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## MOOT PROBLEM

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### Anduin – Certain Measures Affecting Social Media Services

1. Anduin is a large, economically prosperous, monoethnic country. Its citizens enjoy a high standard of living in terms of access to education, health, livelihood, and civil rights. Anduin shares a border with Endor, a least developed country that is currently in the midst of a protracted civil war. Baranduin is a large, landlocked, developed economy. Anduin and Baranduin are members of the World Trade Organization (“WTO”) and permanent members of the United Nations (“UN”) Security Council. Anduin is not a signatory to the WTO Government Procurement Agreement.

2. Since 2015, the Anduin has witnessed a significant influx of refugees from Endor. This resulted in widespread resentment by the citizens of Anduin towards the refugees. The “*refugee crisis*”, a term coined by the news media of Anduin, featured prominently in the 2017 national election debates. Eventually, a political party with an anti-globalization rhetoric emerged victorious. One of the mandates of this party was to promote the indigenous identity and proud heritage of Anduin, including through the promotion of domestic products; another was to protect the national security interests of Anduin.

3. Opinion polls taken by a leading newspaper after the election results were declared indicated that the political party won by an overwhelming majority due to its promise of rolling out the controversial ‘Rehabilitation Settlement Process’. This policy was rolled out soon after the new government was formed. It stipulates that refugees from Endor are only permitted to reside in demarcated land zones in Anduin with access to basic civic amenities like water, food, electricity, and primary education. Leaving the demarcated zones to visit other parts of Anduin requires special permission by the State Police. There are a total of five such zones throughout Anduin.

4. Some of the refugee youth in one of the zones coalesced and formed an informal political group called the National Liberation Group (“NLG”). Over the next few months, NLG uploaded several videos on the social media platform, *B-Connected*, demanding for rights such as

access to secondary education, healthcare, ease of transit, and better quality civic amenities like access to clean drinking water and continuous electricity. The message spread amongst fellow refugees in other zones, and a significant majority of youth joined the NLG. Subsequently, NLG chapters were created in each zone. Videos and posts released by the NLG chapters on *B-Connected* galvanized the international community to petition Anduin at inter-governmental forums to provide the zones with better facilities and to lift the mobility restrictions.

5. Anduin agreed to look into all the demands, but rejected the proposition of NLG playing the interlocutor since it did not recognize the group. Instead, an independent committee comprising of academics, government officials, and prominent members of human rights organizations was set up which undertook a fact-finding study. Upon conclusion of the study, the committee recommended that Anduin immediately provide access to secondary education, healthcare, clean drinking water, continuous supply of electricity, and ease of transit in-and-out of the zones. Anduin accepted all the recommendations listed in the report except the ease of transit request, and acted in an expedited manner to implement the recommendations to the zones. The efficiency and swiftness with which Anduin acted upon the recommendations that it accepted was lauded by the international community. However, NLG chapters continued demanding complete and immediate removal of transit requirements.

6. The increase in number of persons seeking refugee status alarmed the citizens of Anduin. According to statistics released by Anduin, nearly 15% of the total population of Endor had either received refugee status or were currently seeking refugee status in Anduin.

7. Opinion polls dated July 2019 reflected a significant dip in the popularity of the President of Anduin. Annual National Budget reports of Anduin also indicated a severe strain on the State Exchequer since the state was diverting large sums of money otherwise allocated for public amenities towards maintaining the zones. While no untoward incidents were reported, intelligence agencies of several countries warned Anduin that international terrorists based in Endor may have entered Anduin posing as refugees. The Chief of the Army of Anduin also expressed concern about the possibility of a terrorist attack in Anduin.

8. In her annual State of the Nation address to the country in August 2019, the President of Anduin declared that Anduin would not accept any more refugees from Endor, where the civil war was intensifying, with immediate effect. She also appealed to other neighbouring countries to accept more refugees. The announcement elicited divided and wide-ranging reactions – majority of the citizens in Anduin cheered at the decision, whereas some expressed disappointment. The international community also echoed mixed reactions. Baranduin, another leading global economy and Anduin’ largest trading partner, supported the President’s decision and stated that “sovereignty of a country is paramount”.

9. Citizens of Endor who were making their way to the border of Anduin uploaded videos on *B-Connected* of the people being stopped at the border by the Anduin Border Control authorities. Upon hearing that Anduin had stopped accepting refugees, an all-out attack was perpetrated by military units under the command of General Radol, who was widely regarded as the cause of the civil war in Endor, at the border. The incident, known as the *Drina Massacre*, resulted in the killing of over 1000 Endorian civilians. Since media personnel were not permitted to visit the location of the massacre, videos uploaded on *B-Connected* were the only source of information available to the world. The *Drina Massacre* generated wide-spread condemnation for General Radol’s acts.

10. A few days later, explosive devices were detonated in front of four eminent political institutions – the Parliament building, the National Museum, the Supreme Court of Justice, and residency of the President – in the capital city of Anduin. The attack resulted in the death of 40 people and more than 100 people were injured. Live high-grade explosives were also found in parking lots of hospitals and schools in four different cities. These were diffused by security forces in a timely manner. This was the first ever terrorist attack in Anduin since it gained independence.

11. No terrorist outfit claimed responsibility for the terrorist activity. Police and Security Intelligence Unit of Anduin swung into action to establish the identity of the organization that carried out the attack. At a press conference organized two days later, the Chief of the Security Intelligence Unit made the following statement:

*We have arrested 24 persons in connection with the terrorist activity. 16 of them were Endorian that had sought refuge in Anduin and lived in different zones, whereas the other 8 were citizens of Anduin who sympathized with the cause of the refugees. We can conclusively establish based on facts available to us that all involved persons are associated with the NLG. They had planned the execution of the attack through the internal messaging system of B-Connected. We anticipate further terror-related activities and we encourage citizens to remain vigilant and exercise caution.*

12. Subsequently, NLG was deemed a terrorist organization by Anduin. NLG vehemently refuted any connection with the terrorist activities. A common *B-Connected* post released by all five NLG chapters welcomed investigation into their day to day activities. The post also stated that “[...] the common intention of a few persons who happen to be members of a social media group cannot be attributed to all members of the group.”

13. Being a permanent member of the UN Security Council, Anduin also sought to include NLG in the list of global terror organizations. This move was supported by another permanent member of the Security Council. However, the proposal was vetoed by Baranduin, which made the following statement:

*We note that this is the first time that individuals have attacked under the banner of this outfit. Further, we remain unsure as to whether it was, indeed, NLG that was behind the horrific attacks. For this reason, we are not in a position to accurately assess whether NLG meets the definitional-threshold of a ‘terrorist outfit’.*

#### B-Connected

14. *B-Connected* is a well-known international social media platform that is incorporated in Baranduin. It has presence in 103 countries and hosts 900 million active monthly users worldwide. Individuals and organizations can become members of *B-Connected* by signing up without any charge. Upon signing up, the user can build a profile which consists of a user name, a profile photograph, and a short description of the user. The user can also post her or his feelings along with photographs or videos. Further, the user can search for other users and

request them to be “buddies”. In addition to commenting on feelings, buddies can also connect with each other through an internal messaging system which functions like email.

15. *B-Connected* generates its revenues through advertising and sells advertising space on its platform. Given the large number of users, *B-Connected* is one of the world’s most commercially viable advertising forums. From the time it began operations, *B-Connected* has been known to protect personal data of its users. Data generated through the activity on *B-Connected* across the world is stored in four large data farms in Baranduin. Baranduin has a robust internal data protection philosophy. Enforcement authorities of Baranduin are also consistently denied information of *B-Connected* users even when the enquiry relates to national security concerns. The Founder and CEO of *B-Connected* has repeatedly said, “*It is the users’ trust that their personal data will never be misused which has resulted in B-Connected’s dominance in the social media space*”.

16. Over the past few years, *B-Connected* has been receiving a lot of flak from governments across the world for protecting information of its users since some of the users were thought to be members of international criminal syndicates and terrorist organizations. At the same time, the CEO of *B-Connected* was named Person of the Year by Moments Magazine, a leading international weekly publication, for being instrumental in protecting information of its users who were part of several prominent protests and uprisings that sought to uphold human rights. Global media had, in particular, hailed the pivotal role played by *B-Connected* in protecting the identity of persons who were part of the uprisings which had resulted in overthrowing a long dictatorial regime and re-establishing democracy in a country.

17. For *B-Connected*, setting up operations in Anduin and establishing a local office was a natural business decision. *B-Connected* received considerable percentage of its annual profits from Anduin. However, its relations deteriorated with the new government. In 2017, within the first week of assuming his position, the newly elected Minister of Information and Technology demanded that *B-Connected* share all data of refugees from Baranduin that were in Anduin for a proposed refugee surveillance project that the government had planned to implement. *B-Connected* refused to provide data of any of its users to the Minister.

18. Soon after the terrorist attack took place, the Security Intelligence Unit asked *B-Connected* to cooperate in the investigation. *B-Connected* engineers and data analysts wrote an algorithm which assisted the Security Intelligence Unit Officers in identifying the persons involved in the planning and execution of the attack. It is a widely acknowledged fact that the Security Intelligence Unit apprehended those involved in a timely manner because of the assistance of *B-Connected* executives.

19. Despite this, large sections of society attributed the ease of planning and execution of the terrorist attack to *B-Connected* and started the “#DeleteBConnect” campaign. It is estimated that *B-Connected* lost nearly 10% of its active users in Anduin as a result of this campaign.

### Let's Talk

20. The Trust Group is a major domestic business empire in Anduin. The Trust Group had traditionally focussed on the telecom sector. Over the past few years, the business group leveraged its physical infrastructure in the telecom sector to diversify into the over-the-top services market and rolled out an app-based voice-video call service using voice over Internet Protocol (“VoIP”) technology called *WhatsUp*. The Trust Group also floated a media-services company called *MadMedia* that lets users stream movies and TV shows for a monthly fee. Both *WhatsUp* and *MadMedia* are highly profitable ventures and are excessively popular in Anduin.

21. Two months after the terrorist attack, Trust Group surprised business analysts, investors and the public alike by releasing its own social media platform called *Let's Talk*. *Let's Talk* is a free social media site which permits registered members to broadcast short written posts and videos. 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.

22. The Trust Group knew that it would stand little chance of competing against *B-Connected* given the latter's first-mover advantage. To attract users to *Let's Talk*, the Trust Group cross-subsidized from its other business ventures, i.e. *WhatsUp* and *MadMedia*. Subscribers to *Let's Talk* received a free annual subscription of *MadMedia*, and the cost of subscription for such subscribers for subsequent years was nominal as compared to those who did not use *Let's Talk*.

Subscribers could also avail the voice and video calling feature offered through *WhatsApp*. These attractive features resulted in mass exodus of users from *B-Connected* to *Let's Talk*. Their greatly successful advertisement campaign – “*Let's Talk* to our friends” – targeted the nationalist sentiment of Anduin and immediately struck a chord with the masses.

23. Notably, the Founder of the Trust Group – who consistently ranks amongst the top 10 richest persons in the World, and had publicly endorsed the current President’s political party – firmly believed that “*data is the new oil*”. In a televised speech he gave to a powerful industry association in Anduin, the Founder declared that it was his decision to enter and disrupt the social media platform market since such platforms gathered rich datasets about choices and desires of consumers which could turn data into profitable business decisions. Renowned economists in Anduin have noted that the Trust Group’s strategy to expand widely, cross-subsidize, and price below-costs has resulted in the group positioning itself at the centre of all e-commerce transactions in Anduin. This, they observe, may result in monopolization of e-commerce infrastructure for other businesses that are dependent upon it, and could raise anti-competitive concerns.

#### Imposing data localization laws

24. After the terrorist attack, Anduin was placed on high security alert and the demarcated zones were constantly being monitored. The President of Anduin expressed serious concern about the use of social media in coordinating future terrorist attacks. Security Intelligence Unit reports also indicated a high probability of future attacks in light of the increase in intensity of the civil war in Endor. These reports also indicated that any future attacks would most likely be planned and executed through social media platforms.

25. The Parliament debated ways to regulate social media and directed the Ministry of Information and Technology to hold consultations with relevant stakeholders and present a draft law. *B-Connected* and *Let's Talk* actively participated in the ensuing consultations. Based on publicly available information, *Let's Talk* pressed for mandatory imposition of localization requirements to protect national security interests. Transcripts of the meeting show that the *Let's Talk* Policy & Regulatory Head had said: “*We would have cooperated fully with the authorities in the aftermath of the terrorist attack and made all data with us available to the government. In future, we will provide*

*the Government with data as and when they need it.”* On the other hand, *B-Connected* contended that data localization would not ensure effective regulation of social media, and that the government should instead consider introducing stringent *Know Your Customer* norms and other similar policy measures.

26. Based on the consultations, the Ministry of Information and Technology presented the draft *Social Media Regulation* bill to the Parliament. The bill, which included data localization provisions, was signed into law without any amendments or debate. Relevant excerpts of the law are reproduced below:

#### Social Media Regulation Act

*In light of concerns related to the maintenance of public order and national security, the Parliament of Anduin implements the said Act with immediate effect.*

- Section 3: All types of data generated through social media platforms by users in Anduin will necessarily be stored in Anduin.
- Section 4: All social media platforms servicing Anduin will mandatorily be required to set up their data servers in Anduin.
- Section 5: Copies of the data may only be taken outside the country under exceptional circumstances, and requires the government’s discretionary approval.
- Section 8: Under no circumstances are social media platforms permitted to sell, trade, or rent any type of data to its users. However, the data, except sensitive personal data, can be used by the family of companies. Sensitive personal data, for the purposes of this section means, bank account details, sexual orientation, and ethnicity.

27. Moving forward with its proposal to implement data localization requirements for social media platforms, the government permitted both foreign and domestic firms to set up data centres in Anduin. The government released Official Notification No. 21/2019 which stated that data centres that use at least 50% of technology equipment developed in Anduin will be exempt from paying 5% of the annual electricity bill they incur. The data centres of *Let’s Talk* and two



other smaller foreign-owned social media platforms met the requirement set out in the Official Notification No. 21/2019. On the other hand, data centres of *B-Connected* did not meet the requirement since the Global Technology Team of *B-Connected*, as a matter of policy, only used technology equipment made in Baranduin for quality purposes.

28. Further, Official Notification No. 21/2019 also stated that data centres meeting the requirements set out in Official Notification No. 21/2019 were to be provided land to build data centres in the eastern part of Anduin which had cold climate. All other data centres were to be provided land in the hot and arid region of Anduin.

29. The cost of setting up data centres for *B-Connected* was substantially higher since they had to import majority of the technological equipment for the data centres from Baranduin. Further, they had to invest in high-performance cooling systems. Despite these cooling systems, the efficiency of *B-Connected's* data centre was reduced because of the hot weather conditions. This significantly impacted the technical performance of *B-Connected*. The website started hanging often and the user had to forcibly terminate the program without logging out. This led to a marked decline in user friendliness of the *B-Connected* interface. *B-Connected's* buddies search option and internal messaging system also took longer to perform their functions. Declining number of users in Anduin resulted in less revenue generation through advertisements. At the end of the financial year, *B-Connected* posted losses for two consecutive financial quarters for the first time since it was established. On the other hand, the membership of *Let's Talk* was increasing substantially.

### **The Social Credit Plan**

30. In November 2019, the President announced that the government intended to implement the Social Credit Plan as part of their policy to integrate refugees into mainstream society in Anduin. This plan envisaged monitoring the social behaviour of refugees in the zones and assigning credit scores to them. Persons with a good “social standing” would be granted citizenship in Anduin in accordance with Article 6(1)(b) of the Constitution of Anduin. A person would move up or down on ratings based on their behaviour. According to the President, the precise methodology to determine rating of behaviour was still being discussed but infractions resulting in contributing to a bad score would include: fraud and embezzlement of funds, riding

public transport without tickets, leaving the zones without permission, engaging in criminal activities in the zones, spreading fake news, and activities on social media. The plan would be mandatorily rolled out in all zones.

### Constitution of Anduin

#### Article 6:

- (1) A person who has migrated, under whatever circumstance, to the territory of Anduin can be considered for citizenship of Anduin if:
- (a) s/he or either of her/his parents or any of his grand-parents was born in Anduin as defined in the Government of Anduin Act, 1935 (as originally enacted); OR
  - (b) s/he can demonstrate outstanding character.

31. On the same day, the Ministry of Human Resources of Anduin released a White Paper detailing the Social Credit Plan. According to this document, the Social Credit Plan would be run by governmental agencies. The data for the programme would be procured from various sources, including from governmental databases and social media service providers. Foreign social media firms were required to provide their source code to the Anduin Government. Technology supporting the policy would be operational within one year and participation in the scheme was mandatory.

32. Many people hailed the Social Credit Plan as a system designed to incentivize lawfulness and integrity of refugees towards Anduin. Others saw the policy as a tool to assert political control over the refugees. Non-governmental organizations within and outside Anduin expressed concern at the possible infringement to the right to privacy of persons living in the zones.

#### **B-Connected exits Anduin**

33. A few weeks later, *B-Connected* issued the following statement:

*Social media forums will always remain important since they have the power to connect – connect friends, new people, new ideas, new content. As people increasingly use social networks, they become more vulnerable to misuse of their data. There is a growing concern that technology may be centralizing power in the hands of governments. We regret to say that this is what we feel is happening in Anduin. Though there is a difference between providing service in a country and storing people’s data there, we still built data centres as we wanted to serve our customers. But to demand for personal data is violating human rights like privacy and freedom of expression. And over the past few weeks, this is what the Government of Anduin is doing. We will not let governments take information from us. For this reason, we have decided to cease our operations in Anduin with immediate effect.*

### **WTO dispute**

34. *B-Connected* petitioned the Government of Baranduin claiming that it has been treated unfairly by Anduin, and that its actions violate WTO rules. According to *B-Connected*, the requirement to store data in Anduin, the requirement to share the source code with the Anduin Government, the benefit of reduction in annual electricity bills by 5% for data centres that used 50% technology products manufactured in Anduin, and the allocation of land for the setting up of data centres were designed in a manner to provide an advantage to domestic over foreign manufacturers of technology products.

35. Acting on *B-Connected’s* request, Baranduin requested for consultations with Anduin at the WTO. Baranduin claimed that imposing data localization requirements under the Social Media Regulations Act violated Anduin’s national treatment obligations under Article XVI (1) of the GATS relating to CPC 7523 under the General Agreement on Trade in Services (“GATS”). Further, Baranduin contended that the requirement to share source code with Anduin in accordance with the Social Credit Plan was in violation of Article XVII (1) of the GATS. Moreover, the reduction of annual electricity bills by 5% and land allocation policy *vide* Notification No. 21/2019 constituted treatment that was less favourable to foreign producers as

compared to domestic producers of “equipment for data centres” according to Article III:4 of the General Agreement on Tariffs and Trade (“GATT”).

36. Anduin stated that imposition of data localization requirements was in line with Anduin’s GATS schedule of commitments. It also noted that Baranduin had mischaracterized the classification of supplied service, which should fall within the sub-sector “Computer and Related Services”. Further, Anduin noted that it had the right to implement measures which it considered necessary for maintaining public order under Article XIV (a) of GATS as well as for the protection of its essential security interests under Article XIV *bis* of GATS. Anduin also stated that it was well within the limits of WTO law for seeking source code from foreign social media firms in accordance with Article XIV (c)(2) of GATS. Moreover, allocation of land according to climatic conditions did not constitute less favourable treatment under Article III:4 of the GATT. In any event, Article III:8(a) of GATT permits Anduin to accord more favourable treatment to data centres using domestic technology since the data is being procured by the Government of Anduin for the Social Credit Plan.

**Annex 1:**

GATS/SC/XX

15 April 1994

**Anduin - Schedule of Specific Commitments**

Modes of supply	(1) Cross border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons			
<i>Sector/sub-sector</i>	<i>Limitations on market access</i>	<i>Limitation on national treatment</i>	<i>Additional commitments</i>	
<b>Telecommunication services;</b> Data & message transmission services, the following (CPC 7523):  (a) Electronic mail (b) Voice mail	1) None	1) None		
	2) Unbound	2) Unbound		
	3) None	3) None		
	4) Unbound	4) Unbound		

<p>(c) Online information &amp; data base retrieval;</p> <p>(d) Enhanced/value added facsimile services, including store &amp; forward, store &amp; retrieval;</p> <p>(e) Online information and/or data processing</p>				
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**Annex 2:**

GATS/SC/XX

15 April 1994

**Anduin - Schedule of Specific Commitments**

<p><b>Modes of supply</b></p>	<p><b>(1) Cross border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons</b></p>
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<i>Sector/sub-sector</i>	<i>Limitations on market access</i>	<i>Limitation on national treatment</i>	<i>Additional commitments</i>	
<b>Computer and Related services;</b>	1) None	1) None		
Data base services –All services provided from primarily structured databases through a communication network.	2) Unbound	2) Unbound		
	3) Unbound	3) Unbound		
Exclusions: Data and message transmission services (e.g., network operation services, value-added network services) are classified in class 7523 (Data and message transmission services). (CPC 844)	4) None	4) None		