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12<sup>TH</sup> GNLU INTERNATIONAL MOOT COURT COMPETITION, 2020

BEFORE THE PANEL ESTABLISHED BY WORLD TRADE ORGANISATION DSB

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ANDUIN – CERTAIN MEASURES AFFECTING SOCIAL MEDIA SERVICES

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BARANDUIN

*...Complainant*

*versus*

ANDUIN

*...Respondent*

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**-WRITTEN SUBMISSION ON BEHALF OF THE COMPLAINANT-**

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**LIST OF ABBREVIATIONS**

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|            |   |  |
|------------|---|--|
| AB         | - | Appellate Body                                 |
| Annex.     | - | Annexure                                       |
| art.       | - | Article  |
| CPC        | - | Central Product Classification                 |
| DCOS       | - | Directly Competitive or Substitutable Products |
| Doc.       | - | Document                                       |
| DSR        | - | Dispute Settlement Records                     |
| DSU        | - | Dispute Settlement Understanding               |
| EC/ECU     | - | European Communities                           |
| EU         | - | European Union                                 |
| ECC        | - | European Economic Community                    |
| GATS       | - | General Agreement on Trade in Services         |
| GATT       | - | General Agreement on Tariffs and Trade         |
| <i>Id.</i> | - | <i>Ibidem</i>                                  |
| No.        | - | Number   |
| SMRA       | - | Social Media Regulation Act                    |
| SCP        | - | Social Credit Plan                             |
| UN         | - | United Nations                                 |
| US         | - | Unites States                                  |
| Vol.       | - | Volume   |
| WT/DS      | - | World Trade/Dispute Settlement                 |
| WTO        | - | World Trade Organisation                       |

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## **STATEMENT OF FACTS**

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### **THE PARTIES**

Anduin is a large and economically prosperous country. It shares a border with Endor, a least developed country, in the midst of a protracted civil war. Baranduin is a developed economy and along with Anduin, is a member of the World Trade Organization and permanent members of UNSC. Anduin was receiving a significant influx of refugees from Endor and they were only permitted to reside in demarcated land zones with access to basic civic amenities.

### **REFUGEE CRISIS IN ANDUIN**

The refugees from Endor coalesced to form an informal political group, NLG which uploaded several videos on B-Connected, for demanding rights. Anduin did not recognise NLG as a group, however, it agreed with all the demands made by the refugees except for the ease of transit request. The increase in the number of refugees alarmed the citizens of Anduin as large sums of money, otherwise allocated for public amenities, were being diverted towards maintaining the zones.

### **TERRORIST ATTACK IN ANDUIN**

The President of Anduin declared that they would not accept any more refugees, this was followed by a civil war which resulted in the killing of a thousand Endorians, at the border. Videos uploaded on B-Connected were the only source of information available to the world. This massacre led to explosions in the capital city of Anduin, making it the first ever terrorist attack in Anduin. The Chief of the Security Intelligence Unit stated that all involved persons were associated with NLG and had planned the attack through the internal messaging system of B-Connected.

### **SOCIAL MEDIA PLATFORM IN BARANDUIN**

B-Connected is an international social media platform, incorporated in Baranduin, having its presence in 103 countries. Individuals could become members by signing up without any charge. They could post their feelings, photographs or videos, request other users to be their buddies and connect through an internal messaging system. It generated its revenues through

advertising. Soon after the terrorist attack in Anduin, B-Connected's engineers wrote an algorithm to assist in the identification of the persons involved.

### **SOCIAL MEDIA PLATFORM IN ANDUIN**

The Trust Group, a domestic business empire in Anduin, released its own free social media platform called Let's Talk. Users could broadcast written posts or videos and anyone could follow anyone. To attract users to Let's Talk, the Trust Group offered its subscribers a free annual subscription of MadMedia and voice-video called feature in WhatsUp.

### **IMPLEMENTING OF DATA LOCALIZATION LAWS IN ANDUIN**

Evidence of terrorist attacks executed through B-Connected, Social Media Regulation Act was enacted. It mandates the social media platforms to mandatorily set up their data servers and store their generated data in Anduin. Copies of such data could be taken abroad only after the government's approval. Further, Official Notification No. 21/2019 was released, stating that if the data centres used 50% of the technology equipment developed in Anduin, they will be exempted from paying 5% of the annual electricity bill they incur and would be provided land in suitable location.

### **THE SOCIAL CREDIT PLAN**

In order to integrate refugees into the society of Anduin in furtherance on human rights, the government of Anduin implemented the Social Credit Plan. A person with a good social standing would be granted Anduin's citizenship. According to this plan, the data for this programme would be procured from governmental databases and social media providers. Henceforth, foreign social media firms were required to provide their source code to the Anduin government.

### **WTO DISPUTE**

B-Connected petitioned to the Government of Baranduin that it has been treated unfairly by Anduin and its actions violate WTO rules as the policies of Anduin were deigned in a manner to provide an advantage to domestic over foreign manufacturers. Hence, Baranduin requested for consultations with Anduin at the WTO, which failed and a panel has been established and composed to decide on the matter under the DSU.

**MEASURES AT ISSUE**

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**I**

**WHETHER IMPOSING DATA LOCALIZATION REQUIREMENTS UNDER THE SOCIAL MEDIA REGULATIONS ACT, 2019 VIOLATED ANDUIN’S MARKET ACCESS OBLIGATIONS UNDER ARTICLE XVI RELATING TO CPC 7523 UNDER GATS**

**II**

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

**III**

**WHETHER ANDUIN’S TREATMENT IS LESS FAVOURABLE TO FOREIGN PRODUCERS AS COMPARED TO DOMESTIC PRODUCERS OF “EQUIPMENT FOR DATA CENTRES” ACCORDING TO ARTICLE III:4 OF THE GATT**

## SUMMARY OF PLEADINGS

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### I

The market access obligations, as stated under Article XVI, prevent a member from violating the commitments undertaken by them in their Schedule of Specific Commitments. Anduin has committed to grant full market access in the relevant services sector through a particular mode of supply, which is telecommunication services supplied cross border. The SMRA passed by Anduin's Parliament was a market access limitation under Article XVI under GATS as Anduin does not follow its specified limitations under Article XVI:1 by limiting the total number of service operations and service output resulting in a zero quota.

### II

Article XVII obliges the members of WTO not to discriminate between domestic and foreign services, if they are like. Anduin has undertaken national treatment commitments; however, has adopted a measure affecting the supply of services as the Social Credit Plan which was affecting the foreign service suppliers owing to its discriminatory nature. The foreign and domestic services as well as the service suppliers are like in the present matter as their characteristics, end-uses and consumer tastes and product classification under the UN CPC are like. The unlikeness in the mode of supply, in such a case, cannot be taken into account.

### III

The fundamental purpose of Article III of GATT is to ensure equality of competitive conditions between imported and like domestic products. In this context less favourable treatment is enforced in the present case wherein the equality of competitive conditions, a principle under Article III has been violated by Anduin. In order to establish a violation of Article III:4, three elements have been satisfied in the present case; that the imported and domestic products at issue are like products; that the measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and that the imported products are accorded less favourable treatment than that accorded to like domestic products.

**LEGAL PLEADINGS**

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**I. IMPOSING DATA LOCALIZATION REQUIREMENTS UNDER THE SOCIAL MEDIA REGULATIONS ACT VIOLATED ANDUIN'S MARKET ACCESS OBLIGATIONS UNDER ARTICLE XVI RELATING TO CPC 7523 UNDER GATS**

(¶1.) Anduin has committed to grant full market access in the relevant services sector through a particular mode of supply [A]; and the SMRA passed by Anduin's Parliament, was a market access limitation under Article XVI under the GATS [B].

**A. ANDUIN HAS COMMITTED TO GRANT FULL MARKET ACCESS IN THE RELEVANT SERVICES SECTOR AND MODE OF SUPPLY**

(¶2.) Anduin has committed to grant full market access in the relevant services sector of telecommunication services [i]; which was being supplied by B-Connected through cross-border supply as defined under Article 1:2(a) of GATS [ii].

*i. The services supplied by B-Connected falls within the sub-sector 'Telecommunication Services'*

(¶3.) It is contended that B-Connected is a social media platform, on which the users can build their profiles, post their photographs or videos and also, message other users through an internal messaging system which functions like email.<sup>1</sup> For the identification of these services as 'telecommunication services', its meaning should be examined.<sup>2</sup> Basic telecommunication services involve the real-time transmission of customer-supplied information between two or more points without end-to-end change in the form or content of the customer's information.<sup>3</sup> It requires a high degree of interaction or communication between each other's networks during the delivery of the service.<sup>4</sup>

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<sup>1</sup> Moot Problem, ¶14.

<sup>2</sup> Panel Report, *Mexico - Measures Affecting Telecommunications Services of 2004*, WTO Doc. WT/DS204/R (adopted Aug. 19, 2005).

<sup>3</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Telecommunication, sec 3(b), 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

<sup>4</sup> Panel Report, *Mexico - Measures Affecting Telecommunications Services of 2004*, WTO Doc. WT/DS204/R (adopted Aug. 19, 2005).

(¶4.) Article 31(1) of the Vienna Convention on the Law of Treaties<sup>5</sup> provides for a treaty to be interpreted, using the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, the convention can be applied to interpret the Schedule of Specific Commitments. In the Schedule of Specific Commitments of Anduin, the sector of telecommunications<sup>6</sup> involves data and message transmission services, including electronic mail and value added facsimile services.

(¶5.) In a liberalized market, which is the sole aim of GATS,<sup>7</sup> a distinction between basic and value-added services has become blurred with the introduction of new transmission technologies.<sup>8</sup> CPC 7523 includes network services necessary to send and receive electronic messages<sup>9</sup> and hence, the services provided by B-connected involving the transmission of information from one user to another falls under the sub-sector of Telecommunication services.

*ii. The services supplied by B-Connected fall within cross border supply of a service (Mode 1) as defined under Article I: 2(a) of GATS*

(¶6.) Cross-border supply of a service i.e., mode 1, comprises of the supply of a service from the territory of one member into the territory of any other member.<sup>10</sup> The ordinary meaning of the words of Article I:2(a) of GATS indicate that a service is supplied from one Member's territory into another Member's territory, with no reference being given to the actual presence of the service supplier.<sup>11</sup>

(¶7.) Further, if a company is registered in a member nation and engages in substantive business operations there or in the territory of another member, the

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<sup>5</sup> Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331.

<sup>6</sup> Moot Problem, Annexure I.

<sup>7</sup> WTO, Measuring Trade in Services: A Training Module Produced by WTO/OMC in collaboration with the Inter-agency Task Force on Statistics in International Trade in Services (Mar. 2006).

<sup>8</sup> WTO Secretariat, *Telecommunications Services* of 1998, WTO Doc. S/C/W/299 (adopted Jun. 10, 2009).

<sup>9</sup> United Nations, *Statistical Papers - Provisional Central Product Classification of 1991*, Series M No. 77 (adopted May 22, 1989).

<sup>10</sup> GATS, art. 1:2(a).

<sup>11</sup> Panel Report, *Mexico - Measures Affecting Telecommunications Services of 2004*, WTO Doc. WT/DS204/R (adopted Aug. 19, 2005).

member where the company is registered may invoke the provisions of GATS.<sup>12</sup> Thus, it can be said that both the consumer and the service supplier remain in their respective territories wherein the service crosses the border.<sup>13</sup>

(¶8.) In the present matter, data generated on B-Connected across the world was stored in four large data farms in Baranduin,<sup>14</sup> where it was incorporated.<sup>15</sup> Thus, it can be implied that the services provided by B-Connected fall within the cross-border mode of supply as defined under Article I:2(a) of GATS.

(¶9.) Anduin's Schedule of Specific Commitments in relation to the limitations on market access in the sub-sector of 'Telecommunication services' regarding supply through mode 1 reads 'none'<sup>16</sup> which means that the member has undertaken a full market access commitment.<sup>17</sup> Therefore, Anduin has committed to grant full market access to the telecommunication services provided by B-Connected.

## **B. SMRA CONSTITUTES A MARKET ACCESS LIMITATION LAID DOWN IN ARTICLE XVI**

(¶10.) Even after committing a full market access in the sector of telecommunication services in its Schedule of Specific Commitments, Anduin does not follow the specified limitations resulting in the violation of Article XVI:1 [i]; as it has adopted a measure limiting the total number of service operations and the total quantity of service output of B-Connected [ii] amounting to a zero quota [iii].

*i. Anduin does not follow the limitations as specified in its Schedule*

(¶11.) Any act attributable to a member can be a measure<sup>18</sup> of that member for purposes of dispute settlement<sup>19</sup> including legislations passed by the members, which

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<sup>12</sup> Panel Report, *European Communities-Regime For The Importation, Sale And Distribution of Bananas*, ¶ 7.328, WTO Doc. WT/DS27/R/ECU (adopted May 22, 1997).

<sup>13</sup> ROBERTA MALEE BASSETT, *THE WTO AND THE UNIVERSITY* 59 (2006).

<sup>14</sup> Moot Problem, ¶15.

<sup>15</sup> Moot Problem, ¶14.

<sup>16</sup> Moot Problem, Annex. I.

<sup>17</sup> Panel Report, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, WTO Doc. MTN.GNS/W/164, ¶24.

<sup>18</sup> GATS, art. XXVIII (a).

<sup>19</sup> Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, ¶81, WTO Doc. WT/DS244/10 (adopted Jan. 9, 2004).

herein is the SMRA<sup>20</sup> passed by Anduin. Under Article XVI:1, when a Member makes a market access commitment, it binds the level of market access specified in its Schedule.<sup>21</sup>

(¶12.) In doing so, it commits not to maintain any type of market access barriers<sup>22</sup> that would restrict access to the market beyond the level specified.<sup>23</sup> As ‘none’ is inscribed in Anduin’s Schedule with respect to market access limitations for mode 1 in CPC 7523, it has clearly maintained a market access barrier, even after committing to provide full market access in telecommunications services sector.

*ii. Anduin has maintained or adopted measures that limit the total number of service operations and/or the total quantity of service output*

(¶13.) A measure prohibiting the supply of a service, wherein specific commitments have been undertaken, is a limitation within the meaning of Article XVI:2(c) if it totally prevents the service operations or service output through one or all means of delivery that are included in mode 1.<sup>24</sup> All types of limitations under these provisions are quantitative in nature and restrict market access.<sup>25</sup>

(¶14.) It has been held by the Panel in the case of *US - Gambling* that a ‘service operation’ comprises of the activities in the production of a given service and ‘service output’ was the result of the production of the service, which has also been upheld by the Appellate Body.<sup>26</sup>

(¶15.) It is contended that the requirement of mandatorily setting up of data centres in Anduin<sup>27</sup> for all social media platforms servicing in Anduin was a disadvantage to

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<sup>20</sup> Moot Problem, ¶26.

<sup>21</sup> GATS, art. XVI:1.

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

<sup>23</sup> Panel Report, *China - Publications and Audiovisual Products*, WTO Doc. WT/DS363/19 (adopted Jan. 19, 2010).

<sup>24</sup> Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ¶6.355, WTO Doc. WT/DS285/26 (adopted May 22, 2007).

<sup>25</sup> SIMON LESTER, BRYAN MERCURIO, ARWEL DAVIES ET AL., *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 714 (3<sup>rd</sup> edn., Hart Publishing).

<sup>26</sup> Appellate Body, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.264, WTO Doc. WT/DS285/AB/R (adopted May 22, 2007).

<sup>27</sup> Moot Problem, ¶26.



B-Connected as they already had their data farms<sup>28</sup> in their home country, through which they conducted the supply of their service. They stored data from around the world in their data farms, as they provided services in 103 countries<sup>29</sup> hosting 900 million active users.

(¶16.) In the emerging digital media age, the users consume, share and engage in content in order to fulfil the need for social interaction, entertainment and learning,<sup>30</sup> which was done through the data farms of B-Connected for all the data, that is, service output, collected by it universally. Anduin, by implementing data localisation laws<sup>31</sup> restricted the user data, required for the service operations of B-Connected, compelling it to infuse its capital for the re-writing of software and content generation on their platform.

(¶17.) The basic rationale behind such a provision in GATS is that a member should not be allowed to circumvent its market access commitment by prohibiting the entry into its market either overall or with respect to specific means of supply,<sup>32</sup> which has been done by Anduin in the present matter, by passing the SMRA, which completely hampered the cross-border supply of services of B-Connected.

*iii. The measures adopted by Anduin are expressed in terms of designated numerical units in the form of quotas*

(¶18.) The second part of the provision of XVI:2(c) clearly modifies the first part by stating that such limitations to the market access must be designated numerical units in the form of quotas. Though it has been held that such a meaning of the words should not be prescribed as a rigid mechanical formula for the analysis of a market access barrier,<sup>33</sup> which was further supported by the Appellate Body by stating that a complete prohibition on the supply of services in respect of which a market access commitment has been taken, amounts to a zero quota.

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<sup>28</sup> Moot Problem, ¶15.

<sup>29</sup> Moot Problem, ¶14.

<sup>30</sup> World Economic Forum, *Digital Media and Society Implications in a Hyperconnected Era* 13 (Jan. 2016).

<sup>31</sup> Moot Problem, ¶27.

<sup>32</sup> PETER-TOBIAS STOLL, *MAX PLANCK COMMENTARIES ON WORLD TRADE LAW* (2008).

<sup>33</sup> Appellate Body, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted May 22, 2007).

(¶19.) Anduin, by implementing the SMRA, effectively mandated all the social media platforms to set up data centres in Anduin, with no copies of data to be taken outside, resulting in the total prohibition of telecommunication services of B-Connected amounting to a zero quota for the supply of service through mode 1.

(¶20.) Further, it is humbly contended that, Anduin made no benevolent acts to fulfil its market access commitments. The general international law principle of good faith applies to all WTO rules.<sup>34</sup> Whenever the assertion of a right impinges on the field covered by a treaty obligation, it must be exercised in bona fide and reasonable manner.<sup>35</sup> Anduin has failed and continues to fail to respect the market access commitment made in its schedule of commitments in a reasonable manner.

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

(¶21.) Article XVII of GATS, which is entitled ‘National Treatment’ provision, obliges WTO Members, not to discriminate between domestic and foreign services; and service suppliers by treating foreign services and suppliers less favourably<sup>36</sup> than like domestic services and suppliers, subject to any limitations noted in the Schedule of Specific Commitments.<sup>37</sup> Anduin has undertaken such commitment [A]; had adopted a measure affecting the service by B-Connected [B]; and the foreign and domestic services as well as service suppliers, in the present case, are like [C].

### **A. ANDUIN HAS UNDERTAKEN NATIONAL TREATMENT COMMITMENT IN THE RELEVANT SECTOR AND MODE OF SUPPLY**

(¶22.) As elaborated earlier, the Communication services by B-Connected falls within the sub-sector of Telecommunications Services. Also, as already stated, it falls

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<sup>34</sup> Ernst - Ulrich Petersmann, *From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System*, Vol. 1, 2, 190, JOURNAL OF INTERNATIONAL ECONOMIC LAW (1998).

<sup>35</sup> Appellate Body Report, *United States-Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan*, ¶ 81, WTO Doc. WT/DS192/AB/R (adopted Oct. 8, 2001).

<sup>36</sup> GATS, art. XVII(1).

<sup>37</sup> GATS, art. XVII(1); *see also* W. Zdouc, *WTO Dispute Settlement Practice Relating to the GATS* 324 JOURNAL OF INTERNATIONAL ECONOMIC LAW (1999).

under the mode of cross border supply. Anduin has undertaken national treatment commitment for the sub-sector of Telecommunication Services with respect to cross border mode of supply.<sup>38</sup> In the national treatment column of its schedule, Anduin has inscribed 'none'. This term is a GATS scheduling convention which means no limitations, in other words, a full commitment.<sup>39</sup>

**B. ANDUIN HAS ADOPTED OR APPLIED A MEASURE AFFECTING THE SUPPLY OF SERVICES IN THAT SECTOR AND/OR MODE OF SUPPLY**

(¶23.) Anduin's SMRA regime comprised of a series of measures affecting the supply of services by B-Connected. The domestic regulations, namely SCP, imposed by the government of Anduin are affecting the foreign service suppliers [i]; and is discriminatory in nature [ii].

*i. SCP is affecting the foreign service suppliers*

(¶24.) The term affecting is not defined in the GATS. The selection of the word 'affecting' would imply, that the drafters of the Article intended to cover<sup>40</sup> not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.<sup>41</sup>

*ii. SCP is discriminatory in nature*

(¶25.) Under Article XVII, both de jure and de facto discrimination are prohibited.<sup>42</sup> De facto discrimination occurs even if foreign producers or suppliers could theoretically comply with the regulation in question, but for reasons of higher transaction costs are not practically able to do so on a competitive basis. Here, there is

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<sup>38</sup> Moot Problem, Annex. I.

<sup>39</sup> Panel Report, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, ¶ 24, WTO Doc. MTN.GNS/W/164, (adopted Sep. 3, 1993); see also GATS, *Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services*, ¶42, WTO Doc. S/L/92 (adopted Mar. 23, 2001).

<sup>40</sup> GATS, art. XVII (1).

<sup>41</sup> Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, WTO Doc. L/833 (adopted Oct. 23, 1958).

<sup>42</sup> Appellate Body Report, *Canada-Certain Measures Affecting The Automotive Industry*, ¶78, WTO Doc. WT/DS139/AB/R & WT/DS142/AB/R (May 31, 2000).

de facto discrimination between foreign and domestic services. This is a result of Anduin's act of implementing the SCP.<sup>43</sup>

(¶26.) All measures that are designed to induce consumers to purchase local services modify the conditions of competition in favour of domestic service suppliers. In *Canada – Autos*, the Panel struck down a measure providing for tax benefits to car manufacturers which obtained services related to the production and repair of motor vehicles from suppliers within Canada.<sup>44</sup>

(¶27.) If a specific technical standard or regulatory requirement for cybersecurity is implemented without guidelines or in a discriminatory fashion, it could be inconsistent with WTO law. The Chinese cybersecurity law requires all foreign service suppliers to adopt 'secure and controllable' standards without clearly specifying how they can meet this requirement.<sup>45</sup> Additionally, this law also forces foreign companies to disclose the source code of their digital services to the government.<sup>46</sup>

(¶28.) In the present case the domestic regulations have made it mandatory for B-Connected to use at least 50% of the technological equipment manufactured in Anduin and only then they will avail an exemption of 5% on electricity bill they incur.<sup>47</sup> Moreover, the SCP forces the foreign social media firms to provide their source code to the Anduin government.<sup>48</sup> This clearly shows the discriminatory intent of the government behind the Domestic regulations.

**C. THE FOREIGN AND DOMESTIC SERVICES AND SERVICE SUPPLIERS IN THE PRESENT CASE ARE 'LIKE SERVICES AND SERVICE SUPPLIERS'**

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<sup>43</sup> Mireille Cossy, *Determining 'likeness' under GATS: Squaring the circle?*, WTO Economic Research and Statistics Division (Sep. 2006).

<sup>44</sup> Appellate Body Report, *Canada-Certain Measures Affecting The Automotive Industry*, ¶78, WTO Doc. WT/DS139/AB/R & WT/DS142/AB/R (May 31, 2000).

<sup>45</sup> S. Sacks and M. K. Li, '*How Chinese Cybersecurity Standards Impact Doing Business in China*', CSIS Policy Brief, CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES (Aug. 2018).

<sup>46</sup> *Supra* note 45.

<sup>47</sup> Moot Problem, ¶27.

<sup>48</sup> Moot Problem, ¶31.

(¶29.) For services to be considered ‘like’, they need not necessarily be exactly the same and that in view of the references to ‘approximately’ and ‘similar’, services could qualify as ‘like’ if they are essentially or generally the same.<sup>49</sup> However, it is essential that the characteristics [i]; end-use and consumer tastes towards the service [ii]; description of services under the UN CPC [iii] are like. The consideration towards different modes of supply is not to be taken [iv]; and hence, B-Connected and Let’s Talk are like services and service suppliers[v].

*i. Characteristics of services and service suppliers*

(¶30.) The characteristics of the services include the nature of the service.<sup>50</sup> The nature of services provided by B-Connected and the Trust Group are identical since both are social media sites, both facilitate content sharing over the internet and services necessary to receive and send messages,<sup>51</sup> connect with other users by connecting with them on these online platforms and Hence, the nature of the services provided by Let’s Talk and B-Connected is ‘like’.

(¶31.) The characteristics of intangible services are more elusive than those of tangible goods, and even more so in sectors where services transactions are very customized.<sup>52</sup> Such characteristics could relate, for instance, to the result of the service being supplied, but also to how the service is actually being supplied (operational characteristics), among others. The ordinary meaning of the activities concerned might also contribute to the identification of ‘intrinsic characteristics’ of services.

(¶32.) In the present case both the companies concerned have the same operational characteristics, the subscribers to both the social media platforms can share images and videos with other users, they can communicate with other users<sup>53</sup> and hence, the

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<sup>49</sup> Panel Report, *China - Publications and Audiovisual Products*, ¶7.971, WTO Doc. WT/DS363/19 (adopted Jan. 19, 2010).

<sup>50</sup> Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶7.322, WTO Doc. G/AG/W/18/Add.1 (adopted Dec. 11, 2008) [hereinafter *EC – Bananas*].

<sup>51</sup> Moot Problem, ¶¶14, 20.

<sup>52</sup> Mireille Cossy, *Determining ‘likeness’ under GATS: Squaring the circle?*, WTO Economic Research and Statistics Division (Sep. 2006).

<sup>53</sup> Moot Problem, ¶14.

intrinsic characteristics of the services provided by B-Connected and the Trust Group in the present case are ‘like’.

*ii. End-uses and consumer tastes towards the services are like*

(¶33.) The concept of end-use assesses the ability of the services to perform the same particular function.<sup>54</sup> The analysis made by the Appellate Body in the *EC – Asbestos* dispute can be transposed to the services context. The criterion of consumers' tastes refers to the extent to which consumers are, or would be willing to choose one product instead of another to perform those end-uses, or, in other words, whether consumers regard two services as substitutable in a given market.<sup>55</sup>

(¶34.) In *EC – Bananas III*, the United States argued that distribution suppliers were like Latin American suppliers because their respective activities, equipment, types of personnel employed and marketing stages were either identical or virtually so and the extent to which they had competed directly with each other in the market had been limited only by the restrictive regulatory regimes established by certain member States; and by traditional marketing relationships built up over time.<sup>56</sup>

(¶35.) In the present matter B-Connected and Lets Talk are engaged in identical activities of social media services.<sup>57</sup> Let's Talk and B-Connected result in the same end-use, i.e., facilitate content sharing among its users and communicating over messaging system. In order to operate their social media platforms data servers were setup for storage of the data generated by its users in Anduin.<sup>58</sup> Let's Talk's strategies had led to mass exodus of users from B-Connected to itself,<sup>59</sup> which shows that they competed directly with each other and had been limited only by the regulatory regimes in Anduin.

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<sup>54</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 117, WTO Doc. WT/DS135/12 (adopted Apr. 5, 2001).

<sup>55</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* ¶ 117, WTO Doc. WT/DS135/12 (adopted Apr. 5, 2001) [hereinafter *EC - Asbestos*].

<sup>56</sup> *EC - Bananas*, ¶ 4.677.

<sup>57</sup> Moot Problem, ¶21.

<sup>58</sup> Moot Problem, ¶26.

<sup>59</sup> Moot Problem, ¶22.

*iii. Description of services under the UN Central Product Classification (CPC).*

(¶36.) The Appellate bodies in *Canada- Periodicals*<sup>60</sup> and *EC-Asbestos*<sup>61</sup> as well as the Panels in *United States- Section 337*,<sup>62</sup> and *Korea – Taxes on Alcoholic Beverages*,<sup>63</sup> have referred to the tariff classification of products in determining likeness between products. In *Chile- Taxes on Alcoholic Beverages*,<sup>64</sup> the Panel held that, the domestic distilled alcoholic beverages produced in Chile and the imported products are like because they are identified by Harmonized System Classification 2008 in the same category and are directly competitive or substitutable products. Further it can be presumed that, when two services fall within one sector, they are like services.<sup>65</sup> In the present case the services provided by B-Connected and Let's Talk fall under CPC 7523 under sub-sector of telecommunications services.<sup>66</sup>

*iv. Unlikeness across modes of supply is not to be considered*

(¶37.) Another issue concerning the determination of likeness of services is whether different modes of supply are to be taken into account when establishing likeness.<sup>67</sup> According to Panel view in *Canada-Autos case*, the mode of supply doesn't change the likeness of a service.<sup>68</sup> Therefore, the services supplied through different methods of supply should generally be considered unlike.<sup>69</sup>

*v. Let's Talk and B-Connected are like service suppliers*

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<sup>60</sup> Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, ¶29, WTO Doc. WT/DS31/AB/R (adopted Jun. 30, 1997).

<sup>61</sup> *EC - Asbestos*, ¶ 101.

<sup>62</sup> Panel Report, *United States - Section 337*, ¶ 5.14.

<sup>63</sup> Panel Report, *Korea-Taxes on Alcoholic Beverages* ¶ 10.100, WTO Doc. WT/DS75/R, WT/DS84/R (adopted Sep. 17, 1998).

<sup>64</sup> Panel Report, *Chile - Taxes on Alcoholic Beverages*, ¶ 8.1, WTO Doc. WT/DS87/R, WT/DS110/R, (adopted Jun. 15, 1999).

<sup>65</sup> A. MATTOO, *supra* note 50, at 128.

<sup>66</sup> UN, Provisional Central Product Classification (CPC) Services Sectoral Classification List MTN.GNS/W/120.

<sup>67</sup> A. MATTOO, *Supra* note 50, at 1, 107, 119-121; *see also* G. VERHOESEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT- ADJUDICATING THE BOUNDARIES OF REGULATORY AUTONOMY 59-60 (2002).

<sup>68</sup> *Canada-Autos*, ¶ 10.307.

<sup>69</sup> 6 RÜDIGER WOLFRUM, PETER-TOBIAS STOLL ET AL., MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 406, ¶ 27 (2008).

(¶38.) The Panel in *EC-Bananas*<sup>70</sup> stated that to the extent that entities provide these like services, they are like service suppliers. Hence, it can be implied that as the service supplied by the Trust Group and B-Connected are like, they are also like service suppliers.

### **III. ANDUIN’S TREATMENT IS LESS FAVOURABLE TO FOREIGN PRODUCERS AS COMPARED TO DOMESTIC PRODUCERS OF “EQUIPMENT FOR DATA CENTRES” ACCORDING TO ARTICLE III:4 OF THE GATT**

(¶39.) The principle of non-discrimination forms the cornerstone of the GATT and is set forth in the preamble as a general commitment to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariff and other barriers to trade and the elimination of discriminatory treatment in international commerce.<sup>71</sup> In this context less favourable treatment is enforced in the present case wherein the equality of competitive conditions, a principle under Article III [A] has been violated by Anduin [B].

#### **A. EQUALITY OF COMPETITIVE CONDITIONS BETWEEN IMPORTED AND LIKE DOMESTIC PRODUCTS UNDER ARTICLE III**

(¶40.) The fundamental purpose of Article III of the GATT is to ensure equality of competitive conditions between imported and like domestic products.<sup>72</sup> The principle of non-discrimination is one of the essential building blocks in the WTO, national treatment obligation being one under it.<sup>73</sup> The national treatment obligation is incorporated in Article III of the GATT<sup>74</sup> and requires Baranduin’s goods not to be treated inferior to domestic goods.<sup>75</sup> The fundamental purpose of Article III is to

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<sup>70</sup> *EC - Bananas*, ¶ 7.322.

<sup>71</sup> General Agreement on Tariffs and Trade of October 1947, Preamble, WTO Doc. 58 U.N.T.S. 187, Can. T.S. 1947 No. 27, (entered into force January 1, 1948).

<sup>72</sup> Panel Reports, *US - Tobacco*, ¶99 DS44/R, (adopted Oct. 4, 1994); *see also* Panel report on United States - Measures Affecting Alcoholic and Malt Beverages, (adopted Jun. 19, 1992), BISD 39S/206, 270; *see also* Panel Report, *Canada - Provincial Liquor Boards (EEC)*, ¶5.6 L/6304 (adopted Mar. 22, 1988), 35S/37, 87.

<sup>73</sup> HESTERMEYER, TECHNICAL BARRIERS AND SPS MEASURES (2007).

<sup>74</sup> General Agreement on Tariffs and Trade 1994, art. III, Annex 1A, WTO Doc. 1867 U.N.T.S. 187 (Apr. 15, 1994).

<sup>75</sup> *Ibid.*



avoid protectionism in the application of regulatory measures and perpetuate an equal competitive relationship between countries, i.e., Anduin and Baranduin.

(¶41.) Article III:4 must be read in unison with Article III:1 of the GATT, which articulates the guiding principle for the interpretation of the obligations laid down in other paragraphs of Article III.<sup>76</sup> Therefore, it is submitted that the panel, while examining the issue at hand under Article 12 of the DSU with respect to the violation of Article III:4 is to consider all the paragraphs of Article III of the GATT.

#### **B. ANDUIN’S TREATMENT HAS LED TO THE VIOLATION OF ARTICLE III:4**

(¶42.) It is contended that in order to establish a violation of Article III:4, three elements must be satisfied: that the imported and domestic products at issue are 'like products' [i]; that the measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use [ii]; and that the imported products are accorded less favourable treatment than that accorded to like domestic products [iii].<sup>77</sup>

##### *i. Treatment than that accorded to like products of national origin*

(¶43.) Likeness<sup>78</sup> has to be determined between the products<sup>79</sup> [a]; along with the competitive relationship between the imported and domestic products in the context of Article III:4 [b].

##### *a. Likeness of products under a four tier test*

(¶44.) Article III:4 requires a ‘likeness’ analysis based on the same market-based test and factors as they apply to the directly competitive or substitutable standard of Article III:2, second sentence of the GATT. In *EC – Asbestos*, the Appellate Body

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<sup>76</sup> *EC - Asbestos*, ¶98; see also Panel Report, *United States - Section 337 of the Tariff Act of 1930 and Amendments thereto* ¶5.10., WTO Doc. L/6439 (adopted Nov. 7, 1989) [hereinafter *US – Section 337*].

<sup>77</sup> Appellate Body Report, *Korea – Various Measures on Beef*, ¶133, WTO Doc. WT/DS161/12 WT/DS169/12 (adopted Jan 10, 2001); see also Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶133, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000) [hereinafter *AB Korea - Beef*].

<sup>78</sup> HESTERMEYER, *TECHNICAL BARRIERS AND SPS MEASURES* 1, 15 (Rudiger Wolfrum 2007).

<sup>79</sup> Panel Report, *EEC - Animal Feed Proteins* ¶99. L/4599, (adopted 14 March 1978), 25S/49, 64.

referred to criteria from *Border Tax Adjustments* which it had already confirmed to be relevant for the scrutiny of Article III:2, namely (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and (iv) the tariff classification of the products,<sup>80</sup> where the tariff classification clearly reflects the physical properties of a product.

(¶45.) In the present matter, the Official Notification No. 21/2019 stated that the data centres that use at least 50% of technology equipment developed in Anduin will be exempted from paying 5% of the annual electricity bill they incur,<sup>81</sup> thereby implying that in any case, the equipment made should be utilised by the data centres for their functioning. Let's Talk and B-Connected, being social media platforms, had similar end-use<sup>82</sup> and therefore, even their technological equipment for data centres, for serving the purpose of technical performance, had similar usage. It has been held by the Appellate Body in *US - Clove Cigarettes*,<sup>83</sup> stated that both the domestic menthol cigarettes and the like imported cigarettes had the same end use<sup>84</sup> as they are products, being perfectly substitutable for each other.

b. A competitive relationship has to be determined between the imported and domestic products under Article III:4

(¶46.) As regards the likeness of B-Connected and Let's Talk, the factors which have been taken into account are the same as those which are to be examined when considering whether the two products were directly competitive or substitutable under Article III:2, second sentence.<sup>85</sup> A finding of likeness requires a degree of competition that is higher than merely significant and in Anduin, The Trust Group cross-subsidized from its other business ventures to provide attractive features to end-users which resulted in mass exodus of users from B-Connected to Let's Talk.<sup>86</sup>

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<sup>80</sup> *EC - Asbestos*, ¶101-102.

<sup>81</sup> Moot Problem, ¶27.

<sup>82</sup> Moot Problem, ¶¶14-21.

<sup>83</sup> Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes* ¶132, WTO Doc. WT/DS406/R (adopted Apr. 4, 2012).

<sup>84</sup> *EC - Asbestos*, ¶120.

<sup>85</sup> Panel Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages* ¶8.106, WTO Doc. WT/DS308/16 (adopted Mar. 24, 2006).

<sup>86</sup> Moot problem, ¶22.

(¶47.) The like-products analysis and DCOS products analysis is based on an analysis of the competitive relationship between the imported and domestic products in the context of Article III:4<sup>87</sup> and in the context of the second sentence.<sup>88</sup> The notion that actual competition does not need to take place in the whole market, but may be limited to a segment of the market, is separate from the question of the degree of competition that is required to satisfy the standards of the above mentioned analysis.

(¶48.) A determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. While considering the measure at issue, the relationship between the two paragraphs of Article III is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends.<sup>89</sup>

(¶49.) In the present situation, the Trust Group already had the knowledge of its competition in the market and therefore, to attract users to Let's Talk and compete with B-connected, it cross-subsidized from its other business ventures<sup>90</sup> and gradually positioned itself at the centre of all e-commerce transactions in Anduin which resulted in monopolization of e-commerce infrastructure for other businesses that are dependent upon it, raising anti-competitive concerns.<sup>91</sup>

(¶50.) This raises a parallel with market definition in antitrust or competition law and indeed the 'relevant market' is to be referred.<sup>92</sup> The market power enjoyed by an enterprise can not only be assessed by the market share held by it but by also the extent to which the products controlled by it may be particularly close substitutes for

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<sup>87</sup> *EC - Asbestos*.

<sup>88</sup> Appellate Body Report, *Korea - Taxes on Alcoholic Beverage*, WT/DS75/R, (adopted Feb. 17, 1999, DSR 1999:I, 44).

<sup>89</sup> *EC - Asbestos*, ¶99.

<sup>90</sup> Moot Problem, ¶22.

<sup>91</sup> Moot Problem, ¶23.

<sup>92</sup> Official Journal of European Communities, Commission notice on the definition of relevant market for the purposes of Community competition law (8<sup>th</sup> edn., December 9, 1997).

one another.<sup>93</sup> The objective is to assess the extent to which The Trust Group- Let's Talk will benefit from the unfavourable treatment imposed on B-Connected or alternatively, the extent to which B-Connected will be harmed by this unfavourable treatment.<sup>94</sup>

(¶51.) 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.

(¶52.) An additional step is required to move from identifying the degree of competition to establishing the effects of the national measure on competition. Any panel considering discrimination in the trade context will inevitably be influenced by the aim and effects of the relevant measure.<sup>95</sup>

ii. *The measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.*

(¶53.) The imported technology equipment should be considered 'like products'; further that the domestic purchase requirement of at least 50% of equipment affected the internal sale, offering for sale, and use of B-Connected's social media platform

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<sup>93</sup> DAMIEN NEVEN & JOEL P. TRACHTMAN, PHILIPPINES- TAXES ON DISTILLED SPIRITS: LIKE PRODUCTS AND MARKET DEFINITION, THE WTO CASE LAW OF 2011 LEGAL AND ECONOMIC ANALYSIS 184 (2011).

<sup>94</sup> *Ibid.*

<sup>95</sup> Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test* 619, 620, 32:3, The International Lawyer (1998) [hereinafter 'Aim and Effects'].

and Anduin's requirement that importers must purchase domestic equipment in order to be allowed to get 5% exemption on their annual electricity bill,<sup>96</sup> which clearly accords less favourable treatment to B-Connected's equipment than that accorded to like domestic equipment, all of which are inconsistent with the meaning of Article III:4.

(¶54.) It is contended that, if the domestic purchase requirement had the effect of altering the competitive relationship between imported and domestic equipment, even for the purpose of partially compensating for the benefits granted through the Official Notification No. 21/2019, it is evident to see how this requirement did not affect the internal sale, offering for sale, purchase, and use of imported equipment in order to make their data centres operate smoothly,<sup>97</sup> in clear violation of Article III.

(¶55.) The domestic purchase requirement certainly had an effect on their competitive relationship which decreased the efficiency of B-Connected's operations as it was provided with land in hot and arid region of Anduin, in furtherance of Official Notification No. 21/2019,<sup>98</sup> and thus affected the decisions of end users on the use of services given by B-Connected. Purchase of like imported equipment<sup>99</sup> in order to set up the data centres in Anduin did not grant the same benefit<sup>100</sup> as the purchase of domestic equipment accorded advantages.

*iii. The imported product shall be accorded treatment no less favourable.*

(¶56.) It is contended that the term 'less favourable treatment'<sup>101</sup> expresses the general principle, in Article III:1, that internal regulations should not be applied so as to afford protection to domestic production<sup>102</sup> and the principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, to domestic products, under the national treatment standard of Article III.

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<sup>96</sup> Moot Problem, ¶27.

<sup>97</sup> Moot Problem, ¶29.

<sup>98</sup> Moot Problem, ¶28

<sup>99</sup> Appellate Body Report, *Turkey - Measures Affecting the Importation of Rice*, ¶¶215, 225, 233 & 234.

<sup>100</sup> Moot Problem, ¶28.

<sup>101</sup> Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances* ¶5.2.9, WTO Doc. L/6175, (adopted Jun. 17, 1987).

<sup>102</sup> EC-Asbestos, ¶100.

(¶57.) The intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs.<sup>103</sup> Article III:4 requirement is addressed to relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market. The selection of land for setting up data centres was forced upon B-Connected by the virtue of the Official Notification No. 21/2019.<sup>104</sup> It is considered that the very denial of this opportunity of freely operating in any region of the country in the case of imported equipment constituted less favourable treatment along with the requirement to necessary use the equipment domestically rather than from Baranduin<sup>105</sup> was inconsistent with Article III:4.<sup>106</sup>

(¶58.) The prohibition of *de facto* discrimination extends to all obligations of national treatment of GATT.<sup>107</sup> In the existing situation, the measure imposes a disadvantage predominantly on imported goods, whereas domestically produced goods remain predominantly unaffected.<sup>108</sup>

(¶59.) Under an interpretation of *de facto* discrimination in accordance with an extreme diagonal test, ‘less favourable treatment’ of just one foreign producer who could potentially import into the domestic market compared to one domestic producer is discriminatory.<sup>109</sup> In fact, any difference in technical standards or qualification requirements between Anduin and Baranduin or any country is in one way or another more burdensome to some producers from the exporting country than to domestic firms.

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<sup>103</sup> Panel Report, *Italian Discrimination against Imported Agricultural Machinery*, L/833, (adopted 23 Oct. 1958), 7S/60, 63-64, ¶ 11.

<sup>104</sup> Moot Problem, ¶28.

<sup>105</sup> Moot Problem, ¶27.

<sup>106</sup> Panel Report, *Canada - Administration of the Foreign Investment Review Act* Note 9 ¶160-61, WTO Doc. BISD 30S/140 (adopted Feb. 7, 1984).

<sup>107</sup> Panel Report, *Japan - Taxes on Alcoholic Beverages* ¶¶3.5, 5.9 (adopted Nov. 10), 1987, BISD 34S/83.

<sup>108</sup> NICOLAS F. DIEBOLD, *NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES* 40 (2010).

<sup>109</sup> Ehring & Lothar, *De Facto Discrimination in World Trade; National and Most-Favoured- Nation Treatment or Equal Treatment?*, 36, 921-77 *JOURNAL OF WORLD TRADE* (2002).

## REQUEST FOR FINDINGS

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Wherefore in light of the measures at issue, legal pleadings, reasons given and authorities cited, Baranduin, the Claimant, respectfully requests the Panel to:

1. Find that Anduin has failed to oblige its market access commitments as prescribed under its Schedule of Specific Commitments.
2. Find that Anduin has failed to gratify its national treatment obligations under Article XVII of GATS
3. Find that Anduin's treatment is less favourable to foreign producers as compared to domestic producers of equipment for data centres in accordance with Article III:4 of the GATT.

*All of which is respectfully affirmed and submitted.*

Agent/s for the Government of Baranduin  
(Claimant)