea – Beef* sets out that in determining whether a WTO-consistent alternative measure exists, it should be considered whether the alternative measure contributes to the realization of the end pursued.¹² Additionally, if the common interests or values pursued are vital and important, the measures designed to achieve those ends will be deemed “necessary”.¹³

10. In our case, the objective pursued by the Social Media Regulation Act is maintenance of public order and national security, in the aftermath of a terrorist attack. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether the alternative measure would achieve the end envisioned and is less restrictive of trade than a prohibition.

11. The data localization requirements under the Social Media Regulation Act restrict the cross-border transfer of data through its sections 3, 5 and 8.¹⁴ This limitation on the dissemination of data is crucial for Anduin to prevent any future terrorist attacks that might be coordinated through the help of social media platforms. It has been successful in preventing the terrorist attacks because after the implementation of this act, no untoward incidents have been reported. Furthermore, these requirements do not constitute a restriction in trade because there are three social media platforms, among which two are foreign owned, that are in operation in Anduin.¹⁵

12. Therefore, the data localization requirements under the Social Media Regulation Act is a WTO-consistent alternative measure, necessary for the maintenance of public order and national security,

¹¹ WTO Analytical Index, GATS – Article I (Jurisprudence) (June 2019) ¶ 12.

¹² Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶ 163 and 166, WTO Doc. WT/DS161/AB/R (adopted 10 January 2001) [hereinafter, Appellate Body Report, *Korea – Beef*]

¹³ *Id.* at ¶ 162.

¹⁴ Moot Problem, ¶ 26.

¹⁵ Moot Problem, ¶ 27.

in the aftermath of a terrorist attack and does not constitute a prohibition in cross border mode of supply.

13. The Panel in *US-Gambling*, expresses that the United States had "an obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services".¹⁶ Because the United States had not engaged in such consultations with Antigua, the Panel found that the United States had not established that its measures are "necessary" and, therefore, provisionally justified under Article XIV(a).¹⁷

14. In our case, the Ministry of Information and Technology of Anduin held consultations with B-Connected and *Let's Talk* to prepare a draft of the Social Media Regulation bill.¹⁸ The bill was then presented to the Parliament, which was signed into law.¹⁹ Since Anduin had engaged in consultations with Baranduin's service supplier before the imposition of data localization requirements, the measures are "necessary" and provisionally justified.

15. Commercial presence is defined as services delivered within the territory of the Member, through the commercial presence of the supplier. In accordance with Art. I:2 lit. c, commercial presence means any type of business establishment within the territory of a Member for the purpose of supplying a service.²⁰ 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.²¹ Therefore, B-Connected's local office is a representative office that provides Computer and Related Services in the territory of Anduin through the mode of Commercial Presence.

16. A Member who remained unbound concerning market access is allowed to introduce discriminatory quantitative restrictions or other limitations within the meaning of Art. XVI.²²

¹⁶ Panel Report, *US Gambling*, *supra* note 1, ¶ 6.531.

¹⁷ *Id.* ¶ 6.533-6.535.

¹⁸ Moot problem, ¶ 25.

¹⁹ Moot Problem, ¶ 26.

²⁰ RÜDIGER WOLFRUM, *supra* note 4, ¶ 71 at 64.

²¹ 2001 Scheduling Guidelines, *supra* note 2, ¶ 32; Article XXVIII, GATS.

²² RÜDIGER WOLFRUM, *supra* note 4, ¶ 62 at 418.

Anduin's lack of commitment in Computer and Related Services through Commercial Presence gives it the right to introduce any measures that might restrict or limit the ability of other service suppliers. Therefore, the data localization requirements are in line with Anduin's market access commitment for Computer and Related Services through Commercial Presence and do not constitute a prohibition in Mode 3 of supply.

1.3 The data localization requirements do not accord "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.

17. The meaning set out in the words and context of Article XVI, confirms that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article."²³ The data localization requirements in the Social Media Regulation Act do not fall within the impermissible 'limitations' set out in the subparagraphs of Article XVI:2 because they do not limit the number of service suppliers in Anduin.²⁴ Hence, those requirements do not constitute a restriction in market access and do not accord "less favorable" treatment

18. Even if a measure would fall under the limitations under Article XVI:2, a member retains the ability to apply any of the measures of Art. XVI:2 when it has inscribed "unbound" in the relevant market access column of its Schedule.²⁵

19. Article XVIII acknowledges that there are measures other than those subject to scheduling under Article XVI which can still affect market access. Thus, this provision supports the view that the absence of the limitations listed in Article XVI in a Member's Schedule does not ipso facto mean that this Member allows for full market access.²⁶ This interpretation is in line with the

²³ Panel Report, *US - Gambling*, *supra* note 1, ¶ 6.318.

²⁴ Moot Problem, ¶ 27.

²⁵ RÜDIGER WOLFRUM, *supra* note 4, ¶ 74 at 392.

²⁶ The Interaction Between GATS Articles VI, XVI, XVII and XVIII after the US – Gambling Case Working Paper No 2006/JUNE 9, 2006 at 8.

principle of progressive liberalization as well as Members' right to regulate.²⁷ Such an interpretation is also corroborated by the US – Gambling case law.²⁸

20. 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.²⁹

21. 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.³⁰

22. As established earlier, the data localization requirements under the Social Media Regulation Act are a necessary measure for the maintenance of public order and national security. It is not against Anduin’s Schedule of Commitments that Anduin enact a WTO-consistent alternative measure in order to achieve a necessary objective.³¹ Furthermore, the requirements do not impose any restriction in cross border supply of service because it does not limit the number of service suppliers supplying the computer and related services as evident by the number of social media platforms in operation in Anduin.³² Therefore Anduin’s actual treatment is conformant with the minimum treatment of imposing no restrictions on market access through cross border set out in its Schedule.

23. Anduin’s lack of commitment in Computer and Related Services through Commercial Presence gives it the right to introduce any measures that might restrict or limit the ability of other service suppliers. Therefore, the data localization requirements are in line with Anduin’s market access commitment for Computer and Related Services through Commercial Presence and do not constitute a less favorable treatment.

²⁷ Panel Report, *US – Gambling*, *supra* note 1, ¶ 6.313-6.317.

²⁸ *Id.* ¶ 6.318; Appellate Body Report, *US – Gambling*, *supra* note 5, ¶. 215.

²⁹ Appellate Body Report, *US -Gambling*, *supra* note 5, ¶ 6.263.

³⁰ The Interaction Between GATS Articles VI, XVI, XVII and XVIII after the US – Gambling Case Working Paper No 2006/9 June 2006 at 7.

³¹ Appellate Body Report, *Korea – Beef*, *supra* note 12, ¶ 163 & 166.

³² Moot Problem. ¶ 27.

2. THE REQUIREMENT TO SHARE SOURCE CODE WITH B-CONNECTED IN ACCORDANCE WITH THE SOCIAL CREDIT PLAN IS NOT IN VIOLATION OF ARTICLE XVII (1) OF THE GATS.

24. A Member's right to pursue national policy objectives is recognized in the preamble of the GATS. National treatment is obligatory only to the extent a WTO Member chooses to impose it on itself by making a specific commitment in a services Sector.³³

25. It is hereby established that the source code requirement is not in violation of national treatment within the meaning of Article XVII(1) of the GATS for the reasons that: a) there exists no national treatment commitment in the related sector and that the involved services suppliers are not 'like', b) the measure taken was within the limits of WTO Law, c) the measure was implemented in order to maintain public order and to protect the security interests of Anduin.

2.1 Anduin has not undertaken a national treatment commitment in the sector of Computer and related services within the meaning of Article XX: 1(b) of GATS.

26. Article XVII:1 is obligatory only in a Sector in which a WTO Member has made a commitment, and the extent to which it is obligatory is subject to any conditions imposed by the Member. It is clear that the national treatment obligation under Article XVII of the GATS has an effect only if WTO Members have explicitly agreed on granting national treatment regarding specific sectors.³⁴

2.1.1: Anduin has not committed to a full national treatment commitment for Computer and Related services in the context of Article I:2 (c).

27. Anduin's specific commitments are those listed and bound in its GATS Schedule³⁵ on the basis of the UN Provisional Central Product Classification (CPC).³⁶ According to the applicant's argument, the services at issue fall under Telecommunication services. However, it is established

³³ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, (3rd ed. 2014) [hereinafter RAJ BHALA].

³⁴ PETER VAN DEN BOSSCHE, WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 391 (4TH ED. 2017) [hereinafter PETER VAN DEN BOSSCHE]

³⁵ Moot problem 13-15, Annex 1&2.

³⁶ United Nations Statistical Office, Provisional Central Product Classification, UN Doc.ST/ESA/STAT/SER.M/77 (New York: United Nations, 1991) (hereinafter CPC).

here that the service has been mischaracterized by the applicant and that Anduin has not made a specific commitment with respect to Computer and Related Services.

28. The source code was required from the social media companies in order for the government to access the online databases of people living in the zones so as to monitor their activity. Under Computer and Related services, database services are listed in the Provisional CPC as classification 844.

29. Anduin's Schedule distinguishes between commitments in respect of 'Telecommunication services', and those in respect of 'Computer and related services'.³⁷ Under 'Telecommunication services', Anduin has made commitments only in respect of certain services in classification 7523; that is, for data and message transmission services not database services.³⁸

30. The commitment to which the applicant refers, under CPC 7523, is listed in Anduin's Schedule of Specific Commitments only under 'Telecommunication Services'. It is not listed under 'Computer and related services which controls the source code requirement for the Social Credit Plan. Anduin has clearly specified in its schedule of specific commitments that it wishes to retain 'Unbound' limitations on the Commercial Presence of a service supplier of Computer and related services in terms of national treatment.³⁹ Anduin's specific commitments therefore do not extend, and were not intended to extend, to database services for computer and related services. In the absence of such a commitment, there can be no breach of Article XVII of the GATS.

2.1.2: The services provided by B-Connected and *Let's Talk* are not 'like' services.

31. The 'less favorable' treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers.⁴⁰ The Panel report in *Canada – Autos* determined that likeness had to be established for both services and service suppliers.⁴¹

³⁷ Moot problem, Annex 2.

³⁸ Moot problem, Annex 1.

³⁹ Moot Problem, Annex 2.

⁴⁰ Panel report *US - Gambling*, *supra* note 1. ¶ C-44.

⁴¹ *Id.*, ¶ C-45.

32. In the absence of ‘like’ domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS.⁴² In *US-Gambling*, a number of factors relevant to a determination of "likeness" in the services context. Such factors ranged from product characteristics, differences in the suppliers of such services.⁴³

33. The *compromis* establishes that there are two primary distinctions between *Let's Talk* and *B-Connected*: first, whereas *B-Connected* requires users to approve social connections, anyone could follow anyone on *Let's Talk*. Second, unlike *B-Connected*, *Let's Talk* does not have an internal messaging system. The differences in product characteristics hence, establishes that the two products aren't alike. This establishes that, the applicant has failed to make even a *prima facie* case regarding the first element of the test in respect of determination of like services in the context of the two social media platforms.

2.2 Anduin was within the limits of WTO law for seeking source code from foreign social media firms in accordance with Article XIV (c)(2) of GATS.

34. Art. XIV lit. c (ii) stipulates the significance of ensuring the privacy of individuals and acknowledges the protection of sensitive personal data. At the same time, a government is allowed to gain access to data held by private entities when such data is necessary to accomplish public goals and for public interest reasons such as those associated with the imminent risk to public security.⁴⁴ It is also understood that a test for achieving legitimate surveillance power involves the key principle that surveillance should be limited to specific national security objectives.⁴⁵

35. The execution of the attack in Anduin that killed over 1000 people, was planned through the internal messaging system of *B-Connected*. Further terror-related activities were anticipated by the Security Intelligence Unit of Anduin. The involvement of a private agency in surveillance can be

⁴² Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶10.283-10-289, WTO Doc. WT/DS139/R, WT/DS142/R (adopted June 19, 2000) [hereinafter Panel report *Canada – Autos*].

⁴³ Appellate Body Report, *European Communities Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99-103, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos*].

⁴⁴ Claire Bury, Midterm review of the Digital Single Market- a good moment to take stock (May 10, 2017) <https://ec.europa.eu/digital-single-market/en/content/mid-term-review-digital-single-market-dsm-good-moment-take-stock>.

⁴⁵ UNCTAD, DATA PROTECTION REGULATIONS AND INTERNATIONAL DATA FLOWS: IMPLICATIONS FOR TRADE AND DEVELOPMENT, 59, https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf

used for appropriate assistance in responding to a specific request.⁴⁶ The Social Credit Plan's primary objective is to uproot the risk of terrorism and violence in Anduin by eliminating the terrorists residing in Anduin as refugees. The major alternative sought by the government to execute this objective is monitoring these individuals' social behavior. Therefore, Anduin government seeking aid in the Social Credit Plan from *B-Connected* and others remains legitimate.

36. The Appellate Body confirmed in the *US—Gambling*, that the two-tier analysis developed by dispute settlement practice with respect to Art. XX GATT 1994⁴⁷ may be used *mutatis mutandis* for the application of the general exceptions clause under GATS.⁴⁸ Thus, the correct approach to interpreting Article XIV is to consider, first, whether or not the measure falls within one of the legitimate non-trade interests outlined in paragraphs (a)–(e) and, then, whether the measure is applied in the facts of the case in a manner consistent with the *chapeau*.

2.2.1. The measure falls within one of the legitimate non-trade interests outlined in XIV (c) (iii).

37. Art. XIV of GATS directly reflects a necessity test. Based on this understanding, the two-tier analysis consists of examining whether the measure addresses one of the interests of Art. XIV and, in the case of lit. a–c, is necessary to achieve the objective pursued.⁴⁹

38. In order for a measure to fall within the provision invoking this exception, it must be established that the measure for which justification is claimed “secures compliance” with other laws or regulations and those other “laws or regulations” are consistent with the GATS.⁵⁰ The Appellate Body, in interpreting Art. XX lit. d GATT 1994 which uses similar terms to Art. XIV lit. c, ruled that the term “laws or regulations” refers to “rules that form part of the domestic legal system of a WTO Member.”⁵¹ A Member can adopt any measure that it considers protects its

⁴⁶ *Id.*

⁴⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 115-116, WTO Doc. WT/DS58/AB/R (adopted Nov.6, 1998) [hereinafter Appellate Body Report, *US – Shrimp*].

⁴⁸ Appellate Body Report, *US—Gambling*, *supra* note 5, ¶ 292.

⁴⁹ RÜDIGER WOLFRUM, *supra* note 4.

⁵⁰ Appellate Body Report, *US—Gambling*, *supra* note 5, ¶ 6.536.

⁵¹ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶ 70, 79, WTO Doc. WT/DS308/AB/R (adopted Mar.24, 2006) [hereinafter *Mexico—Taxes on Soft Drinks*].

essential security interests, under Art. XIV of GATS, without applying an objective necessity test as the standard that determines the measure invoked as necessary.⁵²

39. In the present case, the measure is a regulatory requirement that demands the source code of a social media platform to be shared with the government of Anduin. This is initiated primarily to bring into effect a government policy, The Social Credit Plan which is a government policy envisaged to monitor the social behavior of the Endorian refugees in order to segregate the ones involved in terrorism and to incorporate only those with good social character into the Anduinian society.

40. The Intelligence Agencies of several countries had warned Anduin that international terrorists based in Endor may have entered Anduin posing as refugees. Soon after the Drina Massacre which resulted in the death of over 1000 Endorian civilians, explosive devices were detonated in front of four eminent political institutions in Anduin causing the death of 40 people and more than 100 injuries. The report of live high-grade explosives found in parking lots of hospitals and schools in four different cities brought into sight an even dangerous potentiality of the attack. It was conclusively established based on facts available that all involved persons are associated with the NLG, a political refugee organization. Thus, the measure requiring the source code of social media firms, adopted by Anduin, is a measure enacted solely for the purpose of protecting the national security interests of Anduin. Hence, it can be established that the source code requirement measure addresses the underlying interest of Art XIV (c) of the GATS.

2.2.2. The measure was applied in the facts of the dispute in a manner consistent with the *chapeau* of Art.XIV of the GATS.

41. The elements of the general principle of proportionality have been incorporated into the Article XX of GATT 1994, which can also be applied in the interpretation of Art XIV of the GATS. This stipulates that if the measure is provisionally justified it must be subsequently analyzed with respect to its compliance with the good faith principle of the *chapeau*.

⁵² RÜDIGER WOLFRUM, *supra* note 4, 337.

42. Members must employ the principle of proportionality in their domestic processes in order to ensure that their measures are not applied in an arbitrary or unjustifiable manner.⁵³ This is very closely analogous to the obligation of Members to observe due process and the abuse of rights doctrine of the principle of good faith, a broad principle under WTO Law⁵⁴, and it is better viewed in that context than as a proportionality requirement.⁵⁵

43. Sixteen people responsible for the attack in Anduin were Endorians who had sought refuge in Anduin and lived in different zones and were members of NLG. NLG is an informal political group formed by the coalition of the refugee youth living in the demarcated zones in Anduin. Moreover, the surveillance project was done with the consent of the refugees as a common *B-Connected* post released by all five NLG chapters had welcomed investigation into their day to day activities. The post also stated that the common intention of few people who happened to be members of a social media group cannot be attributed to all members of the group. However, after the occurrence of such grievous attacks in Anduin, it was necessary for the Anduin government to look into the background of all the refugees to recognize the actual culprits. This establishes that the requirement of the source code is a measure not in any manner inconsistent with the protection of privacy guaranteed by Art. XIV.

44. The most important thing to keep in mind when applying the principle of proportionality to Article XX of GATT 1994 is that WTO Members have the right to determine the level of protection of a protected non-trade interest that they consider appropriate in a given situation.⁵⁶

45. The Appellate Body in *Australia – Salmon* held that all Members have the ‘prerogative’ under the SPS Agreement to determine what the appropriate level of protection for them is.⁵⁷ Technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking

⁵³ Mads Andenas & Stefan Zleptnig, Proportionality and balancing in WTO law: a comparative perspective, 81-82, Cambridge Review of International Affairs, 20:1, 71-92, DOI: 10.1080/09557570701232233 (2007).

⁵⁴ Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, ¶ 81, WTO Doc. WT/DS192/AB/R (adopted Nov.5, 2001) [hereinafter Appellate Body Report, *US – Cotton Yarn*].

⁵⁵ ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES, 193 CAMBRIDGE UNIVERSITY PRESS (2008).

⁵⁶ Appellate Body Report, *EC – Asbestos*, *supra* note 43, ¶168.

⁵⁷ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶199, WTO Doc. WT/DS18/AB/R, (adopted Nov.6, 1998) [hereinafter Appellate Body Report, *Australia – Salmon*].

account of the risks non-fulfilment of the regulation would create. Such legitimate objectives are, *inter alia* national security requirements. Once a Member can establish that their objective is within one of the categories of exceptions, the legitimacy of that objective cannot be questioned.⁵⁸

46. The efficient enforcement of the Social Credit Plan may therefore, require treating Foreign Service providers differently from domestically established providers in terms of procedures and administrative controls. It upholds the principle of due process as the policy is brought out in accordance to the provisions of the Constitution of Anduin. It also establishes good faith as the government simply wishes to monitor the data of the refugees and has not expressed any intention of processing or manipulation of the data at all. This is further established by the government's respect to confidential data of the individuals during the enactment of the Social Media Regulation Act as well.

2.3 Anduin had the right to implement measures which it considered necessary for maintaining public order as well as for the protection of its essential security interests under Article XIV of the GATS.

47. The government of Baranduin, in the present case, claims that the requirement of source code from social media companies is a treatment less favorable to Foreign Service providers. Hence, as the responding party, a *prima facie* case to determine that such a measure is 'necessary' is hereby maintained.

2.3.1. Anduin had the right to implement measures which it considered necessary for maintaining public order under Article XIV (a) of GATS.

48. The Panel in *US-Gambling*, based itself on the relevant dictionary definition in finding the definition of the term 'order', read in conjunction with footnote 5 of the GATS, suggests that 'public order' refers to the preservation of the fundamental interests of society, as reflected in public policy and law. These fundamental interests can relate, *inter alia*, to standards of law and security.⁵⁹

⁵⁸ Andrew D. Mitchell, *Legal Principles in WTO Disputes*, page 194, CAMBRIDGE UNIVERSITY PRESS, 2008.

⁵⁹ Panel Report, *US—Gambling*, *supra* note 1, ¶ 6.467.

49. The Panel also established that the measures adopted to address concerns such as those pertaining to money laundering, organized crime, fraud⁶⁰ can be defined as measures that are designed to maintain public order within the meaning of Article XIV(a).⁶¹

50. In the present case, the Social Credit Plan was brought into play to limit the activities of embezzlement, engagement of individuals in criminal activities inside the zones and to prevent fraudulent activities. These measures are explicitly covered by the Panel Report. Thus, it can be maintained that the measure undertaken to enforce the Social Credit Plan is designed to maintain public order and to meet societal interests⁶² that fall under Art. XIV.

51. The general exception provision under Art. XIV allows Members to accommodate other policy goals pursued in line with domestic law and policy choices made in accordance with societal values and preferences.⁶³ The protection of interests such as public order requires the adoption of trade-restrictive measures, technically resulting in direct conflict with GATS obligations. Article XIV allows for the pursuit of legitimate non-economic policy goals.⁶⁴

52. It is therefore maintained that the concerns which the Social Credit Plan seeks to address fall within the scope of ‘public order’ under Article XIV(a). The requirement of source code in accordance with the Social Credit Plan, therefore, affirms the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements.

2.3.2. Anduin had the right to implement measures which it considered necessary for the protection of its essential security interests under Article XIV bis of GATS.

⁶⁰ Panel Report, *US—Gambling*, *supra* note 1, ¶ 6.486.

⁶¹ *Id.* ¶ 6.487.

⁶² MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY, 158 (2006) [hereinafter KRAJEWSKI].

⁶³ RAJ BHALA, *supra* note 33.

⁶⁴ *Id.*

53. Art. XIV**bis** provides for general security exceptions allowing derogation from any of the GATS provisions for security reasons. Under this provision, a Member may adopt any measure which it considers important to protect its essential security interests.⁶⁵ The *raison d'être* of the security exception under Article XIV *bis* of the GATS is to preserve Members' freedom of action in areas relating to national defence and security.⁶⁶

54. Practices under WTO demonstrates that potential threats have been considered to be on an equal footing with actual threats. The coverage of potential threats under Art. XIV**bis** seems plausible, as Members are entitled to define what they consider 'necessary' for the protection of their national interests.⁶⁷ This inherently implies a member's power to take preventive action, to the extent that it responds to what is an essential interest.⁶⁸

55. Subsequently after the Drina Massacre, explosive devices were detonated in front of four eminent political institutions in Anduin causing 40 human deaths and more than 100 injuries. Live high-grade explosives were also found in parking lots of hospitals and schools in four different cities. Based on conclusive facts and evidences, it was established that that all involved persons are associated with the NLG and had planned the execution of the attack through the internal messaging system of *B-Connected*. The Security Intelligence Unit of Anduin was able to apprehend those involved in the attack in a timely manner because of the assistance of *B-Connected* executives.

56. In the present case, previous scenarios of the potentiality of the attack turning real also makes the Anduin government remain vigilant and thus the background check of the refugees is deemed necessary. In order to bring into effect, the measure concerning the background check, the requirement of data access from social media firms is extremely important as previous attack communications have been done via social media especially *B-Connected*.

⁶⁵ RÜDIGER WOLFRUM, *supra* note 4, 337.

⁶⁶ *Id.* at 331.

⁶⁷ MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND, ¶ 15, WTO Doc. MTN.GNG/NG7/W/16 (Aug. 18, 1987).

⁶⁸ Raj Bhala, *National Security and International Trade Law: What the GATT Says, and what the United States Does Symposium on Linkage as Phenomenon: An Interdisciplinary Approach*, 263, 19 U. Pa. J. Int'l L. 263 (1998). Available at: <https://scholarship.law.upenn.edu/jil/vol19/iss2/4>

57. As acknowledged by the Panel in *U.S.-Gambling*,⁶⁹ GATS explicitly recognizes the sovereign right of a member to regulate services and provides flexibility for members to regulate in order to pursue public policy objectives.⁷⁰ A members' retention of considerable regulatory flexibility to override their GATS commitments under the policy exceptions is recognized by the GATS generally, to global e-commerce.⁷¹ Thus, the discussion of a members' rights under GATS to exercise autonomy in domestic regulations with respect to e-services provided to residents of a member state, directly involves issues of national sovereignty.⁷² In the present case, Anduin can therefore, use wide discretion in determining what they consider necessary to protect their interests.

58. Art. XIVbis:1 *lit. c* provides that nothing in the GATS shall be construed to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. The right of WTO members to regulate measures in order to meet national policy objectives is consistent with the international law principle recognizing a nation's sovereignty in the conduct of its national policies in its territory.⁷³ The decisions made by the UN Security Council, implies that appropriate action may be taken, if the essential security interests of Members are affected and that it creates a situation of actual or potential threat. This sovereign right remains in line with Art. 103 of the UN Charter as well.

59. Accordingly, the various trade restrictions illustrated by the Security Council under Chapter VII, while incompatible with substantive provisions and commitments under GATS, are justified, as they fall within the security exceptions provision.⁷⁴

60. The requirement of applying a given measure in a manner that does not lead to arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services, aims to ensure that a Member's right to invoke Art. XIV is exercised reasonably and in a manner that does not unduly

⁶⁹Panel Report, *US-Gambling*, *supra* note 1, ¶ 6.316.

⁷⁰Panel Report *US-Gambling*, *supra* note 1, ¶ 6.314.

⁷¹RAJ BHALA, *supra* note 33.

⁷² 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).

⁷³ Jan Wouters & Dominic Coppens, *Domestic Regulation Within the Framework of GATS*, 5, (Inst. for Int'l Law, Working Paper No. 93, 2006), available at <http://www.law.kuleuven.be/iir/nlwp/WPIWP93e.pdf>.

⁷⁴ GATT, 605.

frustrate the rights of other Members.⁷⁵ The Panel in *US—Nicaraguan Trade*, recognized that the General Agreement protected each contracting party's essential security interests through Article XXI and that the General Agreement's purpose was therefore not to make contracting parties forego their essential security interests for the sake of these aims.⁷⁶

61. In *Argentina – Financial Services*, the Appellate Body explained that its interpretation of the legal standard of ‘treatment no less favourable’ was also supported by the structure of the GATS. Under this structure, Members could utilize certain flexibilities, available to them uniquely under the GATS, and their obligations are qualified by exceptions or other derogations contained in the GATS and its Annexes.⁷⁷ In sum, the limitations on national treatment are permissible with respect to scheduled Sectors as protection of national security is a legitimate objective.⁷⁸ This provision leaves it to each member to judge what actions it considers necessary for the protection of its essential security interests.⁷⁹

62. Therefore, the source code requirement by Anduin from foreign social media firms can avoid the consideration principles of progressive liberalization⁸⁰ and inherent limitations and hence is provisionally justified and does not amount to an abuse of the right to invoke an exception.

63. Moreover, it can be established that the actions of the NLG members involved in the attack and explosions constitute an extraordinary threat to the national security of Anduin. The fact that a solution to the dispute depended on the security situation can be emphasized based on Baranduin’s support to the President’s decision and statement that the sovereignty of a country is paramount. Hence, it can be demonstrated that the measures adopted by Anduin satisfies the requirements of the invoked defense.

⁷⁵ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter, *US-Gasoline*]; Appellate Body Report, *US—Shrimp*, ¶ 156.

⁷⁶ Panel Report, *United States — Trade Measures Affecting Nicaragua*, ¶ 5.16, WTO Doc. L/6053 (circulated Oct. 13, 1986) [hereinafter, Panel Report, *US—Nicaraguan Trade*].

⁷⁷ Panel Report, *Argentina— Measures Relating to Trade in Goods and Services*, ¶ 6.112, WTO Doc. WT/DS453/12 (adopted May 9, 2016) [hereinafter Panel Report, *Argentina – Financial Services*].

⁷⁸ Communication from Switzerland and Mexico, Proposal for Disciplines on Technical Standards in Services, Working Party on Domestic Regulation, ¶ 15, WTO Doc. S/WPDR/W/32 (Feb.1, 2005).

⁷⁹ Panel Report, *US—Nicaraguan Trade*, *supra* note 76, WTO Doc. L/6053, ¶ 1.2.

⁸⁰ RÜDIGER WOLFRUM, *supra* note 4, 331.

3. THE REDUCTION OF ANNUAL ELECTRICITY BILLS BY 5% AND LAND ALLOCATION POLICY *VIDE* NOTIFICATION NO. 21/2019 DID NOT CONSTITUTE LESS FAVORABLE TREATMENT TO FOREIGN PRODUCERS AS COMPARED TO DOMESTIC PRODUCERS OF EQUIPMENT FOR DATA CENTERS AS PER ARTICLE III: 4 OF THE GATT.

64. The Official Notification⁸¹ 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 does not violate Article III:4 of the GATT.

3.1 The Notification released by Anduin is a measure is necessary to achieve a purported legitimate policy under the Social Credit Plan.

65. A regulatory instrument that is enacted in order to achieve a purported legitimate policy does not violate the principle of non-discrimination contained in Article III of the GATT, even if it affects imported products as compared with their like domestic counterparts.⁸²

66. The requirement of purchasing at least 50% of the technological equipment from domestic producers under the Notification was set out as a measure of promoting the indigenous identity and proud heritage of Anduin, which is one of the mandates of the ruling party of Anduin.

3.1.1: The provisions under Official Notification No. 21/2019 are not anti-competitive and do not disrupt conditions for fair-competition.

67. 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

⁸¹ Moot problem, ¶ 27

⁸² GAETEN VERHOOSSEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT: ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY 2 ((Oxford- Portland Oregon 2002) [hereinafter GAETAN VERHOOSSEL].

discrimination.⁸³ However, just because a measure accords formal difference between imported products and their like domestic counterparts, it does not amount to a violation of Article III:4.⁸⁴

68. The possibility that the concessions being received by a Member State may be revoked or impaired has also been recognized, as shown by the exceptions in Article III, if there are compelling reasons to do so.⁸⁵

69. The Notification does not seek to put the foreign producers at a disadvantage as it is a non-mandatory measure; rather it only seeks to promote domestic products by giving them opportunities to compete with the imported products, as was mandated by the ruling party of Anduin. Additionally, the requirements were fulfilled not only by the data center of a domestic company, *Let's Talk*, but also by the data centers of two foreign companies. This goes on to show how the provisions under the Notification are non-discriminatory, and thus, are not anti-competitive and do not disrupt the conditions for fair competition.

3.1.2: The requirements under official Notification 21/2019 are not against the legitimate expectation of foreign services suppliers.

70. The underlying principle of Article III under the GATT concerning the protection of legitimate expectations imply that it offers only 'relative' protection.⁸⁶ The protection of "expectations" on the competitive environment of imported products and their like domestic products has been stipulated by Article III:4 of GATT.⁸⁷

71. Legitimate expectations only protect the price effect of the regulatory measures.⁸⁸ The price is affected if the measure creates an anti-competitive environment. However, in the present case,

⁸³ 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].

⁸⁴ Appellate Body Report, *Korea – Beef*, ¶ 135–137, *supra* note 12.

⁸⁵ WTO Analytical Index, Volume 1, 285.

⁸⁶ Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.86, WTO Doc. WT/DS44/5 (adopted Apr.22, 1998) [hereinafter Panel Report, *Japan – Film*]

⁸⁷ Panel Report, *United States Section 337 of the Tariff Act of 1930*, ¶ 5.11 and 5.13 WTO Doc L/6439, adopted Nov. 7 1989, BISD 36S/345 [hereinafter Panel Report, *US – Section 337*].

⁸⁸ Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, ¶ 147-8, WTO Doc. L/6627, (adopted Jan. 25, 1990) [hereinafter *EEC-Oilseeds I*]

concessions provided under the Notification do not have a price effect on the foreign producers of technological equipment. Hence the claims of legitimate expectations are not valid.

72. The ruling party of Anduin had the mandate of promoting domestic production in order to preserve the national identity of Anduin right from the start. This implies that the measures under the Official Notification No. 21/2019 were a consequence of the mandates of the ruling party. Here, a “reasonable anticipation” exists.⁸⁹ A measure that can be reasonably anticipated does not go against the legitimate expectation of the foreign services suppliers.

73. The 5% exemption in annual electricity bill and land allocation policy *vide* the Notification also do not set out that the support will only be provided to domestic data centers. Even foreign producers will be offered such concessions if they comply with the measure. Thus, the concept of “beneficiary” of the concessions has been mischaracterized by the Claimants.

74. Therefore, the Notification setting out the requirement of purchasing at least 50% of technological equipment from domestic producers was reasonably anticipated by the foreign producers.

3.2 The reduction of annual electricity bill by 5% and land allocation policy, is a not prohibited subsidy within the meaning of Article 3.1(b).

3.2.1: The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are not subsidies in the form of income or price support within the meaning of Article XVI of GATT 1994.

75. 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

⁸⁹ Panel Report, *Japan – Film*, *supra* note 86, ¶ 10.79

specific domestic producers⁹⁰, it amounts to a subsidy.⁹¹ The provision of items and services could also amount to be a “financial contribution”.

76. The term ‘income or price support’ has a broad concept, which could include any government measure that affects the income or prices.⁹² It has been stipulated that the nature of the government action shall be considered while interpreting the term ‘income or price support’.⁹³ Otherwise, this could give rise to an effect-based approach to define ‘subsidy’, which could cover virtually any government action that provides concessions and causes trade distortions.⁹⁴

77. In the present case, the Official Notification No. 21/2019 sets out that those data centers that purchase more than 50% of technological equipment from domestic producers will receive 5% exemption on the annual electricity bill and land in the eastern part of Anduin. This measure is not a form of income or price support as it does not confer any form of financial contribution to specific data centers. The measure is clearly a step taken by Anduin to achieve its objectives of promoting the heritage and identity of Anduin through promoting domestic production. Therefore, the 5% exemption in annual electricity bill and land allocation policy *vide* the Notification are not subsidies in the form of income or price support within the meaning of Article XVI.

3.2.2: The 5% exemption in the annual electricity bill and land allocation policy *vide* Notification No. 21/2019 are not prohibited subsidies within the meaning of Article 3:1(b).

⁹⁰ 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].

⁹¹ WORLD TRADE REPORT 2006, 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

⁹² DOMINIC COPPENS, WTO DISCIPLINES ON SUBSIDIES AND COUNTERVAILING MEASURES: BALANCING POLICY SPACE AND LEGAL CONSTRAINTS (2014) page 57 [hereinafter DOMINIC COPPENS]

⁹³ Appellate Body Report, *China – Countervailing and Anti – Dumping Duties on Grain Oriented Flat Rolled Electrical Steel from the United States*, ¶ 7.85, WTO Doc. WT/DS414/AB/R (adopted Nov. 16, 2012) [hereinafter, Appellate Body Report, *US – GOES*]

⁹⁴ Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶ 8.74, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001) [hereinafter Panel Report, *US – Export Restraints*]

78. 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.⁹⁵

79. 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*.⁹⁶ This necessarily means that the subsidy has to 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.⁹⁷ However, a subsidy in itself is not prohibited under the SCM agreement.⁹⁸

80. 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.⁹⁹ If subsidies are provided in a discriminatory manner on the basis of the origin of the products, they are “preferential subsidies for domestic products”.

81. In the present case, the subsidies are provided not just to domestic data centers, but also to foreign data centers if they comply with the conditions laid down in the Notification. The measures under the Notification cannot be said to be import substitution subsidies because the Notification is not a regulation. It is only a scheme adopted by Anduin to achieve the objective of the Social Credit Plan.

⁹⁵ 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*]

⁹⁶ Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, ¶ 5.7 WTO Doc. WT/DS487/AB/R and Add.1, adopted Sep.22, 2017 [hereinafter Appellate Body Report, *US – Tax Incentives*]

⁹⁷ Panel Report, *United States — Tax Treatment for “Foreign Sales Corporations”*, WTO Doc. WT/DS108/R, adopted Jan. 29, 2002, [hereinafter Panel Report, *US – FSC (Article 21.5 – EC)*], ¶ 5.7.

⁹⁸ Appellate Body Report, *US – Tax Incentives*, *supra* note 96, ¶ 5.15

⁹⁹ *Id.* ¶ 5.12

3.3 The measures required under Official Notification No. 21/2019 do not 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 Official Notification No. 21/2019 is not in violation of Article III:4 of the GATT as it is a non-mandatory measure.

82. 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 Article III:4 of the GATT.¹⁰⁰ 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’.¹⁰¹ Thus, a measure need not be binding in order to fall within the meaning of Article III:4 of the GATT.

83. However, in *Canada – Wheat Exports and Grain Imports*, when Canada argued that the measure at issue could only be found inconsistent if it mandated or required less favorable treatment, the panel did not concur, and assumed that inconsistency with Article III:4 exists only if it mandates or requires less favorable treatment of imported like products.¹⁰²

84. The Official Notification No. 21/2019 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. It is clearly not a mandatory measure, and the fulfillment of the condition is not required. Imported technological equipment are not required to be treated less-favorably in this case.

¹⁰⁰ Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, ¶ 5.21 WTO Doc. L/6657 (adopted May 16, 1990) [hereinafter Panel Report, *EEC- Parts and Components*]

¹⁰¹ Panel Report, *India – Measures Affecting the Automotive Sector*, ¶ 7.190–7.191, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Apr. 5, 2002) [hereinafter Panel Report *India-Autos*]

¹⁰² Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 6.184, WTO Doc. WT/DS276/20 (adopted Sep. 27, 2004) [hereinafter Panel Report, *Canada-Wheat Exports and Grain Imports*]

85. Hence, as the fulfillment of the condition is not a mandatory measure, it is not in violation of Article III:4 of the GATT because the data centers are in no way compelled to treat the foreign products less favorably.

3.3.2 Anduin is may accord more favorable treatment to data centers using domestic technology under Article III:8(a) of GATT.

86. Article III:8(a) of GATT stipulates that the national commitment treatment under Article III of GATT shall not apply to government procurement. If a discrimination arises out of government procurement, then it is completely exempted from the application of Article III.¹⁰³ A measure covered by Article III:8(a) does not fall within the scope of Article III of the GATT.¹⁰⁴ 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.¹⁰⁵

87. In the present case, the measure under the Notification falls within the scope of Article III:8(a) of the GATT as the data is being procured by the Government of Anduin for the Social Credit Plan. Under the Social Credit Plan, the Social Media Regulation Act was enacted, which has provisions for data localization. In order to implement the data localization plans, data centers were to be built in Anduin. The Notification was thus released by the Government of Anduin to procure data from the data centers, under the Social Credit Plan and consequently is a government procurement that is exempted under Article III:8(a).

88. The derogation of national treatment commitment made available by Article III:8(a) may be challenged only under the coverage of the Government Procurement Agreement.¹⁰⁶ However, as

¹⁰³ Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, ¶. 7.84 WTO Doc. WT/DS472/R, WT/DS497/R (adopted Aug. 30, 2017) [hereinafter Panel Report, *Brazil- Taxation*]

¹⁰⁴ Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, fn. 263 to ¶. 7.113, WTO Doc. WT/DS412/19 WT/DS426/19 (adopted May 21, 2013) [hereinafter, *Canada – Renewable Energy*].

¹⁰⁵ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, ¶ 62 WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R, (adopted Jan. 12, 2000) [hereafter Appellate Body Report, *Chile-Alcoholic Beverages*].

¹⁰⁶ The GATT Article III:8(a) Procurement Derogation and Canada – Renewable Energy Arwel Davies Journal of International Economic Law, Volume 18, Issue 3, September 2015, Pages 543–554, <https://doi.org/10.1093/jiel/jgv027>

Anduin is not a part to the Government Procurement Agreement,¹⁰⁷ it is exempted from providing identical treatment to like domestic and foreign products pursuant to Article III:8(a). As the Notification is a measure adopted to achieve legitimate policy objectives, it does not violate Article III:8(a).

¹⁰⁷ Moot Problem, ¶ 1

PRAYER

For the abovementioned reasons, the Respondent respectfully requests that this Court DECLARE that:

1. The imposition of data localization requirements under the Social Media Regulations Act is in line with Anduin's GATS schedule of commitments.
2. The requirement to share source code with *B-Connected* in accordance with the Social Credit Plan is not 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 did not constitute less favorable treatment to foreign producers as compared to domestic producers of equipment for data centers as per Article III: 4 of the GATT.