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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 RESPONDENT-**

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**LIST OF ABBREVIATIONS**

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AB	-	Appellate Body
Annex.	-	Annexure
Art.	-	Article
CPC	-	Central Product Classification
Doc.	-	Document
DS	-	Dispute Settlement
DSU	-	Dispute Settlement Understanding
EC	-	European Communities
EU	-	European Union
GATS	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariffs and Trade
Id.	-	Ibidem
i.e.	-	Id est
NLG	-	National Liberation Group
No.	-	Number
OECD	-	Organisation for Economic Co-operation and Development
SMRA	-	Social Media Regulation Act
SCP	-	Social Credit Plan
UN	-	United Nations
UNSC	-	United Nations Security Council
US	-	Unites States
v.	-	Versus
Vol.	-	Volume
WT	-	World Trade
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, National Liberation Group 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 THE DATA LOCALIZATION REQUIREMENTS IMPLEMENTED BY ANDUIN IN LINE  
WITH ITS GATS SCHEDULE OF SPECIFIC COMMITMENTS**

**II**

**WHETHER SEEKING SOURCE CODE FORM B-CONNECTED IS IN ACCORDANCE WITH ARTICLE  
XIV (C)(2) OF GATS**

**III**

**WHETHER ANDUIN'S TREATMENT VIDE OFFICIAL NOTIFICATION NO. 21/2019 IS LESS  
FAVOURABLE TO FOREIGN PRODUCERS UNDER ARTICLE III:4 AND JUSTIFIED UNDER  
ARTICLE III:8(A) 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. It is humbly submitted that Anduin has not committed to grant full market access in the relevant services sector through a particular mode of supply; which is computer and related services, supplied through commercial presence. In arguendo, the SMRA passed by Anduin's Parliament is protected under Article XIV under GATS as it was implemented under Article XIV(a) for the maintenance of public order and was a necessary requirement in accordance with the crisis situation in Anduin. SMRA is also justified as it was legislated for the protection of national security interest in accordance with Article XIV *bis*.

### II.

SMRA and SCP provide for data localization and access to its source code. The measures imposed under Article XIV(c) (ii) seek to secure the objectives under the same measures. For measure to be provisionally justified under Article XIV(c) two elements must be shown i.e. the measure is designed to secure compliance with the SCP and the measure must be necessary to secure such compliance. A measure is said to secure compliance with laws or regulations when its design reveals that it secures compliance with specific rules, obligations or requirements under such laws or regulations. The parameters to taken into account for the necessity test under Article XIV(c) are the importance of the objective pursued, the measure's contribution to that objective and the trade-restrictiveness of the measure.

### III.

Art. III:1 of GATT takes into account the measures that should not be applied, 'so as to afford protection to domestic production' while interpreting the provisions of Art. III:4. Even if two products are 'like', there is no violation of Art. III:4 unless the imported products are given 'less favourable treatment' than the domestic products. More favourable treatment to data centres using domestic technology is justified under Article III:8 (a). Measures satisfying the requirements are not subject to the national treatment obligations set out in other paragraphs of Article III. The challenged measures can be characterized as laws, regulations or requirements governing procurement which involve procurement by governmental agencies for governmental purposes and not with a view to commercial resale.

**LEGAL PLEADINGS**

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**I. WHETHER THE DATA LOCALIZATION REQUIREMENTS IMPLEMENTED BY ANDUIN IN LINE WITH ITS GATS SCHEDULE OF COMMITMENTS.**

(¶1.) It is humbly submitted that Anduin has not committed to grant full market access in the relevant services sector through a particular mode of supply [A]. In arguendo, SMRA passed by Anduin's Parliament is protected under Article XIV under GATS [B].

**A. ANDUIN HAS NOT COMMITTED TO GRANT FULL MARKET ACCESS IN THE RELEVANT SERVICES SECTOR AND MODE OF SUPPLY**

(¶2.) Anduin has not committed to grant full market access in the relevant services sector of computer and related services [i]; which was being supplied by B-Connected through commercial presence as defined under Article 1:2(c) of GATS [ii].

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

(¶3.) It is submitted that B-Connected is a social media platform, which lets individuals and organizations become its users by signing up without any charge.<sup>1</sup> For the classification of such a social media platform as a 'Computer and Related Service' it is essential to determine its meaning. This sector includes database services<sup>2</sup> under CPC 844, defining it as the services provided from a primarily structured database through a communication network.<sup>3</sup>

(¶4.) Article 31(1) of the Vienna Convention on the Law of Treaties<sup>4</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 present matter,

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<sup>1</sup> Moot Problem, ¶14.

<sup>2</sup> Moot Problem, Annex. II.

<sup>3</sup> United Nations, *Statistical Papers - Provisional Central Product Classification of 1991*, Series M No. 77 (adopted May 22, 1989).

<sup>4</sup> Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331.

upon signing up on B-Connected, the users can build their profiles and post their photographs or videos, thereby creating a data set of their profiles.

(¶5.) Social media sites have a rich source of naturalistic behavioural data<sup>5</sup> through the profiles build on their platform. The data sets of the profiles are analysed to explore the patterns of the users,<sup>6</sup> and show targeted advertisements for their revenue. In the present matter, B-Connected generated its revenues through advertising and is the most commercially viable advertising forums.<sup>7</sup> It cannot be regarded as a telecommunications service as it provides for more than just a data and message transmission, it enables people to become buddies<sup>8</sup> and have social interactions.<sup>9</sup>

(¶6.) As new members are added, along with their associated content, the social media sites build more data centres and servers.<sup>10</sup> Herein, B-Connected also had data centres<sup>11</sup> for the storage of the user data<sup>12</sup> and its further usage for advertisement purposes. CPC 844 included services provided from a database through a communication network<sup>13</sup> and hence, the services provided by B-Connected from its data centres<sup>14</sup> through the means of a communication network<sup>15</sup> falls under the sub-sector of Computer and Related Services.

*ii. The services supplied by B-Connected fall within commercial presence of a service (Mode 3) as defined under Article I:2(c) of GATS*

(¶7.) Commercial presence of a service,<sup>16</sup> i.e., mode 3, involves the supplier of the service physically moving into a foreign country to provide its services to foreign consumers, through any kind of permanent presence of a service supplier of one

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<sup>5</sup> Danah M. Boyd and Nicole B. Ellison, *Social Network Sites: Definition, History and Scholarship*, 22 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION (2018).

<sup>6</sup> *Ibid.*

<sup>7</sup> Moot Problem, ¶15.

<sup>8</sup> Moot Problem, ¶14.

<sup>9</sup> ROLF H. WEBER AND MIRA BURRI, CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY 117 (2012).

<sup>10</sup> Morten Falch & Anders Henten, *Business Models in Social Networking*, 1 SOCIAL NETWORKING AND COMMUNITIES 1, 26 (2009).

<sup>11</sup> Moot Problem, ¶27.

<sup>12</sup> Moot Problem, ¶15.

<sup>13</sup> UN, Provisional Central Product Classification (CPC) Services Sectoral Classification List MTN.GNS/W/120.

<sup>14</sup> Moot Problem, ¶29.

<sup>15</sup> Moot Problem, ¶4.

<sup>16</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, art. 1:2(c), 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

Member in the territory of another Member.<sup>17</sup> It includes any type of business establishment<sup>18</sup> or any kind of permanent presence of a service supplier of one Member in the territory of another Member.

(¶8.) It is submitted that GATS, through the usage of commercial presence, implies a notion of profitability because business establishments are usually set up to make profits,<sup>19</sup> which has been done by B-Connected for setting up operations in Anduin and establishing a local office<sup>20</sup> as it received a considerable percentage of its annual profits from Anduin. Thus, it can be implied that the services provided by B-Connected fall within commercial presence of supply under Article I:2(c).

(¶9.) Anduin's Schedule of Specific Commitments in relation to the limitations on market access in the sub-sector of 'computer and related services' regarding supply through mode 3 reads 'unbound'<sup>21</sup> which means that the member has undertaken no market access commitments.<sup>22</sup> Therefore, Anduin has not committed to grant market access to the services provided by B-Connected.

#### **B. IN ARGUENDO, SMRA IS PROTECTED UNDER ARTICLE XIV OF GATS**

(¶10.) Even if the market access obligations have not been fulfilled by Anduin, the member nation is justified in implementing measures which it considers necessary for the maintenance of public order [i]; and for the protection of its essential security interests [ii].

*i. Anduin is justified in implementing measures which it considers necessary for maintaining public order under Article XIV(a)*

(¶11.) Pursuant to the text of Article XIV(a) of GATS, it is essential to demonstrate that the measure is designed in a manner to maintain public order [a]; and the measure for which justification is claimed, is necessary to maintain public order [b].

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<sup>17</sup> RÜDIGER WOLFRUM & PETER-TOBIAS STOLL, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 82 (2007).

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

<sup>19</sup> RÜDIGER WOLFRUM & PETER-TOBIAS STOLL, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 82 (2007).

<sup>20</sup> Moot Problem, ¶17.

<sup>21</sup> Moot Problem, Annex. II.

<sup>22</sup> Panel Report, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, WTO Doc. MTN.GNS/W/164, ¶24.

a) The measure falls within the range of policies designed to maintain public order

(¶12.) It is submitted that Article XIV(a) allows derogation from the substantive obligations under GATS, if it is necessary to protect public morals or to maintain public order.<sup>23</sup> Measures necessary for the enforcement of laws and regulations relating to the safety of the public, are included in the legal concept of public order.<sup>24</sup> It has been defined as the preservation of the fundamental interests of a society,<sup>25</sup> which can be related to the standards of law, security and morality.

(¶13.) In the present matter, citizens of Endor had uploaded videos on B-Connected of being stopped at the border of Anduin which led to an all-out attack in Endor, known as the Drina Massacre,<sup>26</sup> killing over a thousand civilians of Endor. It further led to explosive devices being detonated in front of four eminent political institutions of Anduin.<sup>27</sup> Every member invoking Article XIV has the right to determine its own level of protection against the risk sought to be addressed,<sup>28</sup> which has been done by Anduin by implementing SMRA.

(¶14.) An exception of public order can be invoked only in exceptional circumstances, that is, where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.<sup>29</sup> However, it has been agreed by the Panel that Members should be given some scope to apply these concepts for themselves in their respective territories in accordance with their own systems.<sup>30</sup>

(¶15.) Since, a terrorist attack had already taken place in front of the Parliament building, the National Museum, the Supreme Court of Justice and the residency of the President,<sup>31</sup> resulting in the death of forty people and injury to more than hundred. The happening of the first ever terrorist attack has to be read in consonance with the

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<sup>23</sup> GATS, art. XIV(a).

<sup>24</sup> Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.278, WTO Doc. WT/DS285/26 (adopted May 22, 2007) [hereinafter *US - Gambling*].

<sup>25</sup> Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 298, WTO Doc. WT/DS285/AB/R (adopted May 22, 2007) [hereinafter *AB US - Gambling*].

<sup>26</sup> Moot Problem, ¶9.

<sup>27</sup> Moot Problem, ¶10.

<sup>28</sup> Appellate Body Report, *Korea - Measures Affecting the Import of Fresh, Chilled and Frozen Beef*, ¶¶ 176-178, WTO Doc. WT/DS161,169/AB/R (adopted Dec. 11, 2000).

<sup>29</sup> GATS, art. XIV(a)

<sup>30</sup> *US - Gambling*, ¶6.461.

<sup>31</sup> Moot Problem, ¶10.

Appellate Body's finding that the panels are not mandatorily required<sup>32</sup> to make a separate, explicit determination whether a measure poses a genuine and serious threat.

(¶16.) Hence, protection of human rights<sup>33</sup> forms form a part of the public order exception<sup>34</sup> and as there were reports that any future attacks would most likely be planned and executed through social media platforms,<sup>35</sup> Anduin could implement SMRA in light of maintenance of public order.

b) The measure is necessary to protect public morals and maintain public order

(¶17.) The analysis of the necessity of a measure involves a weighing and balancing process of three factors.<sup>36</sup> The panel has to assesses the importance of the societal interests intended to be protected by the measure, the extent to which the measure contributes towards the realization of the end pursued and the trade impact of the challenged measure.<sup>37</sup> Also, a comparison between the challenged measure and possible alternatives should then be undertaken, the results of which are to be considered in the light of the interests at stake.<sup>38</sup>

(¶18.) Anduin enacted the SMRA in light of concerns related to the maintenance of public order and the national security,<sup>39</sup> which is a fundamental requirement of the societal interests.<sup>40</sup> With regards to the contribution of the measure to the object pursued, a means-end analysis is to be used.<sup>41</sup> As videos uploaded on B-Connected by the NLG<sup>42</sup> as well as other refugees, aggravated other citizens of Anduin, leading to

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<sup>32</sup> Panel Report, *European Union and its Member States - Certain Measures Relating to the Energy Sector*, ¶7.1144, WTO Doc. WT/DS476/8 (adopted Nov. 21, 2018) [hereinafter *EU - Energy Package*].

<sup>33</sup> U.N. High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* 10, U.N. DOC. HR/PUB/05/5 (2005).

<sup>34</sup> MARKUS KRAJEWSKI, *BALANCING TRADE AND NON-TRADE POLICY OBJECTIVES IN GATS: POTENTIALS AND LIMITS OF ARTICLE XIV IN WTO LAW AND PROCESS* 22, 32 (2007).

<sup>35</sup> Moot Problem, ¶24.

<sup>36</sup> Appellate Body Report, *Korea - Various Measures on Beef*, ¶¶163-166, WTO Doc. WT/DS161/12 (adopted Jan 10, 2001) [hereinafter *Korea Beef*].

<sup>37</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, ¶172, WTO Doc. WT/DS135/12 (adopted Apr. 5, 2001) [hereinafter *EC-Asbestos*].

<sup>38</sup> *AB US - Gambling*, ¶306-307.

<sup>39</sup> Moot Problem, ¶26.

<sup>40</sup> FARSHAD GHODOOSI, *INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION* 16, (2017).

<sup>41</sup> Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, ¶¶ 145-151, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil - Tyres*].

<sup>42</sup> Moot Problem, ¶4.

an attack in the capital city,<sup>43</sup> it was clear that social media platforms were being used as a means for execution and planning of terrorist attacks in Anduin.

(¶19.) Although, it can be stated that the measure is trade restrictive, it has been held by the Appellate Body that a measure can be justified, if it brings about a material contribution to the objective.<sup>44</sup> As both the elements have already been established, the burden lies on Baraduin to prove that there could have been WTO-consistent alternatives.<sup>45</sup> As there were reports that any future attacks were most likely to be planned through social media platforms<sup>46</sup> and SMRA had been enacted after consultations with relevant stakeholders,<sup>47</sup> the Parliament of Anduin had reasonably implemented the measure.

*ii. Anduin is justified in implementing measures for the protection of its essential security interests under Article XIV bis*

(¶20.) It is humbly submitted that Article XIV *bis* relating to security exceptions, allows Members to adopt and enforce measures, in the interest of national or international security, otherwise inconsistent with GATS obligations.<sup>48</sup> The reason of such an exception relating to security is to preserve Members' freedom of action in areas relating to national defence and security as trade liberalization cannot prevail over a nation's vital interests of sovereignty and cannot restrain Members' freedom to preserve, and defend, their very existence.<sup>49</sup> The same has also been agreed by Baranduin.<sup>50</sup>

(¶21.) Given the identical language and function of Article XXI under GATT, the same conditions can be applied to this provision. Its history reveals the Member's belief that such a provision entailed political questions that ought not to be subject to

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<sup>43</sup> Moot Problem, ¶10.

<sup>44</sup> *Brazil - Tyres*, ¶151.

<sup>45</sup> *AB US - Gambling*, ¶¶309-311.

<sup>46</sup> Moot Problem, ¶24.

<sup>47</sup> Moot Problem, ¶25.

<sup>48</sup> GATS, art. XIV *bis*.

<sup>49</sup> Panagiotis Delimatsis & Thomas Cottier, *Article XIV bis GATS: Security Exceptions*, UNIVERSITY OF BERN (2008).

<sup>50</sup> Moot Problem, ¶8.

judicial scrutiny by the WTO, and thus, no contracting party could question<sup>51</sup> another country's judgement relating to its security interests.<sup>52</sup>

(¶22.) In the present matter, B-Connected had been already receiving a lot of flak from the governments across the world as many of its users were thought to be members of international criminal syndicates and terrorist organisations.<sup>53</sup> Even the security intelligence unit of Anduin stated that the planning of the execution of the attack in their capital city was done the internal messaging system of B-Connected,<sup>54</sup> which put the nation in a high security alert,<sup>55</sup> thereby implementing the SMRA for data localisation.

(¶23.) The principle of security exception, being a general principle of law<sup>56</sup> is to be observed by all the member nations<sup>57</sup> as the performance of all WTO agreements is governed by the principle of good faith,<sup>58</sup> which had been done by Anduin, by also seeking consultations from B-Connected.

(¶24.) The SMRA was implemented in light of concerns relating to national security<sup>59</sup> and can be justified under the provision of Article XIV *bis*: 1(b)(iii) as Anduin was in an emergency situation. It was on high security alert after a terrorist attack and a civil war was going on in its neighbouring nation, Endor.<sup>60</sup> Thus, the emergency situation can be invoked, as this measure was taken as a response to an action that occurred recently.<sup>61</sup>

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<sup>51</sup> Panel report, *US – Export Restrictions (Czechoslovakia) (1949)*, WTO Doc. GATT/CP.3/SR.22 (adopted Jun. 8, 1949).

<sup>52</sup> PETER VAN DEN BOSSCHE WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION* 585 (2016)

<sup>53</sup> Moot Problem, ¶16.

<sup>54</sup> Moot Problem, ¶11.

<sup>55</sup> Moot Problem, ¶24.

<sup>56</sup> JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 334 (2003).

<sup>57</sup> Appellate Body Report, *US - FSC*, ¶166, WTO Doc. WT/DS108AB/R, (adopted Mar. 20, 2000); *see also* Appellate Body Report, *US - Hot-Rolled Steel*, ¶101, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001).

<sup>58</sup> Appellate Body Report, *US - Offset Act (Byrd Amendment)* ¶296, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (adopted Jan. 27, 2003).

<sup>59</sup> Moot Problem, ¶26.

<sup>60</sup> Moot Problem, ¶1.

<sup>61</sup> Ji Yeong Yoo and Dukheun Ahn, *Security Exceptions in the WTO system: Bridge or Bottle-neck for trade and security ?*, 37 *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 27, 30 (2016).

**II. WHETHER SEEKING SOURCE CODE FROM *B-CONNECTED* IS IN ACCORDANCE WITH ARTICLE XIV (C)(II) OF GATS.**

(¶25.) For a measure to be provisionally justified under Article XIV the appellate body ruled in *Argentina – Financial Services*<sup>62</sup> that for measure to be provisionally justified under Article XIV(c) two elements must be shown, *firstly*, the measure is designed to secure compliance with the SCP [A]; *secondly*, the measure must be necessary to secure such compliance [B]. In the present matter the measures taken by the government of Anduin i.e. SCP requiring B-Connected to share its source code with the government in furtherance of the SMRA is designed to secure compliance with the SCP and is necessary to secure such compliance.

**A. THE MEASURE IS DESIGNED TO SECURE COMPLIANCE WITH THE SCP**

(¶26.) It is submitted that a measure is said to secure compliance with laws or regulations when its designs reveals that it secures compliance with specific rules, obligations or requirements under such laws or regulations. In this regard, the objectives of, or the common interests or values protected by, the relevant law or regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation.<sup>63</sup>

(¶27.) In the present case the rules under SMRA and SCP provide for data localization and access to its source code. The measures imposed under Article XIV(c) (ii) seek to secure the objectives under the same measures. There is no proof of any effect on international commerce due to accessing source code of B-Connected.

(¶28.) In assessing whether the domestic laws and regulations are consistent with WTO law, Panels usually presume legitimacy unless shown otherwise.<sup>64</sup> The SMRA and SCP are laws imposed by the government of Anduin in furtherance of national security and protection of data of its own citizens, these laws are rather protected under the GATS and do not violate the national treatment or market access

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<sup>62</sup> Appellate Body Report, *Argentina - Financial Services*, ¶6.202, WTO Doc. WT/DS/453/12 (adopted May 9, 2016) [hereinafter *Financial Services*].

<sup>63</sup> GATS, art. XIV.

<sup>64</sup> Appellate Body Report, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US - Carbon Steel)*, ¶157, WT/DS213/AB/R (adopted Dec. 19, 2002).

obligations. Under GATS, Members have autonomy to choose their desired level of protection and the means to safeguard their domestic policy objective.<sup>65</sup>

**B. THE MEASURE IS NECESSARY TO SECURE COMPLIANCE**

(¶29.) It is submitted that a measure can be said to secure compliance with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty.<sup>66</sup> The parameters to take into account are the importance of the objective pursued **(i)**; the measures contribution to that objective **(ii)**; the trade-restrictiveness of the measures **(iii)** and <sup>67</sup>

*i. Importance of the objective pursued*

(¶30.) Protecting privacy of internet users, and achieving cybersecurity are fundamental requirements for maintaining the stability of the internet and enabling a trusted environment for cross-border data flows. Given the strategic importance of protecting privacy and cybersecurity, including the enormous risks associated with failing to provide for these frameworks in a digitalized economy, Panels are likely to accord very high priority to these objectives in a data localization-related trade dispute.<sup>68</sup>

(¶31.) In the present matter the first ever terrorist attack has provoked the government to take immediate and necessary steps to counter them. The Security Intelligence Unit reports indicated a high probability of future terrorist attacks and that any future attacks were most likely to be planned and executed through social media platform.<sup>69</sup> Subsequently, the government of Anduin in order to counter the misuse of social media platforms and targeting of innocent lives by terrorists enacted the SMRA and SCP.

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<sup>65</sup> GATS, Preamble, *fourth recital*.

<sup>66</sup> *Korea Beef*, ¶157.

<sup>67</sup> *Financial Services*, ¶6.204.

<sup>68</sup> Neha Mishra, *Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?*, WORLD TRADE REVIEW (2019).

<sup>69</sup> Moot Problem, ¶24.

*ii. Contribution of the measure to the realization of the ends pursued by it*

(¶32.) Data localization could enable easier monitoring of local servers or taking actions against operators breaching data protection or cybersecurity laws, particularly considering the low levels of international cooperation on these issues, for instance, tracking down violations or pursuing civil/criminal action against violators in one's territory might be easier than taking actions against those companies operating and providing their services from abroad.

*iii. Restrictive impact of the measure on international commerce*

(¶33.) Even if sufficient evidence were presented by technical experts supporting the efficiency of the alternative measures suggested by B-Connected<sup>70</sup>, which are potentially less trade restrictive, the Panel will most likely refrain from considering them due to the absence of international standards on data privacy and cybersecurity.<sup>71</sup>

(¶34.) The measures taken by the government of Anduin have not affected international commerce negatively. The measures were taken to promote business engaged in social media services by constructing schemes for subsidizing electricity bills incurred.<sup>72</sup> The restrictions are not affecting the business of foreign companies operational in Anduin. Accessing source code does not technically hamper any business unreasonably, it only serves the objective of the government to enhance the data privacy and security of personal information of its citizens owing to the civil war in Endor and the refugee crisis in Anduin which also lead to terrorist attacks executed through the help of social media platform B-Connected.<sup>73</sup>

*iv. Weighing and Balance*

(¶35.) A less trade-restrictive alternative is considered to be "reasonably available" if it would allow the defending party to achieve the same desired level of protection of

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<sup>70</sup> Moot Problem, ¶25.

<sup>71</sup> M. Finnemore and D. B. Hollis, *Constructing Norms for Global Cybersecurity*, AMERICAN JOURNAL OF INTERNATIONAL LAW 425, 438 (2016).

<sup>72</sup> Moot Problem, ¶27.

<sup>73</sup> Moot Problem, ¶24.

the public interest pursued without prohibitive cost or substantial technical difficulties.<sup>74</sup>

(¶36.) In the present case the objective of the laws and regulations undertaken by Anduin is protection of data of citizens in Anduin and national security against terrorist attacks. Implementing the SMRA and SCP will serve to these interests and measures undertaken in furtherance of these regulations will pursue the same objectives. However, the recommendations by B-Connected to implement ‘*Know Your Customer*’ norms<sup>75</sup> would not be ‘reasonably available’ as a substitute measure to the laws and regulations implemented by Anduin under SMRA and SCP.

### **III. ANDUIN’S ALLOCATION OF LAND DOES NOT CONSTITUTE LESS FAVOURABLE TREATMENT UNDER ARTICLE III:4 OF THE GATT AS ARTICLE III:8(A) OF GATT PERMITS ANDUIN TO ACCORD MORE FAVOURABLE TREATMENT TO DATA CENTRES USING DOMESTIC TECHNOLOGY.**

(¶37.) The policy in Article III:1 of GATT<sup>76</sup> takes into account the measures that should not be applied, ‘so as to afford protection to domestic production’ [hereinafter ‘so as to afford protection’] while interpreting the provisions of Article III:4.<sup>77</sup> As stated in the *Chile-Alcohol case*,<sup>78</sup> the purpose or objectives laid down by a Member State’s legislature and government as a whole is to be considered,<sup>79</sup> along with its regulatory purpose. Hence, it is submitted that the determination of like products should not infringe upon the regulatory authority [A] and Article III:8(a) permits Anduin to accord more favourable treatment to domestic technology [B].

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<sup>74</sup> *Financial Services*, ¶7.729.

<sup>75</sup> Moot Problem, ¶25.

<sup>76</sup> General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994) [hereinafter GATT].

<sup>77</sup> *EC - Asbestos*.

<sup>78</sup> Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS110/AB/R (adopted Jun. 15, 1999) [hereinafter *Chile - Alcohol*].

<sup>79</sup> *Chile - Alcohol*, ¶25.

**A. ‘LIKE PRODUCT’ DETERMINATION SHOULD NOT UNNECESSARILY INFRINGE UPON THE REGULATORY AUTHORITY AND DOMESTIC POLICY OPTIONS OF CONTRACTING PARTIES**

(¶38.) Regulatory purpose must be considered under Article III:4, as part of the ‘like products’ inquiry, which is to be focussed on the competitive relationship, being an element into the determination of ‘so as to afford protection’.<sup>80</sup> Hence, even if two products are found to be like, there would be no violation of Article III:4 unless the imported products are given less favourable treatment than the domestic products.<sup>81</sup>

(¶39.) The Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*<sup>82</sup> found that a measure’s detrimental effect on imports may be explained by factors other than origin. The existence of a detrimental effect, i.e., allocation of land to firms for setting up data centres in Anduin, on given imported equipment resulting from an Official Notification<sup>83</sup> does not necessarily imply that this measure accords less favourable treatment to imports if this detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the B-Connected in this case<sup>84</sup> and how despite of permitting both foreign and domestic firms to set up data centres in Anduin, B-Connected still opted to manufacture its equipment from outside the nation and still complained about Anduin’s law in position.<sup>85</sup>

(¶40.) The treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the GATT and for the regulatory autonomy of contracting parties with respect to their regulations. It is, therefore, imperative that the ‘like product’ determination in the context of Article III does not infringe upon the regulatory authority and domestic policy options of contracting parties.<sup>86</sup>

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<sup>80</sup> *EC-Asbestos*, ¶100.

<sup>81</sup> *Ibid.*

<sup>82</sup> Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, WTO Doc. WT/DS302/17 (adopted Aug. 29, 2005) [hereinafter *Dominican Republic*].

<sup>83</sup> Moot Problem, ¶27.

<sup>84</sup> *Dominican Republic*, ¶96.

<sup>85</sup> Moot Problem, ¶27.

<sup>86</sup> Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, ¶¶5.71-5.72, WTO Doc. DS23/R-39S/206 (adopted Jun. 19, 1992) [hereinafter *Malt Beverages*].

(¶41.) The laws and regulations in question do not differentiate between imported and domestic product as such, as the Official Notification limits the usage of the equipment developed in Anduin to fifty percent and B-Connected clearly has that option instead of using those equipment made in Baranduin.<sup>87</sup> However, B-Connected followed its own policy rather than availing the benefits provided. The Panel while analysing the like products has to consider the public policies in support of its product distinction.<sup>88</sup>

(¶42.) Although the market for Let's Talk and B-Connected overlaps, there is a certain degree of market differentiation as B- Connected requires the users to approve social connections, whereas anyone could follow anyone on Let's Talk and Let's Talk does not have an internal messaging system, like B-Connected.<sup>89</sup> The subjective theory of 'likeness' allows for a distinction between two products that are in a full competitive relationship, by taking into account the regulatory purpose.<sup>90</sup> Hence, if B-Connected's equipment and quality of products had been superior, then it shouldn't have faced the issues relating to their technical performance or hanging of its website, thereby forcing the users to terminate the program without logging out, despite investments being made for high-performance cooling systems.<sup>91</sup>

**B. ARTICLE III:8(A) OF GATT PERMITS ANDUIN TO ACCORD MORE FAVOURABLE TREATMENT TO DATA CENTRES USING DOMESTIC TECHNOLOGY**

(¶43.) Article III:8(a) establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope.<sup>92</sup> In *Canada Renewable Energy*,<sup>93</sup> three issues have been determined that whether the challenged measures involve procurement by governmental agencies [i]; and the procurement is undertaken for governmental purposes and not for commercial resale or for usage in the production of goods for commercial sale<sup>94</sup> [ii].

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<sup>87</sup> Moot Problem, ¶27.

<sup>88</sup> *Malt Beverages*, ¶¶5.23-5.26.

<sup>89</sup> Moot Problem, ¶21.

<sup>90</sup> Donald Regan, *Further Thoughts on Regulatory Purpose*, JOURNAL OF WORLD TRADE 445 (2002).

<sup>91</sup> Moot Problem, ¶29.

<sup>92</sup> Appellate Body Report, *Canada - Renewable Energy / Canada - Feed-in Tariff Program*, ¶5.56, WTO Doc. WT/DS412/19 (adopted May 24, 2013) [hereinafter *Canada - Renewable Energy*].

<sup>93</sup> *Canada - Renewable Energy*, ¶5.57.

<sup>94</sup> *Canada - Renewable Energy*, ¶¶7.24-7.25.

- i. *Official Notification No. 21/2019 in furtherance of SMRA is law, regulation, or rule governing procurement of products purchased for governmental purposes within the meaning of Article III: 8(a)*

(¶44.) Article III:8(a) describes the types of measures falling within its ambit as 'laws, regulations or requirements governing the procurement by governmental agencies of products purchased', requires an articulated connection between such law and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirements.<sup>95</sup> This refers to the action of obtaining equipment and supplies and government procurement refers to the purchase of goods, construction services and other services required by government bodies which accounts for a substantial proportion of GDP,<sup>96</sup> and it is well recognized that discrimination in this area, as well as other practices, related significant barriers to trade.<sup>97</sup> Thus government procurement is of great potential interest for international trade regimes, including the WTO.<sup>98</sup>

(¶45.) The term governmental agencies refers to those entities acting on behalf of government in the public realm within the competences that have been conferred on them to discharge governmental functions.<sup>99</sup> Further, the Official Notification is a government practice which denotes the Government as the author of the action and such a government practice, covers all acts of governments or public bodies, irrespective of whether or not they involve the exercise of regulatory powers.<sup>100</sup>

(¶46.) The Government of Anduin firmly believes in regulating the use of social media and coordinating any future terrorist attacks in its nation<sup>101</sup> and thus, it came up with the legislation of localising any type of data which has been generated by the users in Anduin.<sup>102</sup> Even by way of implementing the SCP, refugees would be integrated into mainstream society in Anduin and would thereby be granting with

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<sup>95</sup> *Canada - Renewable Energy*, ¶5.58.

<sup>96</sup> D.Audet, *Government Procurement: A Synthesis Report*, 149 OECD JOURNAL ON BUDGETING 2 (2002).

<sup>97</sup> F. TRIONFETTI, THE ECONOMICS OF OPENING UP PUBLIC PROCUREMENT (2002).

<sup>98</sup> ROBERT D. ANDERSON, SUE ARROWSMITH, THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM (2011).

<sup>99</sup> *Canada - Renewable Energy*, ¶5.61.

<sup>100</sup> Panel Report, *Korea - Commercial Vessels*, WTO Doc. WT/DS273/8 (adopted Apr. 11, 2005).

<sup>101</sup> Moot Problem, ¶24.

<sup>102</sup> Moot Problem, ¶25.

citizenship.<sup>103</sup> And for this, the data is procured by way of permitting both foreign and domestic firms to set up data centres in Anduin.<sup>104</sup>

(¶47.) The Appellate Body in *Canada Renewable Energy* stated that the phrase ‘products purchased for governmental purposes’ refers to what is consumed or used by the government; or what is provided by government to recipients in the discharge of its public functions.<sup>105</sup> The word ‘for’ relates the term ‘products purchased’ to ‘governmental purposes’, and thus indicates that the products purchased must be intended to be directed at the government or be used for governmental purposes. Thus, Article III:8(a) requires that there be a rational relationship between the product and the governmental function being discharged.<sup>106</sup>

ii. *Anduin government’s procurement of data is not with a view to commercial resale*

(¶48.) The term resale is defined as the sale of something previously bought, however, in the context of Article III:8(a), the word ‘resale’ refers to the term ‘products purchased’. It is submitted that commercial resale is a resale of a product at arm’s length between a willing seller and a willing buyer.<sup>107</sup> An inquiry into it must be assessed having regard to the entire transaction. Profit-orientation is generally an indication that a resale is at arm’s length and indicates that the seller is acting in a self-interested manner.<sup>108</sup> With respect to a buyer, it stated that commercial resale is evident where the buyer seeks to maximize his or her own interest.<sup>109</sup>

(¶49.) Therefore, Anduin government is not to earning any profit but merely discharging its public function of procuring data for SCP and further, providing citizenship to the refugees via the requirements enshrined under the SMRA.<sup>110</sup> And in order to procure the same, Anduin is providing all the social media firm with

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<sup>103</sup> Moot Problem, ¶30.

<sup>104</sup> Moot Problem, ¶27.

<sup>105</sup> *Canada - Renewable Energy*, ¶5.68.

<sup>106</sup> *Canada - Renewable Energy*, ¶5.69.

<sup>107</sup> *Canada - Renewable Energy*, ¶5.70.

<sup>108</sup> *Canada - Renewable Energy*, ¶5.71.

<sup>109</sup> *Canada - Renewable Energy*, ¶5.72.

<sup>110</sup> Moot Problem, ¶30.

favourable climatic condition in the eastern part of its country so that they are able to operate smoothly and assist Government with its objectives.<sup>111</sup>

(¶50.) A commercial resale would be one in which the buyer seeks to maximize his or her own interest and is an assessment of the relationship between the seller and the buyer in the transaction which allows a judgement to be made whether a transaction is made at arm's length.<sup>112</sup> Anduin government is simply procuring data to protect the interests and safety of its own country to maintain public order and national security.<sup>113</sup> In the present case, owing to the serious concern about the use of social media in coordinating future terrorist attacks,<sup>114</sup> social media platforms were put under scrutiny and thus, the Official Notification was released after the legislation and is justified under Article III: 8(a) of GATT.

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<sup>111</sup> Moot Problem, ¶28.

<sup>112</sup> *Canada - Renewable Energy*, ¶5.71.

<sup>113</sup> Moot Problem, ¶26.

<sup>114</sup> Moot Problem, ¶24.

**REQUEST FOR FINDINGS**

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

1. Find that Anduin's imposition of data localisation laws was in line with its Schedule of Specific Commitments.
2. Find that Anduin is within its limits of the WTO law for seeking source code from foreign social media firms in accordance with Article XIV.
3. Find that Anduin's treatment is not less favourable to foreign producers under Article III:4 as it is consonance with Article III:8(a) of GATT.

*All of which is respectfully affirmed and submitted*

Agents for the Government of Anduin  
(Respondent)