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Alabasta - Certain Measures Affecting Electronic Goods and Digital Services

23rd John H. Jackson Moot Court Competition
Bench Memorandum

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1 Introduction

1.1 The present bench memorandum ("**Memo**") provides an overview of the main facts of the case of the 23rd John H. Jackon Moot Court Competition ("**Case**"), as well as a description of the expected arguments, to assist panellists in their evaluation of written and oral pleadings.

1.2 The expected arguments presented in this Memo are not meant to be exhaustive; students may employ their creativity and argumentation skills to come up with additional arguments. Where a certain argument is indispensable in order to comply with basic notions and principles of WTO law, this will be indicated in the Memo.

2 Background

2.1 Relevant Entities and States

2.1. The following are the entities featured in the Case, in order of appearance:

Wano	The Complainant
Alabasta	The Respondent
Maina	A geographic region comprising Alabasta and two more states
Allos	A state in the Maina region, not involved in the dispute
Karda	Another state in the Maina region, not involved in the dispute
Wegapunk	A Wanian tech and film production company
WegaBasta	WegaPunk's fully owned subsidiary and representative in Alabasta
Wega-Flix	WegaPunk's subscription-based video streaming platform
Wega-Spend	WegaPunk's e-commerce platform
Alemachus	An Alabastan producer of smart TVs
ATV1	Alabasta's largest TV company
Able1	Alabasta's largest cable company
Achilles Films	Alabasta's largest film production studio
Atlas	An Allian subscription-based video streaming platform
Prof. Mario Buggy	An economics professor and current Minister of Economy of Alabasta
McEasy	A global consulting company
Sun Miski	WegaPunk's CEO

2.2 List of Acronyms

2.1. The following are the acronyms consistently employed throughout the Case, for ease of reference:

AU	The Alabastan University
CDTS	Competitive Digital Transformation Strategy
CPC	United Nations Central Product Classification
DEL	Alabasta's Digital Economy Law
DMA	Alabasta's Digital Markets Authority
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
FTA	Free Trade Agreement
GADA	Wano's Government Access to Data Act
GATS	The General Agreements on Trade in Services
GATT 1994	The General Agreement on Tariffs and Trade 1994
IMF	International Monetary Fund
LoI	Letter of Intent
MFN	Most Favoured Nation
MoU	Data Flow Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
Schedule	Alabasta's GATS Schedule of Specific Commitments
UNESCO	United Nations Educational, Scientific and Cultural Organization

2.3 Timeline of Main Events

2.1. The timeline below, also provided as Annex 7 to the Case, provides the most important facts of the case. A more detailed summary of the key facts is provided below in section III.

01 May 2009	Publication of Strategic Economic Study by the Departments of Law and Economics of the Alabastan University
01 January 2011	Wegapunk launches Wega-Flix in Alabasta
01 July 2018	Atlas launches its streaming services in Alabasta
01 March 2019	Prof. Buggy is appointed Minister of Economy
20 March 2019	The DEL is approved by the Alabastan Parliament
15 April 2019	The DEL enters into force
01 August 2019	Tariffs on electronic goods, including tablet computers, increase to 13%
11 October 2019	Wegapunk submits to the DMA an LoI to take over Achilles Films
09 February 2020	The DMA issues a decision on the LoI submitted by Wegapunk
13 May 2020	Sun Miski sends a letter of complaint to the DMA
05 November 2020	The DMA approves the takeover of Achilles Films by Atlas
01 December 2020	Achilles Films' content is streamed by Atlas Platform for the first time
04 January 2021	Prof. Buggy submits a complaint to the DMA against Wegapunk
01 February 2021	The DMA imposes interim measures against Wegapunk (1st interim measures decision)
17 June 2022	The DMA dismisses the complaint submitted by Prof. Buggy
05 July 2022	The DMA self-initiates proceedings against Wegapunk
22 September 2022	The DMA imposes interim measures against Wegapunk (2nd interim measures decision)
03 October 2022	Wegapunk challenges the 2nd interim measures decision in local courts
06 December 2022	Wegapunk submits a complaint to the DMA against Atlas
03 January 2023	Prof. Buggy terminates the tenure of one member of the DMA
01 June 2023	A new DMA member is appointed and confirmed by parliament
11 September 2023	The consortium of ATV1, Able 1, Atlas and Alemachus announces plans for the production of the first Mainan tablet computer
01 November 2023	Wano requests WTO consultations with Alabasta

2.4 The Claims

2.1. The Case is inspired by grey zones in the global regulation of trade in the digital economy. With a growing number of states adopting measures to correct the competitive imbalances caused by algorithmic biases or the market concentration of digital platforms, WTO law, which was developed with simpler models of economic activity in mind (with some authors describing it as "Pre-Internet Law"), is increasingly being put to the test.

2.2. The aim of the claims presented in this Case is to highlight some of the challenges WTO law faces in an increasingly digitalized economy, as well as to prompt participants to creatively think about such challenges.

2.3. Hopefully, by the end of this year's competition, trade law thinkers will benefit from interesting solutions or insights offered by participants, whereas participants themselves will have learned the basics of traditional trade law (MFN, national treatment, quantitative restrictions etc.) against a modern background.

2.4. The Case presents three claims, each dealing with a trending topic related to trade in the digital economy:

- The growth of video streaming platforms, and the adequacy or inadequacy of current WTO rules in limiting the negative externalities of their growth (Claim i);
- The privacy and data protection-related concerns posed by digital platforms, and the extent to which current WTO rules allow members to sufficiently address such concerns (Claim ii); and
- Anti-trust regulation of digital (retail) platforms, strategic anti-trust enforcement and the interaction with current WTO rules (Claim iii).

2.5. Specifically, Claim (i) is a GATS national treatment claim, reading as follows: "*Section 4.2 of the DEL is inconsistent with Article XVII of the GATS*". The measure targeted by this claim requires providers of audiovisual content to stream at least 30% local content, with the failure to meet this requirement triggering a fine equal to 7.5% of local annual turnovers.

2.6. The Respondent "*denies all claims of inconsistency with WTO law*" and argues that, in any case "[t]*he alleged inconsistency with Article XVII of the GATS is justified under Article XIV(a) of the GATS*".

2.7. This claim is inspired by local content requirements and content-related fines on large streaming platforms discussed or adopted by few WTO Members.

2.8. The claim also touches upon the topic of "digital services" taxes and fines more broadly, which some consider to be inherently discriminatory, since not all WTO members are home to large digital companies to which such taxes and fines usually apply.

2.9. The purpose of this claim is to stimulate discussion about the extent to which WTO members can take measures to promote or protect domestic cultural content, if they believe that large digital platforms are suppressing demand for such content.

2.10. This discussion will require, specifically, an analysis of whether "traditional" providers of audiovisual content should be compared with streaming platforms (whether they are "like"), and whether outright local content requirements and consequent fines truly constitute a WTO law-consistent means of addressing cultural concerns.

2.11. Claim (ii) is a GATS MFN claim, reading as follows: "*Sections 4.3 and 4.4 of the DEL are inconsistent with Article II of the GATS*". The measure targeted by this claim effectively requires non-Mainan companies to store Alabastan data locally before being authorized to purchase a controlling stake in Alabastan providers of audiovisual content.

2.12. The Respondent "*denies all claims of inconsistency with WTO law*" and additionally argues that "[t]*he alleged inconsistency with Article II of the GATS is justified under Article XIV(c)(ii) GATS*".

2.13. This claim is inspired by recent investment screening regulations adopted by WTO Members, over some of which discrimination concerns under WTO law have been raised.

2.14. While much of the debate regarding investment screening under WTO law has focused on national security, the mechanism addressed in Claim (ii) concerns privacy and data protection. In effect, the mechanism imposes a data localisation requirement on interested buyers of certain local companies. Such types of requirements are also contentious under WTO law.

2.15. The purpose of this claim is to stimulate discussion about the extent to which WTO members can take measures to protect their citizens' personal information from misuse in other countries in a WTO law-consistent manner.

2.16. This discussion will require, specifically, an analysis of whether suppliers established in companies with strict data regulations are "like" those established in members with more relaxed regulations, and what the measure should be for establishing an optimal measure of data protection in a WTO context.

2.17. Claim (iii) is a traditional GATT claim dealing with quantitative restrictions on imports. It reads as follows: "*The ongoing conduct of the DMA, together with the 2019 tariff increase in tablet computers constitute an overarching measure that systematically restricts imports of tablet computers, contrary to Article XI:1 of the GATT 1994*".

2.18. The Respondent, here again, "*denies all claims of inconsistency with WTO law*" and additionally argues that "[t]*he alleged inconsistency with XI:1 of the GATT 1994 is justified under Article XX(d) of the GATT 1994*".

2.19. The claim is inspired by the rise of competition law instruments in digital markets. The claim delves into issues of strategic anti-trust enforcement, whereby strategic priorities of states in their economic and industrial policy are increasingly implemented through their independent competition (or other market regulation) authorities.

2.20. The purpose of the claim is to stimulate discussion on competition law and policy in digital markets and the extent to which traditional trade law instruments, such as the GATT 1994, govern the enforcement practices and priorities of competition law authorities.

2.21. This discussion will require, specifically, an analysis of whether the identified measures and ongoing practice of the DMA could be examined as a single overarching and unwritten measure, and whether such a measure could be justified as necessary to ensure compliance with domestic laws and regulations (here: anti-trust rules governing digital markets as provided by the DEL).

3 Summary of Key Facts and Clarifications

3.1. Alabasta, a middle-income economy located in the historically and culturally rich Maina region, is renowned for its vibrant entertainment industry. In 2019, the government introduced the **DEL** to stimulate the domestic digital sector and bolster its global digital competitiveness. The DEL regulates video streaming services, mandates local content quotas, restricts data flows, and establishes the **DMA** to enforce its provisions.

3.2. The Alabastan Minister of Economy, Professor Mario Buggy, is a central figure in the introduction of the DEL and the subsequent conduct of the DMA in various anti-trust enforcement proceedings. Prior to his appointment, he widely advocated for a broader **CDTS**, which aimed to modernize Alabasta's economy and reduce reliance on volatile sectors. Wano, a high-income country and global leader in electronic goods and digital services, alleges that these measures breach certain WTO rules, particularly under the **GATS** and the **GATT 1994**.

3.3. At the heart of the dispute is the dominance of **Wegapunk**, a multinational company specializing in e-commerce, video streaming, and electronics, based in Wano. Wegapunk's video

streaming platform, **Wega-Flix**, launched its services in Alabasta in 2011 and quickly captured a substantial share of local viewership. Between 2011 and 2017, 55% of all viewing time in Alabasta was spent on Wega-Flix, dwarfing the shares of television channels, cable TV, and cinemas combined. A study published in 2018 by McEasy, a global consulting firm, identified Wega-Flix's dominance as being driven by its on-demand nature, advanced content recommendation algorithms, and wide accessibility across devices, particularly tablet computers.

3.4. Concerns arose over the lack of local representation on Wega-Flix, with studies revealing that only 4% of the platform's content was locally produced, compared to 60-85% for traditional media platforms such as television and cable. Alabastan citizens expressed fears of cultural erosion due to an over-reliance on foreign media content. In 2018, these fears were exacerbated by a Wega-Flix series on Mainan history, widely criticized for historical inaccuracies and a lack of regional actors or locations.

3.5. Additionally, privacy concerns emerged after a whistleblower revealed that data generated by Wega-Flix and Wegapunk's e-commerce platform, **Wega-Spend**, had been transferred to and disclosed without consent to the Wanian government. These revelations drew significant public and political backlash in Alabasta.

3.6. In response, Alabasta enacted the DEL. Among its provisions, **Section 4.2** requires video streaming providers to source at least 30% of their content locally, defined as content with at least 50% of production costs incurred in Alabasta. Non-compliance triggers fines of up to 7.5% of local turnover.

3.7. **Section 4.3** imposes stringent data localization requirements on foreign companies seeking to acquire local audiovisual providers, mandating that all personal data generated by Alabastan users be stored domestically unless the acquiring company is based in a country with a **Data Flow MoU** with Alabasta. Notably, Wano lacks such an agreement. In 2020, these rules blocked Wegapunk's attempt to acquire **Achilles Films**, Alabasta's largest film production studio. The deal was rejected by the DMA due to Wegapunk's refusal to commit to data localization and the non-existence of an MoU between Wano and Alabasta, ultimately allowing a streaming company, Atlas, based in Allos, to acquire Achilles Films at a lower price.

3.8. After the enactment of the DEL, **Wegapunk faced regulatory challenges in Alabasta regarding its Wega-Pad tablet and Wega-Flix streaming service**. In January 2021, Prof. Buggy, filed a complaint with the DMA accusing Wegapunk of prohibited algorithmic boosting, tying, and bundling practices under DEL. Interim measures were imposed, temporarily restricting Wegapunk's promotional activities and requiring quotas on Wega-Pad sales.

3.9. Although the DMA dismissed the complaint in June 2022, it soon launched a self-initiated investigation into anti-steering practices due to the Wega-Pad's limited compatibility with Atlas streaming services. Interim measures ordered Wegapunk to strip pre-installed Wega-Flix from Wega-Pads. Wegapunk's subsequent court challenge failed, leaving the investigation ongoing. By early 2023, proceedings initiated by Wegapunk against Atlas were stalled after the termination of a DMA member's tenure, only resuming in mid-2023 with a newly appointed member amid complaints of increased workloads.

3.10. Alabasta also increased tariffs on electronic goods, including on Wegapunk's **Wega-Pad** tablets, raising rates from 5% to 13%. The government justified this move as necessary to fund the DMA's operations and modernize customs enforcement. Between 2018 and 2023, imports of tablet computers into Alabasta declined by nearly 16%, despite a 20% growth in global tablet trade. Wega-Pad imports also fell during this period, though the Wega-Pad's market share in Alabasta remained steady at 42%. Local entities, such as the ATV1 and Able1 consortium, capitalized on these developments by announcing plans to develop the first **Mainan tablet computer**, set to launch in 2026.

3.11. Wano claims that the DEL's local content requirement and data localization rules violate **Articles XVII (National Treatment)** and **II (MFN Treatment)** of the GATS, while the combination of the DMA's investigations and Alabasta's tariff increase are inconsistent with **Article XI:1 (Quantitative Restrictions)** of the GATT 1994. Alabasta counters these allegations, arguing that the DEL serves legitimate cultural, economic, and consumer protection objectives, citing justifications under **Articles XIV(a) and XIV(c)(ii) of the GATS** and **Article XX(d) of the GATT 1994**.

4 Expected Arguments

4.1 General/ Preliminary Issues

4.1. Teams should **necessarily** be familiar with the basic rules of treaty interpretation under WTO law; according to Article 3.2 of the DSU, the WTO Covered Agreements should be interpreted in line "*with customary rules of interpretation of public international law*".

4.2. Participants should **necessarily** know that these "*customary rules*" include Articles 31, 32 and 33 of the VCLT (Appellate Body Report, *US – Gasoline*, p. 17; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10; Appellate Body Report, *US – Softwood Lumber IV*, para. 59).

4.3. Moreover, teams should **necessarily** be familiar with the legal status of previous panel and Appellate Body reports. Specifically, participants should know that previous panel and Appellate Body reports are **not binding** on subsequent panels.

4.4. However, the Appellate Body has found that "*ensuring security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case*" (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160). Accordingly, participants should know that, generally, panels **tend to adhere** to previous Appellate Body reports and non-appealed panel reports.

4.5. Lastly, teams should **ideally** be familiar with the rules on the burden of proof under WTO law. Specifically, the teams should be familiar with the general rule **that the burden of proof rests on the party asserting a claim, defence or fact** (Appellate Body Report, *US — Wool Shirts and Blouses*, p. 14). The Complainant must "*establish a prima facie case of inconsistency with a provision of a covered agreement*" and each "*party that asserts a fact is responsible for providing proof thereof*" (Appellate Body Report, *Japan – Apples*, para. 542).

4.6. "*Prima facie case*" means that in "*in the absence of effective refutation by the defending party*" a panel is required "*as a matter of law, to rule in favour of the complaining party*" (Appellate Body Report, *EC — Hormones*, para. 546).

4.7. In case of affirmative defences, such as general exceptions, the burden rests on the Respondent (Appellate Body Report, *US — Wool Shirts and Blouses*, p. 14; Panel Report, *Turkey – Textiles*, para. 9.57).

4.8. Lastly, teams should be aware of the limitations imposed by the terms of reference of the panel with regard to the claims presented. The terms of reference limit the **jurisdiction** of the panel by defining the precise claims at issue in the dispute (Articles 6.2 and 7.1, DSU). Teams should not be left to spend time arguing a claim that is not in the Complainant's terms of reference.

4.2 Claim (i)

4.2.1 Applicability of the GATS

4.2.1.1 Complainant

4.1. Claim (i) presents an alleged violation of Article XVII GATS, i.e., of the national treatment obligation. The measure at issue here is section 4.2 of the DEL, which reads as follows:

> "*At least 30% of the content offered for viewership by a service provider shall be sourced in Alabasta. Content shall be deemed to be sourced in Alabasta when more than 50% of its production costs have been incurred in Alabasta. The DMA shall conduct yearly content reviews; if a service provider fails to meet any of these requirements, the DMA shall impose an administrative fine equivalent to 7.5% of the domestic revenue corresponding to the previous fiscal year*".

4.2. The measure has two components: a 30% local content requirement and a fine of 7.5% of domestic turnover if the requirement is not met. These requirements are challenged as one single measure under Article XVII GATS, "as such" (clarification (c)).

4.3. Complainant should **necessarily** begin by inquiring, "*as a threshold question, into whether the measure is within the scope of the GATS*" within the meaning of Article I.1 of the GATS (Appellate Body Report, *Canada – Autos*, paras. 151-152, and 155).

4.4. Article I.1 of the GATS provides that "[t]*his Agreement applies to measures by Members affecting trade in services*"; to establish the applicability of the GATS, Complainant should thus demonstrate that there is a "*measure*"; the measure is taken by a "*Member*"; there is "*trade in services*"; and the measure "*affects trade in services*".

4.5. Article XXVIII(a) GATS defines a "*measure*" as "*any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form*". Section 4.2 of the DEL is part of a governmental law and, as such, a measure under this definition.

4.6. Article I.3(a) of the GATS defines "*measures by Members*" as measures taken by "*central, regional or local governments and authorities*". Section 4.2 of the DEL was adopted by the parliament, i.e. by a central authority, and is thus a measure by a "*Member*".

4.7. With respect to the term "*services*", Article I.3(b) of the GATS clarifies that the GATS covers "*any service in any sector except services supplied in the exercise of governmental authority*". The Appellate Body has clarified that "*the GATS covers **all services** except those supplied in the exercise of governmental authority*" (Appellate Body Report, *US – Gambling*, para. 180).

4.8. Since the facts do not involve any services supplied in the exercise of governmental authority, the services in question, whatever their precise characterization, are covered by the GATS. At this stage, the Complainant does not yet need to identify the service at issue in this case, which is an issue explored below when examining the Respondent's GATS Schedule of commitments.

4.9. Next, Article I.2 of the GATS defines "*trade in services*" as "*the supply of a service*" through the following modes:

> "(*a) from the territory of one Member into the territory of any other Member;*
> *(b) in the territory of one Member to the service consumer of any other Member;*
> *(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;*
> *(d) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member*".

4.10. Article 4.2 of the DEL targets "*content offered for viewership by a service provider*"; "*service providers*" are defined in Article 4.1 of the DEL as "*all enterprises supplying audiovisual content in Alabasta provided that they make at least 20% of their profits from the supply of audiovisual content*".

4.11. This wording is very broad, indicating that the measure applies to all enterprises active in Alabasta, regardless of the mode by which they supply their service. As such, the measure relates to "*trade in services*" within the meaning of Article I.2 of the GATS. At this stage, the Complainant does not yet need to identify which mode of supply is relevant in this case.

4.12. Finally, *the term "affecting" indicates a broad scope of application and is wider in scope than "regulating" or "governing*" (Panel Report, *China – Publications and Audiovisual Products*, para. 7.971); since the measure here regulates and governs trade in services, it also affects such trade within the meaning of Articles I.1 and I.2, GATS, by extension.

4.2.1.2 Respondent

4.1. The Respondent is not expected to challenge the applicability of the GATS. The DEL is a measure by the parliament which regulates trade in services, however defined or understood. If the Respondent attempts a challenge, panellists would be urged to prompt the Respondent to move to the next topic, unless a very interesting and unexpected argument is presented.

4.2.2 The Correct Sector in Respondent's Schedule

4.2.2.1 Complainant

4.1. Article XVII.1 of the GATS reads as follows:

> "*In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers*".

4.2. After establishing the applicability of the GATS, to demonstrate a violation of Article XVII of the GATS, the Complainant should **necessarily** begin by showing that the foreign services it believes are being discriminated against are "*inscribed in* [Respondent's] *Schedule*" (Panel Report, *China – Publications and Audiovisual Products*, paras. 7.944 and 7.945).

4.3. As specified in clarification (g), the Complainant believes that Section 4.2 of the DEL discriminates against "*the audiovisual content streamed on Wega-Flix in Alabasta*". This content comprises movies, documentaries and series by well-known global studios (Case, para. 12), including content produced by Wegapunk, which is the owner of Wega-Flix.

4.4. For Complainant, the most advantageous sector of services in the Respondent's Schedule is 2.D.c, seen below:

2.D. Audiovisual Services			
c. Radio and Television Services (CPC 9613)	1) Minimum 30% local content 2) None 3) None 4) Unbound, except as indicated in the horizontal commitments	1) Minimum 30% local content 2) None 3) None 4) Unbound	

4.5. Indeed, in the other two sectors provided in the Case, the Respondent has made no commitment to grant national treatment to foreign suppliers, as further discussed below. The Complainant should therefore **necessarily argue that sector 2.D.c is the correct sector** for the services it discusses.

4.6. Both sides **should necessarily** know that the sectors in a member's schedule are **"*mutually exclusive*"** (Appellate Body Report, *US – Gambling*, para. 180). They should also know that services with multiple components are considered as **"*integrated services*", or a "*combination*" of services,** falling under the service sector to which this integrated service, as such, is most akin (Panel Report, *China – Electronic Payment Services*, para. 7.188).

4.7. According to the Appellate Body, GATS schedules form an integral part of the GATS and must be interpreted in accordance with Articles 31 *et seq*. of the VCLT (Appellate Body Report, *US – Gambling*, para. 159). **Ideally,** participants should begin their interpretation of the Respondent's Schedule by looking at the "*ordinary meaning*" of the relevant sectors, pursuant to Article 31(1) of the VCLT.

4.8. In this regard, the Complainant could start by offering a dictionary definition of the term it wishes to interpret (Appellate Body Report, *EC – Chicken Cuts*, para. 175). Here, the objective would be to convince the panellists that the ordinary meaning of the term "*Television Services*" is broad enough to capture Wega-Flix's activities. Moreover, considering the ordinary meaning of other sectors, it is clear that sector 2.D.c more appropriately captures the service at issue than the other sectors of the Schedule.

4.9. The Oxford English Dictionary defines "*television*" as "*a system used for transmitting and viewing images and (typically) sound*". The Complainant can argue that sector 2.D.c is sufficiently broad, according to the ordinary meaning of its terms, to cover Wega-Flix's provision of content, which comprises movies, documentaries and series (para. 12), thus involving the transmission and production of images and sound.

4.10. "*Industry sources*" can also assist in determining the ordinary meaning of a schedule's term (Panel Report, *China – Electronic Payment Services*, para. 7.89). Complainant could argue, for instance, that the International Standard Industrial Classification describes a provider similar to Wega-Flix, namely Netflix, as belonging in the "*Motion Picture, Video & TV*" industry (ISIC 591).

4.11. Under Article 31 of the VCLT, the Complainant could also argue that other members' schedules should serve as "*context*" (Appellate Body Report, *US – Gambling*, para. 182). Indicatively, the EU's schedule clarifies that "*Audiovisual services*" enabled by "*computer and related services*", are "*not covered by CPC 84*" (i.e., "*Computer and related services*"). It also clarifies that the "*provision of content*" which requires "*telecommunications services*" is not included in sector 2.C of its schedule ("*Telecommunications services*").

4.12. The Complainant could argue that this reflects a general tendency of WTO members to treat streaming services as regular audiovisual services, rather than including them in telecommunications or computer-related sectors.

4.13. The Complainant may additionally support its conclusions by arguing that the Schedule should be interpreted in light of the GATS' object and purpose, which is reflected in the preamble (Appellate Body Report, *US – Gambling*, paras. 187-189). Recital 2, for instance, states that, by signing the GATS, Members intended to achieve an "*expansion*" of services trade (recital 2). Accordingly, schedules should be interpreted expansively, so that, in case of doubt, a service should be deemed to fall under the most liberalized out of the possible sectors.

4.14. Still under the notions of object and purpose, Complainant could argue that the GATS seeks to liberalize trade in services in a **technologically neutral** manner; the Panel in *US-Gambling*, for instance, expressly recognized that the GATS is meant to be technologically neutral (Panel Report,

US-Gambling, para. 6.285). As such, the fact that Wega-Flix's services are supplied through an online app should not matter when considering whether these services are "*television*"-related.

4.15. Lastly, the Complainant could also make an argument based on the principle of effectiveness (often understood as part of the overall interpretative exercise of Article 31 VCLT), according to which "*interpretation must give meaning and effect to all the terms of a treaty*" (Appellate Body Report, *US – Gasoline*, p. 23).

4.16. Specifically, the Complainant could argue that a "components-based" approach to classifying services under the GATS, whereby services are classified differently depending on their inputs, would mean that all services with a digital component, regardless of their actual content and end-use, would be classified under "*data processing*".

4.17. "*Data processing*" would then become an unintended super-sector, attracting commitments that were meant to be made in other sectors. Rather, to ensure adherence to the principle of effectiveness, "*data processing*" should be understood as just one input or "component" of the aggregated Wega-Flix service which cannot dictate its classification.

4.18. These same points can also be made under the principle of technological neutrality discussed earlier.

4.19 The Complainant **should** then necessarily move to Article 32 of the VCLT, under which the following instruments can be considered as supplementary means of interpretation:

> "[T]*he 1991 United Nations Provisional Central Product Classification (hereafter 'CPC') and the GATT Secretariat document 'Services Sectoral Classification List' (MTN.GNS/W/120, hereafter 'W/120'), both of which deal with the classification of services. The Appellate Body has identified document W/120 and the 1993 Guidelines for the Scheduling of Specific Commitments under the GATS (hereafter the '1993 Scheduling Guidelines')*" (Panel Report, *China – Publications and Audiovisual Products*, para. 7.923).

4.20. Absent a clear indication to the contrary, the structure and the language of a schedule of commitments should indeed be understood to follow the W/120 and CPC nomenclature (AB Report, *US – Gambling*, para 204).

4.21. The Appellate Body has clarified that, "[a]*s the CPC is a decimal system, a reference to an aggregate category must be understood as a reference to all of the constituent parts of that category*" (Appellate Body Report, *US – Gambling*, para. 200).

4.22. The Complainant **should necessarily note** that Respondent's Schedule **is based on the W/120** (Case, para. 9), which includes under it the CPC code 9613 ("*Radio and television services*") in sector 2.D.c. This code is also expressly seen under sector 2.D.c of the Respondent's Schedule. The Complainant **should necessarily argue** that sector **9613,** as understood under the CPC, **has been scheduled**.

4.23. Further, the Complainant should **ideally argue** that CPC 9613 would encompass **CPC 96133**, which covers "*combined programme making and broadcasting services*" (CPC 96133). Since

Wega-Flix's services include both the production of content ("*programme making*") and its dissemination ("*broadcasting services*"), they fall within CPC 96133 and are covered by sector 2.D.c, which makes reference to the broader code CPC 9613.

4.24. Finally, the Complainant could note that, according to the Appellate Body in *China – Publications and Audiovisual Products*, schedules are subject to evolutionary interpretation and should not be limited to the meaning that they had at the time of conclusion (Appellate Body Report, *China – Publications and Audiovisual Services*, para. 397).

4.25. The Complainant could argue that the meaning of the term "*television*" has evolved to capture streaming platforms and apps, which have replaced television as the primary means of supply of audiovisual content.

4.2.2.2 Respondent

4.1. The Respondent may choose to argue for sector 1.B.c or 2.C.n, or concede the services' classification under sector 2.D.c. The panellists **should not push the participants toward either direction**. It would be acceptable for a responding team to argue its case on likeness and less favourable treatment (below), or also on modes of supply.

4.2. Sectors 1.B.c and 2.C.n read as follows:

1.B. Computer and Related Services			
c. Data Processing Services (CPC 843)	1) Unbound 2) Unbound 3) Unbound 4) Unbound, except as indicated in the horizontal commitments	1) Unbound 2) Unbound 3) Unbound 4) Unbound, except as indicated in the horizontal commitments	
2.C. Telecommunications Services			
n. On-line Information and/or Data Processing (Incl. Transaction Processing) (CPC 843**)	1) Unbound 2) Unbound 3) Unbound 4) Unbound, except as indicated in the horizontal commitments	1) Unbound 2) Unbound 3) Unbound 4) Unbound, except as indicated in the horizontal commitments	

4.3. If a team chooses to argue the issue of classification, which is key, it should **ideally** start by noting that certain dictionary definitions define "*television*" as a **specific technical apparatus** that is unrelated to streaming apps. For instance, Merriam-Webster refers to an "*apparatus that converts light and sound into electrical waves and reconverts them into visible light rays and audible sound*".

4.4. The Respondent could point to industry terms such as "*over-the-top*" services (digital distribution services offered directly to viewers via the internet), which are commonly used to describe streaming platforms, and claim that "*television*" is seen as distinct from such services in industry practice. It can point to instruments such as the EU's Audiovisual Media Service Directive or reports of the US Federal Communications Commission, which also apply this distinction.

4.5. The Respondent should then point to either of the two remaining sectors (1.B.c or 2.C.n) as most appropriate given their reference to "*database processing*" services, which in their ordinary meaning imply the "*handling and processing of information by computer*" (Cambridge). Wega-Flix does just that, by handling user information by computer and returning optimized content. Specifically, it can be argued that Wega-Flix keeps a database of shows and movies, and optimizes it based on input from users, as such *"handling* [...] *information*" and "*processing*" a "*database*".

4.6. Concerning the use of the EU's schedule as context (or of the schedule of any other member), Respondent can recall that the Appellate Body has cautioned against ascribing significant interpretative value to other schedules, because each schedule has its own "*logic*" (Appellate Body Report, *US – Gambling*, para. 182).

4.7. The Respondent can also point out that the purpose of the GATS is to achieve liberalization "*progressively*", with due respect to "*national policy objectives*" (GATS preamble, recital 3). In the same vein, liberalization is meant to occur through progressive rounds of negotiations (Article XIX GATS). Interpretation of Schedules cannot be so expansive as to render the negotiating objective meaningless.

4.8. The Respondent could in this regard also highlight that, according to the Appellate Body, "*the distinctive characteristics of the remote supply of gambling services may call for distinctive regulatory methods, and that this could render a comparison between the treatment of remote and non-remote supply of gambling services inappropriate*" (Appellate Body Report, *US – Gambling*, para. 347). As such, the GATS is not meant to be technologically neutral, and members may have regulatory reasons for classifying online and offline services differently. The internet as a component or input of streaming services is so distinctive as to alter the nature of the service.

4.9. Specifically, rather than pure audiovisual services, streaming platforms operate more as "*data processing*" services, where the users receive access to an audiovisual database that offers optimized content, which is in turn algorithmically shaped based on the processing of information submitted by users.

4.10. The Respondent could further argue that the Panel in *China – Electronic Payment Services* considered the users' expectations in determining the correct classification (para 7.180). Users of streaming services do not purchase a simple audiovisual experience as they do on TV, but a freedom and flexibility to peruse varied content at different hours of the day and according to preferences.

4.11. The Respondent could also claim that removing streaming services from "*data processing*" would render the latter category ineffective, since data processing is most often performed in support of another service (i.e., it is most often an input or component of another service). If the most common use/case of data processing is removed from the sector, then the latter would become ineffective.

4.12. With respect to a possible argument based on evolutionary interpretation, the Respondent could counter with the point that interpretation cannot go as far as to add words that the treaty does not include (Appellate Body Report, *India – Patents (US)*, paras. 45-46). In this case,

streaming services cannot be read where the scheduled entry refers to something as specific as "*television*".

4.13. Moreover, the Respondent could argue that video streaming platforms offering content similar to that of a television were a foreseeable possibility in 1994. The Schedule's drafters could have expressly added such platforms to Respondent's "*television*" commitments, but chose not to.

4.2.3 The Correct Mode of Supply

4.2.3.1 Complainant

4.1. Each relevant sector in the Respondent's Schedule lists four modes of supply, with each mode having a different commitment. Modes 1-4 correspond to modes (a) to (d) within the meaning of Article I.2 of the GATS (clarification (d)). Accordingly:

- Mode 1 indicates supply "*from the territory of one Member into the territory of any other Member*" (Article 1.2(a));
- Mode 2 indicates supply "*in the territory of one Member to the service consumer of any other Member*" (Article 1.2(b));
- Mode 3 indicates supply "*by a service supplier of one Member, through commercial presence in the territory of any other Member*" (Article 1.2(c)); and
- Mode 4 indicates supply "*by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member*" (Article 1.2(d)).

4.2. Each mode has different commitments for national treatment, as seen on the Respondent's Schedule. As such, before discussing whether the commitments have been breached by way of failure to grant national treatment, the Complainant **must necessarily identify which is the relevant mode of supply** covering Wega-Flix's services.

4.3. While difficult, the Complainant will **ideally** want to categorize the services under **mode 2 or mode 3**, where the commitments in the sector it will argue for (2.D.c) are broader, as discussed further below.

4.4. The Complainant may also argue that the relevant mode of supply is mode 1, but then it should advance a very solid interpretation as to why the DEL goes beyond the limitations reserved for that mode. Panellists **should not push participants in one direction or the other**.

4.5. If the Complainant does not want to argue that the services are subject to mode 1, it could rely on *China – Electronic Payment Services*, where the panel examined digital payment services provided by foreign banks with a corporate presence in China under mode 3 (Panel Report, *China – Electronic Payment Services*, para 7.575). It could argue that cross-border electronic transmissions

of content render services no less relevant to mode 3. Even if electronically transmitted across the border, this content is still managed in most aspects through the commercial presence of Wega-Basta (Case, para. 13).

4.6. The Complainant may also argue that, if the panel should look beyond Wega-Basta's commercial presence, it should apply mode 2, and not mode 1. Specifically, it could argue that, according to the 2001 Scheduling Guidelines (which, like the 1993 Guidelines, are relevant under Article 32 VCLT, see Appellate Body Report, *US – Gambling*, para. 197), supply "*in the territory of one Member to the service consumer of any other Member*" within the meaning of mode 2 occurs not only when the consumer travels to receive the service, but also when there is a movement of the consumer's property (S/L/92, para. 29).

4.7. The Complainant could accordingly claim that the use of a website, especially when that website relies extensively on the user's input to offer tailored content, represents a movement of data, and as such a movement of property, to the supplier's territory from that of the consumer; a similar argument has been made by the United States (see WTO Work Programme on Electronic Commerce, "Submission by the United States", WT/GC/16, G/C/2, S/C/7, IP/C/16, WT/COMTD/17, 12 February 1999, 4).

4.2.3.2 Respondent

4.1. The discussion of sectors does not matter if Respondent succeeds in establishing that the correct sectors are 1.B.c or 2.C.n. All modes of supply read *"Unbound"* in these sectors, indicating that there are no commitments for national treatment (as further explained in section 4.2.4 below).

4.2. The discussion of sectors only matters if the Respondent does not succeed in establishing the relevance of sector 1.B.c or 2.C.n, and is forced to discuss sector 2.D.c; in that case, the Respondent must **necessarily** argue that the services are at least partially covered by **mode 1**, even if aspects of them are also covered by mode 2 or mode 3. This is because mode 1 is the only mode in sector 2.D.c where Respondent has retained the right to impose some limitations on national treatment ("*Minimum 30% local content*", further discussed in section 4.2.4 below).

4.3. To be sure, the Respondent does not need to argue that the services are exclusively supplied through mode 1, but only that mode 1 is at least partially involved in their supply. Indeed, according to the 1993 Scheduling Guidelines, where a service transaction requires the combined use of more than one mode of supply, **commitments in all relevant modes of supply are required** to ensure coverage of the service at issue (MTN.GNS/W/164, para. 19(e)).

4.4. The Respondent can thus argue that Wega-Flix's services are not covered under modes 2 and 3 (where its Schedule says "None", which means "full commitment" or no limitations), insofar as they also require mode 1 to be effectively supplied, and insofar as mode 1 has limited commitments.

4.5. To establish that Wega-Flix's services involve mode 1, the Respondent can refer to the 2001 Scheduling Guidelines.

4.6. The 2001 Guidelines state that, "*in making this distinction between modes 1 and 2, one should focus on the delivery of the service itself, and not confuse this with the underlying flows of capital or the act of ordering or requesting the supply of a service*" (S/L/92, para. 19).

4.7. The Respondent could argue that, while there may be a flow of data from Alabasta to Wano in order to make requests and shape algorithmic preferences, the service itself is ultimately delivered from Wano to Alabasta; as such, it involves mode 1. It can rely in that regard on *US-Gambling*, where the Panel classified internet gambling services under mode 1 (Panel Report, *US – Gambling*, para. 6.285).

4.8. With respect to mode 3, if it wishes to raise an argument, Respondent could suggest that WegaBasta does not per se offer streaming services, but rather provides various administrative functions related to the Wega-Flix platform. The DEL does not address such secondary services and as such does not concern mode 3.

4.9. This argument would be difficult to sustain since WegaBasta also manages the content Wega-Flix displays in Alabasta, engaging in "*content determination*" (Case, para. 13).

4.2.4 Respondent's Commitments

4.2.4.1 Complainant

4.1. Both sides should **necessarily be familiar with the way in which specific commitments are read**. "*Unbound*" indicates the absence of any specific national treatment commitment (Panel Report, China – Electronic Payment Services, para. 7.652) whereas "*None"* is *"the opposite of the notation 'Unbound'" and indicates full national treatment commitments*" (Appellate Body Report, *US – Gambling*, fn 257).

4.2. Any other inscriptions imply a national treatment commitment with limitations; according to the language of Article XVII, national treatment commitments are "*subject to conditions and qualifications*" indicated in the bound sectors and modes of supply (see also Panel Report, *China – Publications and Audiovisual Products*, para. 7.950).

4.3. In sectors 1.B.c and 2.C.n, all modes of supply read "*Unbound*"; there are no commitments for national treatment in these sectors. In sector 2.D.c, modes 2-4 read "*None*", meaning full commitments.

4.4. In mode 1 of sector 2.D.c, the Respondent has retained the right to require "*Minimum 30% local content*". Here, the Complainant may argue that, assuming the services fall within mode 1 in the first place, the limitation of 30% local content should be read in the factual context of the time of accession; at the time, an Alabastan law required minimum 30% local content, which it defined as content for which "*25% of costs were incurred domestically*". The DEL requires a higher threshold than that (50% or more), and is therefore not encompassed by the scheduled limitation.

4.5. The Complainant can make this argument by pleading the notion of the "*circumstances of conclusion*" of the Schedule, within the meaning of Article 32 of the VCLT (see the Appellate Body Report, *EC – Chicken Cuts*, para. 283, and how the "*historical background*" against which the EC's tariff schedule had been negotiated was deemed pertinent to that schedule's interpretation).

4.6. Finally, although difficult, the Complainant could argue that, even if the local content requirement is covered, the Respondent never reserved the right to fine non-compliant suppliers. The second component of Article 4.2 of the DEL is, in other words, a non-scheduled limitation.

4.2.4.2 Respondent

4.1. With respect to the inscription reading "*Minimum 30% local content*", the Respondent could argue that the Schedule has purposefully afforded it the discretion to further determine it by way of local regulation, refraining from strict definitions;

4.2. With respect to the fine, the Respondent can argue that the right to impose such a measure is necessarily implied in the right to impose a local content requirement. Respondent can rely on the principle of effective interpretation or the principle of context, and state that limitations in the schedules of various WTO members rarely list enforcement measures. If the right to enforce a scheduled limitation is not implied in the right to adopt it, then most limitations in members' schedules would often be meaningless because foreign service suppliers could simply ignore them.

4.2.5 Likeness and Less Favourable Treatment

4.2.5.1 Complainant

4.1. Both sides should **necessarily** know that, in sectors where commitments have been made, the finding of a violation of national treatment requires a determination of whether the services and service suppliers are **"like", before turning to the existence of less favourable treatment** (see, e.g., Panel Report, *EC – Bananas III*, para. 7.317).

4.2. Both sides should also **necessarily** know that the analysis of likeness is made on a **"case-by-case" basis** (Panel Report, *China – Electronic Payment Services*, para 7.701), and that the complaining party must prove likeness **of both services and suppliers**, although likeness of services can create a presumption of likeness of suppliers (Panel Report, *China – Electronic Payment Services*, para 7.705.).

4.3. What is more, both sides should **necessarily** know that likeness requires a determination that the services are in a **"*competitive relationship*"** with each other (Panel Report, *China – Electronic Payment Services*, para. 7.700). What matters is whether the services are "*essentially or generally the same in competitive terms*" (Panel Report, *China – Electronic Payment Services*, paras. 7.701-7.702). This also applies to the providers of the services.

4.4. In disputes under Article III:4 of the GATT 1994, likeness is typically demonstrated by factors such as end-uses, intrinsic properties and substitutability of the products (see, e.g., Appellate Body Report, *EC – Asbestos*, para. 101). Participants may wish to rely on these criteria to make better sense of the notion of competitive relationship under the GATS.

4.5. Finally, both sides should **necessarily know** that according to Article XVII.3 of the GATS, less favourable treatment occurs when there is "[f]*ormally identical or formally different treatment"* which *"modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member*".

4.6. Factually, both sides should also recall that the services to be compared are those supplied by Able1 and ATV1, as domestic services, against "*against the audiovisual content streamed on Wega-Flix in Alabasta"* (clarification (f)), as foreign services.

4.7. To establish likeness in this regard, Complainant should **ideally** highlight the fact that Able1 and ATV1 provide general content, and Wega-Flix provides **movies, series and documentaries** (Case, para. 12), such that there is a significant degree of overlap between the nature of the domestic and foreign services.

4.8. Complainant could also argue that the end-uses of the domestic and foreign services are very similar, i.e., audiovisual recreation and information, and that domestic and foreign services are almost perfectly substitutable, pointing at the X-like trend of the graph shown in Figure 1.

4.9. With respect to the likeness of the service suppliers, the Complainant could indicate that there are no facts to rebut the presumption of likeness generated by the likeness of services. Wegapunk, as the relevant foreign supplier, is similar to Able1 and ATV1 in that it determines the displayable audiovisual content and manages the various technicalities associated with its dissemination.

4.10. The Complaint should then move on to establish less favourable treatment. It should **ideally** argue that the formally identical treatment of foreign and domestic suppliers in practice modifies the conditions of competition in favour of ATV1 and Able 1. This is because the content requirement and the fine force Wega-Flix to display more local content, on which ATV1 and Able1 have a clear competitive advantage, since they already show a significant amount of local content (Case, para. 30) and already attract consumers for it (Case, para. 32).

4.2.6 General Exception: Article XIV(a) GATS

4.2.6.1 Respondent

4.1. A *prima facie* GATS-inconsistent measure may be found to be GATS consistent if it meets the requirements of the "*general exception*" of Article XIV of the GATS. Since this is a defence by the Respondent, the Respondent's potential arguments in this regard are set out first.

4.2. To begin with, both teams should **necessarily** know that the interpretation of Article XIV of the GATS follows the jurisprudence of Article XX of the GATT 1994 (Appellate Body Report, *US - Gambling*, para. 291), and should accordingly not hesitate to rely on such jurisprudence.

4.3. Respondent has invoked sub-paragraph (a) of Article XIV GATS, arguing that section 4.2 was introduced as a legitimate and effective means of responding to the citizens' calls for cultural and historical preservation. This provision reads as follows:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order [original footnote 5];* [...] [original footnote 5] *The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society".*

4.4. The framing of the Respondent's submissions ("*legitimate and effective means of responding to the citizens' calls for cultural and historical preservation*", see para. 76 of the Case), suggests that the teams should focus on the concept of public morals, not public order. Panellists should guide the teams away from the concept of public order, unless a team can come up with a particularly creative argument.

4.5. With respect to public morals, both teams should **necessarily know** that, in *US – Gambling,* the Panel identified three elements that a member invoking Article XIV(a) must demonstrate: "(a) ***the measure must be one designed to "protect public morals"*** *or to "maintain public order*"; (b) ***the measure for which justification is claimed must be "necessary"*** **to protect public morals** or to maintain public order (para. 6.455); and (c) the measure must further meet the requirements of the *chapeau* of Article XIV (6.566).

4.6. The meaning of **public morals may vary across time and space** (Panel Report, *US - Gambling*, para. 6.455). In general, it denotes "***standards of right and wrong conduct*** *maintained by or on behalf of a community or nation*" (Panel Report, *US - Gambling*, para. 6.465). Both teams should **necessarily know this**.

4.7. The Respondent **should necessarily** argue (although briefly) that **cultural and historical preservation is a standard of right and wrong conduct** maintained in the Alabastan society, and the Complainant should not argue against this.

4.8. With respect to whether the measure is "*designed*" to protect public morals, both teams **should necessarily know** that the threshold to fulfil this element is low. The Appellate Body has explained that the measure must simply **"*not be incapable*" of protecting public morals** (Appellate Body Reports, *Colombia – Textiles*, paras. 5.67.).

4.9. This is a low threshold which would likely be met by section 4.2 of the DEL, which requires local audiovisual content and as such is **at least conceivably capable of protecting history and culture**. The Respondent should **necessarily argue this (briefly)**, and the Complainant should ideally not contest it.

4.10. The most crucial part of the analysis is the standard of **"*necessity*".** Both teams should **necessarily know** that necessity requires:

- The **"*weighing and balancing* [of] *a series of factors*"** (Appellate Body Report, *US - Gambling*, para. 304), such as the **contribution of the measure** to the realization of the ends pursued by it; the **restrictive impact of the measure** on international commerce; and the **importance of the interest or value at stake** (Appellate Body

Report, *US - Gambling*, para. 306; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 239 and 242); and

- An assessment on whether a less trade-restrictive measure is "***reasonably available***" (Appellate Body Report, *US - Gambling*, para. 304). The alternative should achieve the **same level of protection** as the challenged measure. (Appellate Body Report, US – Gambling, para. 308).

4.11. Here, the Respondent could argue that the DEL contributes to cultural and historical preservation by increasing the citizens' exposure to their own culture and allowing cultural audiovisual material to be handled by local producers who have a better command of the culture. The Respondent can cite the incident related to Mainan history discussed in para. 33 of the Case.

4.12. The Respondent could also argue that the trade impact of Article 4.2 of the DEL is minimal since companies already provide local content. This content simply increases with the measure, which should have a minimal impact on streaming activities; at most, it would affect film-making activities, which Able1 and ATV1 do not appear to engage in.

4.13. Moreover, the Respondent could argue that cultural and historical preservation is a value of vital importance to any society, as reflected in various international instruments and organizations tasked with its protection (see, e.g., UNESCO).

4.14. Finally, depending on which alternative is presented by the Complainant, the Respondent may claim that such alternative entails prohibitive costs or does not achieve the same level of protection. What the Respondent should **necessarily** do is to argue that the burden of proving the existence of a **reasonably available, equally effective and less trade-restrictive measure lies on the Complainant** (Appellate Body Report, *US – Gambling*, paras. 309–310).

4.15. With respect to the chapeau of Article XIV, both teams should **necessarily** know that the first element of inconsistency ("***arbitrary or unjustifiable discrimination***") is met when the measure is applied in a **single, rigid, unbending and inflexible manner between countries where the same conditions prevail** (Appellate Body Report, *US-Shrimp*, para. 177). It is not met, on the other hand, when there is **a rational nexus of the measure with the objective at hand** (Panel Report, *Argentina – Financial Services*, para. 7.761).

4.16. The second element of inconsistency ("***disguised restrictions on trade***"**)** is met when there is concealed discrimination as determined, for instance, by an examination of whether **the measure pursues protectionist objectives** (Appellate Body Report, *US-Gasoline*, p. 25).

4.17. The Respondent could argue that there is a rational connection of the measure with the objective of cultural and historical preservation, as seen in certain statements by parliamentarians

before the measure's official adoption (see paras. 39 and 40 of the Case). Further, there are no facts in the case showing a rigid application of the measure or clear protectionist objectives.

4.2.6.2 Complainant

4.1. The Complainant would be urged to be brief on Article XIV(a). In the oral rounds, if there is little time remaining, the panellists should urge the Complainant to focus on the existence of alternatives, where it has the burden of proof, and on the chapeau, if time permits.

4.2. With respect to alternatives, the Complainant could identify measures related to cultural education and education in filmmaking and production as an alternative (see clarification 53). It could point out that the current measure is particularly trade restrictive since it harms streaming companies not only as disseminators of content, but also as producers; less of the content they produce can now be shown in Alabasta.

4.3. It can also be argued that educational and film production-related measures would make a better contribution to historical and cultural preservation, attacking the problem (lack of engagement of local consumers) at its core, by organically creating better cultural awareness. Such measures would not necessarily be costly.

4.4. The Complainant can, of course, use its full creativity to devise other alternatives. **What panellists should evaluate is primarily the Complainant's understanding of the relevant test and rule on the burden of proof.**

4.5. Concerning the chapeau, the Complainant may **ideally** argue that the measure is applied in a rigid manner since Sun Miski projects that Wega-Basta cannot possibly meet the quota and will be subject to a fine "*every year*" (Case, para. 54). The measure can also be seen as disguised protectionism; the impact it had, along with the measures challenged under claims (i) and (ii), on WegaBasta, is presumably what allowed a consortium of companies including domestic ones to develop a tablet computer to rival the Wega-Pad (Case, para. 71).

4.2.7 Indicative Questions

Complainant	**Respondent**
Shouldn't the means of delivery matter when classifying services under a member's schedule? Why should a service supplied by radio or TV signals be the same as a service supplied on the Internet?	Why should the means of delivery matter when classifying services under a member's schedule? Isn't the GATS supposed to be a technologically neutral agreement?
Shouldn't the "on-demand" nature of a given service matter when classifying it under a member's schedule? Why should on-demand audiovisual services be the same as traditional audiovisual services, when the former offer tailored content that can be consumed any time?	Why should the "on-demand" nature of a given service matter when classifying it under a member's schedule? Does the GATS draw any distinctions between services based on whether they have some additional side-features? Why is a service's "on-demand" nature so important as to render it distinct from a more traditional service?
What is the Respondent's intention to truly schedule streaming services under radio and television services? When determining its commitments under radio and television services, could Respondent truly have expected the rise of streaming? Are we not "adding to" Respondent's WTO obligations if we assume that it wanted to schedule commitments for streaming services, at a time when such services were barely conceivable?	Can't we say that streaming services have effectively replaced traditional TV and radio services? Can't we also say that streaming services were conceivable at the time of the adoption of the GATS and of Alabasta's schedule, and that they were seen as future alternatives to radio and TV? If instead we classify such services as database or information-related just because they involve the internet, aren't we creating two "super sectors" that will effectively attract any online service, regardless of its substantive content?
In internet-based services, isn't mode of supply 1 always involved? Doesn't the service always flow from servers located in one territory to consumers located in another territory?	In internet-based services, is mode of supply 1 truly involved, or is the consumer the one actually visiting the provider's territory virtually? Moreover, if the provider has a company in the territory of the consumer, is there truly any cross-border movement? Are we not in mode 3?
If mode of supply 1 is at least partially involved in the supply of Wegapunk's streaming services here, shouldn't the limitation inscribed in mode 1 apply to modes 2 and 3 as well?	What happens if a service involves various modes of supply, and we have conflicting commitments under these modes?

Does it matter for likeness that the services of Able1 and ATV1 are provided neither on-demand nor as an app? If not, why?	Why does it matter for likeness that the services of Able1 and ATV1 are provided neither on-demand nor as an app? Why does an additional comfort fundamentally alter the likeness of the services? What actual data against likeness do we have from the case?
Is a multi-purpose tech giant like Wegapunk truly similar to a local tv or cable channel like Able1 or ATV1? To wit, is a multinational oil company which also sells sandwiches in its gas stations similar to a restaurant?	Why would two companies providing the same service be different, just because one provides additional services? Why would this matter in competitive terms? Do consumers really care about whether one company provides additional unrelated services, when choosing a provider for a given service?
In what way do your suggested alternatives achieve the same level of cultural protection as the DEL?	Why did you opt for a content restriction? Why restrict foreign culture instead of adopting measures to increase local cultural awareness through education?

4.3 Claim (ii)

4.3.1 Applicability of the GATS

4.1. Claim (ii) presents an alleged violation of Article II of the GATS, *i.e.*, of the MFN standard. The measure at issue in this claim is the combined effect of Sections 4.3 and 4.4 of the DEL, which read as follows:

> "*4.3 All acquisitions of a controlling interest in service providers incorporated in Alabasta shall require approval by the DMA. To obtain approval, the acquiring enterprise must submit a Letter of Intent. This Letter of Intent shall:*
>
> *(a) Set out the financial terms of the purchase in accordance with the Alabastan Investment Screening Act; and*
>
> *(b) Indicate a binding legal commitment to store personal information generated by Alabastan users in Alabasta, and to refrain from transferring such information outside Alabasta without approval by the DMA. The commitment shall include the following text: "[The acquiring enterprise] hereby undertakes to ensure that the collection, recording, systematization, accumulation, storage, clarification and extraction of personal data of Alabastan residents is carried out using databases and servers located exclusively in the territory of Alabasta. Personal data of Alabastan residents shall not be transferred abroad without prior written approval by the DMA. For the purposes of this commitment, personal data shall mean: Basic identifiers, such as name, date of birth, address and any other contact information; Sensitive information, such as health, employment, financial or religious information; and Digital information, such as IP addresses, device IDs, cookies, location data and any other data that can be reasonably linked to an individual or household".*
>
> *(c) All acquiring enterprises incorporated in countries which have a Data Flow MoU with Alabasta, are exempt from the requirement of Section 4.3(b).*
>
> *4.4 If any of the requirements in Section 4.3(a) and 4.3(b) above are not met, the DMA shall have the discretion to reject the acquisition. Such a rejection does not preclude the acquiring enterprise from purchasing a non-controlling share in the company*".

4.2. The measure effectively imposes a data localization requirement (or, more concretely, a requirement to undertake a binding legal commitment of data localization) on entities established in countries that have signed no Data Flow MoU with Alabasta, if they wish to acquire a domestic audiovisual service provider; MoU countries (i.e., Karda and Allos) are exempt from this requirement.

4.3. The Complainant brings a claim against this measure under Article II of the GATS, which imposes an MFN obligation in the following terms (para. 1):

> "*With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country*".

4.4. As a preliminary matter, both teams should **necessarily** know that this provision imposes a **general** obligation that applies to all services, regardless of whether (and the extent to which) such services have been inscribed in Alabasta's Schedule, and regardless of any limitations therein. The analysis of sections [4.2.2 and 4.2.3] about scheduled sectors and modes of supply, therefore, does not apply and should not be performed here.

4.5. Further, both teams should **necessarily** recall that paragraphs 2 and 3 of Article II, which allow certain exemptions from the MFN principle that is enshrined in paragraph 1, are irrelevant to the case and should not be pleaded, insofar as "*Teams should not discuss exemptions or carve-outs other than those set out in Section V of the Case*" (clarification 2).

4.6. Finally, both teams should necessarily know that an analysis of the inconsistency with Article II requires a determination of whether *"(i) first, the measures at issue are covered by Article II:1 of the GATS; (ii) second, the relevant services and service suppliers are "like"; and (iii) third, the measures at issue accord "immediately and unconditionally" "treatment no less favourable" to like services and service suppliers*" (Panel Report, *Argentina – Financial Services*, para. 7.149).

4.7. In this regard, here:

- Clarification 52 provides that the existence of less favourable treatment is not contested. This was done in order to simplify the case, and because Article 4.4 is clear that MoU countries are exempted from the localization requirement; and
- As is the case of claim (i), there is no scope for the Respondent to challenge the applicability of the GATS to claim (ii), since the relevant facts are straightforward (no governmental authority is involved in the provision of the service and there is a clear

ability of the measure to affect trade in services). The panellists are referred to section [4.2.1] for the relevant analysis, which the Complainant will not need to repeat here if it has already performed under claim (i).

4.8. The only issue to be analysed in detail in this claim is, therefore, that of likeness, which is presented below. In the oral rounds, panellists should urge participants to proceed promptly to likeness should a team attempt to spend any meaningful time on the question of applicability, or less favourable treatment.

4.3.2 Likeness

4.3.2.1 Complainant

4.1 Both teams should **necessarily** know that:

- Article II of the GATS requires a demonstration that **both** the services themselves and their suppliers are like (Appellate Body Report, *Argentina – Financial Services*, para. 6.29);

- Likeness in an MFN context requires a comparison between the complaining country's services and suppliers against those of an allegedly favoured third country. Clarification (g) provides the following in this regard: "*the services to be compared are, on the one hand, the audiovisual content streamed on **Atlas** in Alabasta, as the third country's services, and on the other, the audiovisual content streamed on **Wega-Flix** in Alabasta, as the complaining country's services. It should be assumed that there are no other services relevant to the claim. The suppliers to be compared are **Wegapunk**, as the relevant supplier of the complaining country, and **Atlas**, as the relevant supplier of the third country. It should be assumed that there are no other suppliers relevant to the claim*";

- Likeness is assessed on a **case-by-case basis** (Panel Report, *Argentina – Financial Services*, para. 7.170;Panel Report, *China – Electronic Payment Services*, para. 7.701.), and requires a determination that the relevant services and suppliers are "*similar*" (Appellate Body Report, *Argentina – Financial Services*, para. 6.21), in the sense of being in a "*competitive relationship*" (Appellate Body Report, *Argentina – Financial Services*, paras. 6.33-6.34);

- Participants can rely on criteria developed under the GATT 1994 to establish the existence of a competitive relationship between the compared services and suppliers; these can include the services' end-uses, their characteristics, the consumers' preferences (substitutability), etc. (Appellate Body, *Argentina – Financial Services* (para. 6.30); and

- When the sole basis upon which both the compared services and service suppliers are distinguished is their origin, the Complainant benefits from a "*presumption*" of likeness (Appellate Body Report, *Argentina – Financial Services*, paras. 6.44-6.45).

4.2. In line with the above, the Complainant should **ideally** argue that Articles 4.3 and 4.4 of the DEL introduce a distinction between MoU and non-MoU services and suppliers that is based **exclusively on origin**; the Complainant can argue in that regard that the reference to the MoU is a façade, constituting simply an alternative means of denoting the Maina region, where all MoU states are located. The Complainant could refer to clarification 7 with regards to the legal nature of MoUs in the Mainan states and the lack of incorporation of the 2022 OECD Declaration by Allos and Karda.

4.3. On this basis, the Complainant should **ideally** argue that there is a strong presumption of likeness, and that the **burden of proof should be on the Respondent** to demonstrate that the suppliers and services in question are not like by reference to the established criteria on likeness (Appellate Body Report, *Argentina – Financial Services*, paras. 6.44-6.45).

4.4. Even if the Complainant does so, it may wish to highlight relevant similarities between Atlas and Wega-Flix, with both platforms providing on-demand and subscription-based audiovisual content (including on apps) (see, e.g., Case, paras. 21 and 55; clarification 40).

4.5. With respect to service suppliers, the Complainant should **ideally** argue that likeness of services creates a **presumption of likeness of suppliers**, that the suppliers in question are active in the **same market**, and that there are **no "*other factors*" that can rebut this presumption** (Panel Report, *Argentina – Financial Services*, para. 7.172).

4.3.2.2 Respondent

4.1. The Respondent's position on likeness may be difficult to sustain. Panellists should be somewhat lenient when questioning the Respondent in this regard.

4.2. With respect to likeness of services, the Respondent would **ideally** argue that the presumption of likeness in case of distinctions based exclusively on origin only applies when the distinction is made ***de jure***, citing the Appellate Body in *Argentina – Financial Services* which reasoned that "*measures allowing the application of a presumption of "likeness" will typically be measures involving a de jure distinction between products of different origin*" (para. 6.36).

4.3. Here, the distinction is *de facto*; the DEL refers to MoU countries, not to the Maina region per se. It does not "target" the Maina region as a place of origin of services, but the non-signature of an MoU, as an indication of lower data protection standards. Indeed, other countries are free to

negotiate an MoU to benefit from the exception (and MoUs with other countries are still under negotiation, see clarification 65).

4.4. Further, the Respondent would **ideally** argue that the presumption of likeness in case of distinctions exclusively on origin **is only that: a presumption,** which does not preclude an examination of the traditional likeness criteria. It only affects the burden of proof.

4.5. The Respondent may even opt to disagree with the Appellate Body that a presumption of likeness should shift the burden of proof of the traditional likeness criteria entirely onto the Respondent, especially since some commentators have criticised this finding.

4.6. In engaging with the traditional likeness criteria, the Respondent **should ideally** argue that the services under comparison are of a different nature, with Atlas serving mostly **Mainan content** (Case, para. 21). The Respondent can also point out that there is no clear econometric evidence in the case that Atlas and Wega-Flix are substitutable.

4.7. With respect to likeness of suppliers, the Respondent **should ideally** argue that there is no need to examine this element since there is no likeness of services to begin with (the two criteria, to recall section [4.2.5] above, are cumulative).

4.8. Assuming the services are like, the Respondent could rely on the following finding of the Panel in *Argentina – Financial Services* concerning likeness of suppliers: "*it appears to us that the possibility for Argentina to have access to tax information on foreign suppliers may be considered to be an "other factor" to be taken into account in our likeness analysis, provided that it is reflected in the competitive relationship between services and service suppliers of cooperative and non-cooperative countries*" (para. 7.179).

4.9. According to this finding, even if likeness of services establishes a presumption of likeness of suppliers, there could be **other factors** specific to the nature of the suppliers themselves influencing how consumers view them; these factors can include **regulatory considerations**, such as, in the above-mentioned case, whether the suppliers are incorporated in tax havens.

4.10. Here, the Respondent **should ideally** argue that consumers in Alabasta are sensitive when it comes to issues of **data protection** (see, e.g., Case, para. 39), such that the MoU or non-MoU origin of a given suppliers could influence the consumer's decision of whether to prefer it over Wega-Flix; this is especially the case when considering that the latter sends local data to Wano, where the GADA permits exploitation of data by the government without consent or clear grounds.

4.11. The Respondent, in this regard, **should ideally** highlight that the true criterion for allowing foreign suppliers to purchase controlling stakes in local suppliers is their ability to guarantee the **non-transferring of data to governments, which may abuse it;** Alabastan consumers want to avoid this risk, and would view MoU countries as less risky in that regard, since MoUs require adherence to the **OECD Principles for Government Access to Data**.

4.3.3 General Exception: Article XIV(c) GATS

4.1. The Respondent has claimed that any alleged *prima facie* inconsistency would be covered by Article XIV(c)(ii) of the GATS since Sections 4.3 and 4.4 DEL. Respondent alleges in this regard that "*MoUs provide important data protection guarantees which providers from non-MoU countries, such as Wano, cannot always offer*".

4.2. The legal analysis of this provision is similar to that which should be performed under Article XIV(a) of the GATS; in the interest of brevity, this section only presents the legal tests that are specific to Article XIV(c)(ii) and do not overlap with Article XIV(a). Both teams are, of course, **expected to know these overlapping tests** but do not need to discuss them in any detail if they have done so under claim (i); they should only apply them to the facts.

4.3. Article XIV(c)(ii) of the GATS reads as follows:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:* [...] *(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to* [...] *(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts".*

4.4. There are no relevant findings from WTO jurisprudence on the lit (ii) of sub-paragraph (c). The team should seek guidance from findings on sub-paragraph Article XIV(c) of the GATS and Article XX(d) of the GATT 1994

4.5. Both teams should **necessarily know** that, under this provision, as a preliminary matter, the Respondent must (i) identify the laws and regulations with which the challenged measure is intended to secure compliance; (ii) prove that those laws and regulations are not in themselves inconsistent with WTO law; and (iii) prove that the measure challenged is designed to secure compliance with those laws or regulations (Panel Report, *Argentina – Financial Services*, paras.

7.595-7.596; while not referring to lit. ii in particular, this finding highlights the broader test of Article XIV(c)).

4.6. The term "*laws and regulations*" refers to rules forming part of the domestic legal system of a WTO member (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69). The measure should seek to ensure compliance with obligations encompassed in the relevant laws and regulations, not their objectives (Panel Report, *Colombia – Ports of Entry*, para. 7.538). A measure can be deemed to secure compliance even if there is no "*guarantee*" to that full compliance will result (Appellate Body Report, *Argentina – Financial Services*, para. 6.203).

4.7. Both parties are invited to examine **the relevance of the OECD declaration** either as **part of an interpretive argument** (such "ordinary meaning" of a term, see Panel Report, *Mexico – Measures Affecting Telecommunications Services*, paras 7.235–7.236) or **as factual guidance** for the concepts included in the Article XIV (including the *chapeau)* (e.g. relevance of Framework Convention on Tobacco Control guidelines in Panel Report, *Australia –Plain Packaging*, para. 7.416 and Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras 7.216–7.217)

4.3.3.1 Respondent

4.1. The Respondent should **necessarily argue** that Sections 4.3 and 4.4 of the DEL are designed to secure compliance **with the 2017 Data Protection Law** (discussed in clarification 7), which in turn incorporates the OECD's Declaration on Government Access to Personal Data held by Private Sector Entities.

4.2. Specifically, the Respondent could highlight various principles in the Declaration, such as the need for prior approval for government access, a clear legal basis for access, the need for legitimate aims etc., and argue that Sections 4.3 and 4.4 of the DEL are designed to secure compliance by audiovisual service providers (and their governments) with these principles.

4.3. Further, the Respondent should argue that the Declaration is WTO-consistent (it does not per se have an impact on trade) and is has been adopted as a domestic rule, forming part of the 2017 Data Protection Law. This entire preliminary discussion, in the oral rounds, should ideally be brief and the Complainant is not expected to argue strongly against it.

4.4. With respect to necessity, the Respondent **should ideally argue** that data protection, and more specifically consent by consumers when a government (especially a foreign one) accesses their data, is an objective of vital importance, **as reflected in the OECD's Principles or other international legal instruments**.

4.5. The measure contributes to this objective by requiring potential purchasers of audiovisual service providers either to accept a data localization requirement (which ensures that data can only be processed by the Respondent, who has an adequate legal framework) or an MoU signed by its home government that complies with the OECD's Principles, thereby **protecting data from being accessed by governments without consent**.

4.6. The measure is minimally trade-restrictive since it still allows for the acquisition of a non-controlling interest, even if there is no MoU or localization commitment.

4.7. Finally, with respect to alternatives, the Respondent could argue that only a measure such as a total blocking of acquisitions of control can achieve a zero-risk level of protection. Arguments can also be made about the costliness of potential alternatives; it will all depend on the nature of these alternatives as proposed by the Complainant.

4.8. With respect to the *chapeau*, the Respondent should focus on explaining how the difference in treatment based on the existence of an MoU has a "rational connection" to the objective at hand, i.e. protecting data from being accessed by governments without consent, since the MoUs incorporate the OECD declaration.

4.9. The Respondent can also argue that the measure is not applied in a manner that shows a disguised restriction or protectionism since there is no evidence that it has benefitted any local or Mainan company. On the contrary, Complainant was on track to sign an MoU which would have made its companies eligible to fully acquire local audiovisual service providers without a localization commitment, but negotiations were halted due to the toxic comments of Sun Miski (clarification 9). This could be difficult to sustain since Atlas was able to acquire Achilles Films soon after the entry into force of the measure (although there is no clear evidence that the measure itself was what permitted this acquisition).

4.3.3.2 Complainant

4.1. Like in Claim (i), the Complainant in Claim (ii) should ideally focus on necessity and, if there is time, on the chapeau of Article XIV(c)(ii). The Complainant should, of course, be aware of the entire test of Article XIV(c)(ii) and its written submissions should reflect this awareness by way of a very brief analysis (no more than a paragraph is expected).

4.2. On necessity, the Complainant **should necessarily argue** that the measure makes a minimal contribution to compliance with the Principles; the measure **simply assumes** that a supplier from an MoU state **will be compliant,** but in reality **neither Karda nor Allos have actually implemented laws to transcribe these Principles into their domestic legal orders** (clarification 7); as such, the measure is not truly enforceable, and in practice, there is a danger even

for MoU states to behave in a manner inconsistent with the Principles when handling Alabastan data, yet still acquire a controlling interest over local audiovisual service providers. The Complainant should stress the measure does not have the necessary safeguards to address instances of non-compliance by the MoU states.

4.3. Further, the Complainant could argue that the measure is more trade-restrictive than necessary; the only MoU states are Karda and Allos (other countries are still under negotiation, see clarification 65), so that trade is effectively restricted to these two states.

4.4. With respect to alternatives, the authors leave the issue to the teams' creativity, so long as they can identify and properly apply the relevant test.

4.5. With respect to the *chapeau*, the Complainant can argue that the measure is applied in a manner that shows a disguised restriction or protectionism on the following grounds:

- The measure is too rigid; full localization can make the functioning of audiovisual service providers very cumbersome if not impossible, as explained in Sun Miski's letter (Case, Annex 6);
- Along with the other challenged measures, sections 4.3 and 4.4 of the DEL have presumably helped Mainan companies form a consortium to compete with Wegapunk in the tablet computers sector;
- The measure, in its application during the attempted takeover of Achilles Films, ended up benefiting a Mainan company that acquired Atlas at a lower price than that offered by Wegapunk; this even helped Atlas meet the quota requirement challenged in claim (i) (clarification 43);
- In *Brazil-Retreaded Tyres*, the Appellate Body found that the exemption of MERCOSUR imports from the import ban, based **solely on their status as members of a customs union**, bore no rational relationship to the invoked environmental and health objectives (Appellate Body Report, *Brazil–Retreaded Tyres*, paras. 227-228). The Complainant **should ideally make a similar argument** concerning the MoU status of Allos and Karda; Clarification 7 clarifies how in practice the OECD Declaration has not been incorporated by Allos and Karda, and the signature of the MoU does not guarantee domestic application of the related data protection standards.
- The Panel in *Argentina – Financial Services* analysed the more favourable treatment provided by Argentina to countries with whom they have a tax information exchange agreement in force as well as those with whom they are negotiating such an agreement

with, over the rest of the WTO Members. The Panel considered this to constitute arbitrary and unjustifiable discrimination since the application of the measure was counterproductive to the objective of this discriminatory treatment, which was the ability to have access to the information necessary to secure compliance with Argentina's laws and regulations: "[f]*or example, jurisdictions in different situations as regards Argentina's access to information are classified in the same category; and jurisdictions in a similar situation as regards Argentina's access to information are placed in different categories*" (Panel Report, *Argentina – Financial Services*, para. 7.761.). Here, the Respondent does not assess the data protection regime of the country at issue. It simply requires an MoU on its terms. It could differentiate between countries based on what they actually do in terms of data protection, but does not do so. As shown in practice, Allos and Karda have not incorporated the relevant OECD principles in the domestic legal regime. Such a "rigid" and "unbending" approach constitutes arbitrary and unjustifiable discrimination.

4.3.4 Indicative Questions

Complainant	Respondent
Isn't it normal for a local law to defer to an international instrument, such as an MoU and guidelines issued by the OECD, instead of laying out concrete principles? In tax law, for instance, local laws occasionally refer to double taxation agreements, which in turn incorporate rules issued by the OECD or the UN. Is the DEL's approach of using the existence of an MoU truly problematic and unusual?	Why does the DEL require an MoU instead of actually requiring compliance with certain data protection related principles? Does the mere existence of an MoU with the home state of the buyer truly prevent data protection violations?
Hasn't the panel in Argentina – Financial Services left some scope for distinguishing, in the context of likeness, between service suppliers based on regulatory considerations? Since Alabastan consumers are sensitive to data protection issues, can we not assume that they would look at Mainan and non Mainan suppliers differently?	What are the differences between Atlas and Wega-Flix? Both provide audiovisual services on demand and even through apps. Can we truly consider them and their services "non like" on regulatory grounds? Hasn't the Appellate Body rejected the so-called aims and effects test under likeness?
Atlas provides more local content that Wega-Flix, and local consumers value local content. Should this not have an impact on likeness?	Does it truly matter that Atlas provides more local content than Wega-Flix? Why would the "nationality" of the content render two suppliers "unlike"? What indications does the GATS provide in that regard?
Are you arguing that sections 4.3 and 4.4 of the DEL do not seek to ensure compliance with the OECD's declaration? If so, on what grounds are you saying that? Are there no relevant principles in the declaration these sections could be rationally related to?	Which parts of the OECD's declaration, as implemented in the 2017 Data Protection Law, do sections 4.3 and 4.4 of the DEL seek to ensure compliance with, and how?
Isn't it natural for the Respondent to require broad localization? Shouldn't the Respondent have the right to protect a broad category of data?	Why did you opt for full localization when there is no MoU? Why did you not require the localization of only some categories of strictly sensitive data? Isn't your approach overly trade restrictive?
Respondent still allows the purchase of a minority stake without the demonstration of an MoU or a localization commitment. Is this	Why do you still allow the purchase of minority stakes without a localization requirement? What is the difference between

not a minimally trade restrictive and WTO consistent measure?	majority and minority stakes in terms of data protection?
Does it truly matter whether Allos and Karda have incorporated into their domestic law the MoU and the OECD Declaration? Isn't there a presumption of good faith in international law?	In practice, the OECD Declaration has not been incorporated into domestic law by Allos and Karda. Why are you assuming that Allos and Karda offer the same level of data protection as you, even if they do not currently enforce the MoU and accordingly the OECD Declaration?
Does it truly matter whether Atlas was able to purchase Achilles Films? Is it not because Allos is a more data protection-friendly jurisdiction?	What importance should we ascribe to the fact that Atlas was able to purchase Achilles Films, whereas Wegapunk was not?

4.4 Claim (iii)

4.1. Claim (iii) presents an alleged violation of Article XI:1 GATT 1994, i.e., the prohibition of quantitative restrictions under the GATT 1994. The Complainant challenges a composite measure comprising the conduct of the Respondent as shaped by, inter alia, the following acts:

- The DMA's blocking of Achilles Films acquisition by Wegapunk in 2020;
- The DMA's approval of the full takeover of Achilles Films by Atlas in 2020;
- The DMA's investigation and imposition of interim measures against Wegapunk in 2021;
- The DMA's investigation and imposition of interim measures against Wegapunk in 2022; and
- Alabasta's treatment of the 2022 complaint submitted by Wegapunk in relation to Atlas.

4.2. Coupled with the 2019 tariff increase for tablet computers, the Complainant argues that this conduct contributed to the realization of the CDTS strategy and constitutes a single unwritten and overarching measure to systematically suppress demand for Wega-Pads and prepare the ground for the creation of a local tablet computer industry.

4.3. The unwritten and overarching measure has two major components: (1) the actions and inactions of the DMA in the examined markets and its effects on imports of tablet computers, and (2) the 2019 tariff increase for tablet computers. This conduct is challenged as one single "*overarching and unwritten measure*" under Article XI:1 GATT 1994.

4.4. Complainant should **necessarily** begin by arguing that the conduct at hand should be examined collectively as an "*overarching and unwritten measure*". Then, it should argue that the measure is inconsistent with Article XI:1 GATT 1994. As Respondent invokes Article XX(d) GATT 1994, any alleged inconsistency needs to be examined under the general exception, with Respondent bearing the burden of proof.

4.4.1 Overarching and Unwritten Measure: Overview

4.1. Under Article 3.3 of the DSU, a WTO member may initiate a dispute whenever it considers that "*any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member*". The concept of **"measures" includes any "*acts or omissions of the organs of the state, including those of the executive branch*"** (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

4.2. The measure may not always manifest itself as a formally enacted measure; it can instead comprise various consistent administrative practices, official statements, documents, or even informal agreements. Panels and the Appellate Body have **acknowledged various approaches by which a complainant may challenge these types of "*overarching*" and "*unwritten measures*"**.

4.3. Overall, the issue of overarching and unwritten measures is not fully settled in WTO case law. **Two primary approaches have emerged** under the case law, and students could potentially choose either of them; yet, the second approach is more suitable to the facts at hand and should be prioritised. The latter also has more extensive findings in WTO case law to support an analysis.

4.4. Under the first approach, the Appellate Body has examined whether various administrative acts or omissions may be considered as evidencing **a "*rule or norm*" of "*general and prospective application*"** (Appellate Body Report, *US – Zeroing (EC)*, paras. 198, 201-205). Under the second approach, the Appellate Body has considered whether various administrative acts or omissions amount to "***ongoing conduct***" (Appellate Body Report, *Argentina – Import Measures*, paras 5.99-5.118).

4.5. With respect to the first approach, the Appellate Body in *US – Zeroing (EC)* noted that "*a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document*." (Appellate Body Report, *US – Zeroing (EC)*, para. 196). The Appellate Body also stated that a complainant who attempts to establish such an unwritten measure:

> *"[M]ust clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member, its precise*

> *content, and that it does have general and prospective application. ... [I]t is only if the complaining party puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such*" (Appellate Body Report, *US – Zeroing (EC)*, para. 228).

4.6. If they choose this approach, the teams should **necessarily** enter into a **general discussion over the relevance of the CDTS** and the way it has been expressed so far. To be sure, doing so does not require an attribution of conduct analysis (i.e., an analysis of whether the Annex 3 Report is "*governmental*" or whether the actions of Prof. Buggy as a parliamentary candidate are attributable to Respondent), since the documents reflecting the CDTS are not themselves the challenged conduct. As a reminder, clarification 68 clearly states that the CDTS has not been formally adopted.

4.7. Rather, Complainant may opt to allege that the CDTS normatively drives the actions of Respondent's authorities. However, it is hard to identify the ***"general and prospective application"*** of the measure at hand, given that it seems to be focusing on Wegapunk only. Panellists should not be too stringent in evaluating this discussion either by Claimant or Respondent, and would be urged to point the participants to the second approach.

4.8. With respect to the second approach, the Panel in *Argentina – Import Measures* (in a finding approved by the Appellate Body) accepted that an overarching measure could exist in the form of an "*ongoing conduct*". In that case, the measure consisted of five types of requirements imposed on firms as a condition for importing into Argentina (commitments to invest in Argentina; to export from Argentina; to incorporate local content; not to expatriate funds; or to limit the volume and/or price of imports). The panel first examined the existence of each individual conduct and then considered that each conduct contributed ***"in different combinations and degrees"*** **to** ***"the realization of common policy objectives that guide Argentina's 'managed trade' policy"*** (Panel Report, *Argentina – Import Measures*, para. 6.228).

4.9. The Appellate Body consolidated the legal test for establishing an unwritten overarching measure consisting of an "ongoing conduct":

> *"In any event, the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant. Depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence. For instance, a complainant challenging a single measure composed of several different instruments will normally need to*

> *provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components. (original footnote 451) A complainant that is challenging a measure characterized as "ongoing conduct" would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue. (original footnote 452)"* (Appellate Body Report, Argentina – Import Measures, para. 5.118)

4.10. To prove the existence of an overreaching measure consisting of an "ongoing conduct", **six** constitutive elements must be **necessarily** proven: **(i)** the attribution of the measure to a WTO Member; **(ii)** its precise content; **(iii)** the repeated application of its conduct; **(iv)** the likelihood that such conduct will continue to be applied in the future, **(v)** the combined operation of the different components as part of a single measure, and **(vi)** the operation of the unwritten measure as separate from its components. The Complainant must **necessarily** prove each point, while the Respondent may opt to challenge only particular elements.

4.11. The present case involves an unwritten measure that **is more easily considered under the second approach**, especially in light of the Complainant's characterization of the measure in its request for the establishment of the Panel (See Case, para. 80). Indeed, the measure at issue comprises a range of different actions and inactions of the DMA as well as the tariff increase. Complainant, accordingly, challenges this ongoing conduct as a **single "*overarching measure*" which "*systematically restricted*" imports**.

4.12. The Complainant should **necessarily** know, if it chooses the second approach, that the Appellate Body clarified that "***the specific measure challenged and how it is described or characterized by a complainant*" will determine the elements that the Complainant must prove** in order to establish the existence of an unwritten measure (Appellate Body Report, *Argentina – Import Measures,* para. 5.110).

4.13. Complainant **may seek recourse to circumstantial evidence** (Appellate Body Report, *Russia – Railway Equipment*, para. 5.234) **such as statements, export statistics and other relevant facts to establish the existence of that measure**.

4.14. The panellists are invited to ask factual questions to the teams to clarify the circumstances of the various measures in this regard. The following section introduces the main arguments of the parties and the main related cases.

4.4.2 Attribution and Precise Content

4.4.2.1 Complainant's Arguments

4.1. As discussed, the Complainant could either argue that an **"*ongoing conduct*"** of the Respondent systematically suppresses imports of Wega-pads, focusing on the various acts and omissions of the DMA and the tariff increase, or that the CDTS, as evinced by the actions and inactions of the DMA and the tariff increase, along with the role of Prof. Buggy in the introduction of the DEL, or that the operation of the DMA, constitutes an unwritten **"*rule or norm*" of "*general and prospective application*"**. The Complainant should **ideally argue the former;** yet creative arguments on the latter could be accepted, as long as they do not deviate from the request for the establishment of the Panel. (Case, para. 80)

4.2. As indicated above, the Complainant **should start** by proving that the alleged measure is attributable to the Respondent, an issue which should not raise significant concerns.

4.3. **Second**, the Complainant should **necessarily** define the precise content of the measure. In this regard, in *Argentina – Import Measures*, the Complainant referred to **extensive evidence** with regards to the precise content of the measure that crystallized the Argentinian "*managed trade*" policy, including **regulations and policy documents; official statements; company statements and communications; news articles; and industry surveys and reports**. The Complainant must prove the systematic application of the measure in restricting imports (Appellate Body Report, Argentina – Import Measures, para. 5.142).

4.4. The Complainant should **necessarily** demonstrate the concept of the measure as a **systematic restriction of imports** of tablet computers. The Complainant should identify the limiting effect on imports of component and use the graphs introduced in paras 66-69, and the emergence of domestic tablet computers competitors (paras 70-71) as evidence of the effects on imports of tablet computers. The Complainant could also refer to clarification 66 mentioning how the Minister of Economy submitted several complaints related to key digital economy sectors with significant foreign market players. The Complainant should carefully examine the different proceedings and make connections with the CDTS.

4.5. Since Complainant has characterised the content of the measure as "systematic" import restrictions (Panel Report, *Russia – Tariff Treatment*, para. 7.296), the Panel is required to examine whether the individual elements constitute "*part of an underlying system, plan or organized method or effort*" (Panel Report, *Russia – Tariff Treatment*, para. 7.383), which could be inferred by an observed repetition of treatment.

4.6. Complainant should **ideally** differentiate the case from *Russia-Tariff Treatment* where EU failed to demonstrate that an unwritten measure existed in the form of a "***general practice***" **which resulted in "*the systematic application of particular types of tariff treatment*" to a "*significant amount of tariff lines*"** (Panel Report, *Russia – Tariff Treatment*, paras. 7.282, 7.291-7.292, 7.336.). The EU failed to show how 23 instances of tariff treatment were objectively connected as part of a system or overall plan.

4.7. Complainant could focus on how the various elements of the alleged "ongoing conduct" are objectively connected in light of the CDTS. The latter is reflected in the various provisions of DEL, the policy priorities of the DMA (such as Section 2.4 of DEL, which provides priority to complaints submitted by the Minister of Economy, and the termination of the tenure of the DMA member who supported Wega-flix). On the latter point, the Complainant could place emphasis on the authority of the Minister of Economy (Prof. Buggy) over the priorities of the DMA, the appointment and termination of the tenure of DMA members and the impact on consideration of the proposed acquisition (see case 64 and 65 and Section 2.2-2.3 of DEL in Annex 5).

4.4.2.2 Respondent's Arguments

4.1. Respondent should not contest the attribution of the measure since all elements of the alleged overarching measures are taken by Respondent's official state organs. However, the Respondent should **ideally** contest the precise content of the alleged measure**.**

4.2. In *Indonesia – Chicken*, the panel considered that each element of the alleged overarching measure should have a sufficient connection with the underlying objective of trade restriction (Panel Report, Indonesia-Chicken, paras. 7.678-7.683). In *Argentina – Import Measures*, the policy of managed trade had been officially proclaimed by the Argentine Government through various state releases, official speeches and decisions (Panel Report, *Argentina – Import Measures*, para. 6.162).

4.3. The Respondent should argue that, here, the notion of the CDTS has only appeared in studies and speeches made by Prof. Buggy in his own private capacity as an academic and later as a political candidate. Respondent should emphasize that the evidence relied on by Complainant is not enough to demonstrate that the various elements constitute part of an "*ongoing conduct*". Respondent should stress that the decisions of the DMA are taken on a case-by-case basis based on the evidence collected, without any ties to other governmental policies or aspirations.

4.4.3 Repeated Application and Likelihood of Continuation

4.4.3.1 Complainant's Arguments

4.1. In *Argentina – Import Measures*, the Appellate Body clarified that "*[a] complainant that is challenging a measure characterized as "ongoing conduct" would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue*" (Appellate Body Report, Argentina – *Import Measures*, paras 5.108). The Complainant **necessarily** has to prove repeated application of the conduct, and demonstrate the likelihood of its continuation in the future. The various circumstantial evidence spread across the case should be introduced to support the systematic nature of the "*ongoing conduct*".

4.2. The Complainant should **ideally** rely on the Panel's analysis to identify the DCTS (see Annex 3: Strategic Economic Study by the Department of Law and the Department of Economics of the Alabastan University on Challenges and Opportunities for Alabastan economy in a digital world) as evidence of "*ongoing conduct*" since the actions of Respondent are clearly spelled out in the Study and the influence of Prof. Buggy in the operation of the DMA which proves that the occurrences will continue in the future. The Complainant could argue that the DMA's practice and the tariff increase were explicitly part of the CDTS and were introduced as part of Prof. Buggy's ministerial work. The study and the strategy of Prof. Buggy should be used as evidence of "*repeated*" and "*organised*" (Appellate Body Report, US – Anti-Dumping Methodologies (China), paras 5.132, 5.160 and 5.180) "*ongoing conduct*" that will continue in the future.

4.3. Complainant should **ideally** refer to the legal and factual assessment by the Appellate Body in *Argentina – Import Measures***.**

4.4.3.2 Respondent's Arguments

4.1. Respondent should **ideally** note how the different elements of the alleged measure are not connected with restrictions on imports on tablet computers. Many of the elements identified, such as the blocking of Achilles Films acquisition by Wegapunk in 2020, are unrelated to the importation of table computers.

4.2. Respondent should **ideally** emphasize that the conduct identified involves "sporadic" or "unrelated" applications to individual cases in different markets. (Appellate Body Report, *Argentina – Import Measure*s, para. 5.142) Respondent could contest that the elements form a repeated pattern and challenge the allegations that any alleged conduct would continue in the future. Respondent cannot increase the tariff on tablet computers above the tariff bindings while the decisions of the DMA are taken on a case-by-case basis based on the evidence collected.

4.4.4 Combined Operation and Existence of a Single Measure Distinct from its Components

4.4.4.1 Complainant's Arguments

4.1. The Complainant must **necessarily** prove "*how the different components operate together as part of a single measure and how a single measure exists as distinct from its components*" (Appellate Body Report, *Argentina – Import Measures*, para. 5.108). The overarching measure needs to be "*greater than the sum of its parts*" (Panel Report, Russia – Tariff Treatment, para. 7.389).

4.2. Further, the Complainant should **necessarily** clarify that the claim considers that the various elements, such as the tariff increase and the DMA decisions, fall within the ambit of Article XI:1 as part of the overarching measure that restricts imports, and it is not required to examine how each element individually operates as a trade restriction.

4.3. The Complainant **ideally** should identify a connection between the Study in Annex 3, the statements of Prof. Buggy, the overall conduct of the DMA and the actions of the government of Alabasta (e.g., Clarifications 57 and 66). The Complainant should **necessarily** use the content of the study as a benchmark for explaining how the different elements are combined together to an ultimate strategy, the CDTS.

4.4. The Complainant **should make the precise connection between the personal/academic views of Prof. Buggy and the legislative history of the DEL and the administrative practice of the DMA**. Further, the Complainant could mention that the complaint submitted in January 2021 by Prof. Buggy mentioned the CDTS as its main reasoning, as corroborated by the press conference (Case para. 57 and clarification 57). The overall workload of the DEL due to the priority complaints introduced by Prof. Buggy could also be mentioned (para. 65), since **the authority over the termination of tenure of DMA members could be linked to the overall conduct**.

4.5. The Complainant could also rely on the *Indonesia – Import Licensing Regimes*, where it **was found that while eight different import licenses were trade-restrictive in their own right, they could also be challenged as part of an overall "*licensing regime*"** (Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.266.). Critically, the panel noted that each measure in that case could be conceived as part of a system with interrelated measures. The Complainant here could focus on the progressive escalation of the measures and their combined effect on Wegapunk and the domestic market, as shown by competition statistics and the consolidation of competition in manufacturing a domestic tablet.

4.4.4.2 Respondent's Arguments

4.1. The Respondent should **necessarily** rebut the existence of the overarching measure by **demonstrating that each of the each individual element and the bundled measure cannot be described as a trade restriction within the meaning of Article XI:1 of the GATT 1994 due to their nature and characteristics, and then showing that** contrary to previous case law, such as *Argentina – Import Measures*, none of the conduct introduced here are in and of themselves WTO inconsistent (at least not clearly).

4.2. The Respondent may invest more time and space in disproving the establishment of the trade restrictive nature of the elements of the composite measure within the meaning of Article XI:1 of the GATT 1994. The Respondent should examine the nature and application of the various elements and the composite act such as clarification 27 which clarifies how importation was never restricted by the DMA decisions, aside from the sales related to direct sales of online retailers, and the overall trade statistics on the tablet computer market.

4.3. In *Argentina – Import Measures*, **each of the five types of measures were found to be restricting imports in addition to the finding that they formed an overarching measure/policy of "*managed trade*"**.

4.4. Similarly, in *Russia – Railway Equipment*, Ukraine failed to show the existence of an overarching measure because two out of the three measures invoked could be legally justified. Respondent could focus on the WTO consistency of each measure and the legitimate rationale of the DMA's conduct (enforcement of competition law and protection of personal data). Respondent could emphasize that the different decisions of the DMA have separate justifications and reasonings such as data protection and consumer protection. Respondent could mention that there is evidence with regards to the negative effects of Wegapunk's abusive practices on consumers and data protection (see para. 60 of the Case, on Wegapunk's refusal to address the issue of limited interoperability). Finally, Respondent could address the issue that the conduct of the DMA focused generally on the streaming services market, not the sale of tablet computers.

4.5. The Respondent could note that the panel in *Argentina – Import Measures* considered that the overarching measure was "*characterized by a lack of transparency and predictability, which further discourages imports*" (Panel Report, *Argentina – Import Measures*, para. 6.265). To the contrary, the tariff increase here was properly announced in advance and no evidence exists that the DMA did not follow the prescribed rules of the DEL with regards to transparency or appropriate procedure. Respondent could also point out how the DMA lifted the provisional measures for the complaint of January 2021 (para. 59) and how Wegapunk had legal avenues to challenge any measure in domestic courts (para. 62).

4.6. Finally, Respondent should **necessarily** make references to *Indonesia – Chicken*, where Brazil failed to prove the existence of an overarching unwritten measure since the **individual measures were not "*dependent on each other*", did not operate together and there was no objective link with the policy objective at hand ("policy of self-sufficiency").** (Panel Report, *Indonesia – Chicken*, paras. 7.669-7.760, 7.7683.). The mere co-existence of different requirements within the same regime does not suffice to establish an overarching measure, when the removal or termination of one of them does not affect the operation of the others. (Panel Report, *Indonesia – Chicken*, paras 7.668-7.669) The measures presently are not dependent on each other and do not operate together, as each action and inaction of the DMA is independent from another. Respondent could similarly challenge the linkage of each measure with the CDTS, especially given the fact that the objective is not mentioned in the DEL and the DMA instigated many of the proceedings on its own accord.

4.7. Overall, the **Respondent could ideally argue how the measures operate in isolation without being interdependent as case law has placed significant emphasis on the need for an overarching element separate and additional to the parts of the composite measure.** (e.g. Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.266) The Complainant has placed considerable emphasis on this element when describing the measure in its request for the establishment of the panel. (Case, para. 80)

4.4.5 Article XI:1 GATT 1994

4.1. The Complainant pleads a violation of Article XI:1 of the GATT 1994, which reads as follows:

> "*Article XI of the GATT 1994: General Elimination of Quantitative Restrictions* [...] *No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party*".

4.2. Article XI:1 of the GATT 1994 has **a broad scope covering "*restrictions*" and "*other measures*".** It includes any measure having "*limiting effects*" on import volumes. (Appellate Body Report, *China – Raw Materials*, para. 319-320.) The limiting effect "*can be demonstrated through the design, architecture, and revealing structure of the measure*", and does not require quantitative evidence. (Appellate Body Report, *Argentina – Import Measures*, para. 5.217)

4.3. Further, according to the GATT Panel in *Japan Semi-Conductors*, Article XI:1 GATT prohibits "*all measures instituted or maintained by a contracting party prohibiting or restricting* [...]

exportation or sale for export of products other than measures that take the form of duties, taxes or other charges". (similarly, and more recently: Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.971) The prohibition of Article XI:1 encapsulates both *de jure* and *de facto* quantitative restrictions.

4.4. Even though no quantitative evidence is required, the fact that the constituent elements are not *as such* incompatible with Article XI:1 GATT means that the Complainant would have to demonstrate that the measure is of such nature and extent to operate similarly to a quantitative restriction. (Appellate Body Reports, *China – Raw Materials*, paras. 319-320; Panel Report, *Indonesia – Chicken (21.5 – Brazil)*, para. 7.232.) The Panel in Colombia – Ports of Entry found that "*that any measure that creates uncertainty as to the ability to import/export, and otherwise 'compete' in the marketplace, violates Article XI:1*". (Panel Report, *Colombia – Ports of Entry*, para. 7.240.) Similarly, the Panel in *China – Raw Materials* highlighted how the measure at hand "inherently" constituted a restrictive measure, and that "*the very potential to limit trade is sufficient*" to constitute a restriction under Article XI:1. (Panel Report, *China – Raw Materials*, paras. 7.1081.)

4.5. Article XI does not cover "*simply any restriction*" but only those "*on the importation* [...] *or exportation or sale for export*". (Appellate Body Report, *Argentina – Import Measures*, para. 5.217). Therefore, any purely internal measure that lacks any border element would not be considered under this provision. However, the Panel in *Brazil – Retreaded Tyres* considered that **overly burdensome fines for importation constituted an import restriction due to their prohibitively restrictive effect**, despite not being administered at the border, and despite the exclusion of "duties, taxes or other charges" in the text of Article XI:1. (Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.) Still, this remains **quite an exceptional case** and any reference by the teams should be followed by **relevant factual comparisons**.

4.4.5.1 Complainant's Arguments

4.1. If the Complainant successfully proves the existence of the overarching measure that systematically suppresses importation, then inconsistency with Article XI:1 GATT follows essentially automatically, because it is an integral part of the manner in which the Complainant described the measure.

4.2. The Complainant **necessarily** has to prove the "limiting effect" on imports of Wega-Pads of the overarching measure by referring to the graphs introduced in paras 66-69, and the emergence of domestic tablet computers competitors (paras 70-71) as evidence of the effects on imports of tablet computers.

4.4.5.2 Respondent's Arguments

4.1. The **Respondent should necessarily prioritize demonstrating how each conduct is consistent or outside the scope of Article XI:1**, including the tariff increase (Article XI:1 does not apply to "*duties, taxes or other charges*"). Similarly, Respondent should **ideally** argue that the DMA decisions are internal measures since they affect domestic sales, not solely imports (e.g. the temporary quotas of sales in para. 58). In any event, Respondent could argue that the drop in importation is not significant enough to show that the alleged measure has the required "limiting effect" on importation. (see graphs 66-68)

4.4.6 General Exception: Article XX(d) GATT

4.1. The Respondent has claimed that any alleged inconsistency would be covered by Article XX(d) GATT since the overarching measure was necessary to offset the unfair competitive practices of Wegapunk in the streaming services market.

4.2. **The Complainant should ideally anticipate the allegation and prepare relevant argumentation in its main pleading, but can also address this aspect as part of its rebuttal**.

4.3. Panellists should keep in mind that a defence under Article XX of the GATT 1994 would be premised on the finding of the overarching measure being deemed to exist. Therefore, the **discussion should be steered towards how the overarching measure can be justified when examined jointly as a single measure**.

4.4. The relevant provision reads as follows:

> *"Article XX* [...] *General Exceptions* [...] *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices".*

4.5. As mentioned previously, the Respondent must prove that the measure is provisionally justified under one of the sub-paragraphs (a)-(j), and second, it satisfies the conditions of the introductory paragraph (chapeau) of Article XX. (Appellate Body Report, *US – Gasoline*, p. 22).

4.6. The analysis of Article XX(d) GATT and *chapeau* mirrors the analysis and structure of Article XIV(c) GATS and *chapeau* GATS.

4.7. For the present claim, it is required to add the following: the term "laws and regulations" covers any measure adopted or applied by a WTO Member's legislative or executive branches of government, as long as it is normative in nature and legally enforceable. (Appellate Body Report, *India – Solar Cells*, para. 5.106-109) Normativity or enforcement is required to be proven by the existence of coercive compliance rules, as imposition of penalties or sanctions satisfies the requirement.

4.8. It is not required that the "law or regulation" within the meaning of Article XX(d), be contained in a single instrument or provision. Instead, the rule of conduct may be established through multiple instruments that function together to set out a course of action or rule of conduct. (Appellate Body Report, *India – Solar Cells, para.* 5.140; Appellate Body Report, *Argentina – Financial Services (2016)*, fn. 505 to para. 6.208)

4.9. The list of "laws or regulations" in Article XX(d) is not exhaustive. The policy objectives of the "laws and regulations" included in the list refer to customs enforcement, the enforcement of monopolies, the protection of intellectual property rights, and the prevention of deceptive practices. The Panel in Indonesia – *Chicken* accepted laws and regulations dealing with halal requirements as being covered by Article XX(d) (Panel Report, *Indonesia – Chicken (2017)*, para. 7.119) Competition law and consumer protection would surely fall within the scope of Article XX(d).

4.10. The underlying law and regulation need to be WTO compliant. In *Thailand –Cigarettes (Philippines)*, the panel rejected an Article XX(d) defence by Thailand that the measures at issue were necessary to secure compliance with Thai tax laws, because the panel had already found that these tax laws were GATT-inconsistent. (Panel Report, *Thailand – Cigarettes (Philippines) (2011)*, para. 7.758; Similar Panel Report, *EC – Trademarks and Geographical Indications (Australia) (2005)*, para. 7.332; and Panel Report, *EC – Trademarks and Geographical Indications (US) (2005)*, para. 7.297.) However, it is required that the consistency of the precise law or regulation is challenged or examined. (Panel Report, *Colombia – Textiles (2016)*, para. 7.511)

4.11. As the *chapeau analysis* of Article XX GATT is similar to Article XIV GATS, the present part will not reexamine issues previously mentioned.

4.12. The following interesting case law can be added: the *chapeau* of Art. XX GATT 1994 is concerned with the application of the substantive and procedural requirements of the measure at hand, which can be discerned from its design, architecture, and structure. (Appellate Body Report,

US–Shrimp, para. 115, 160; Appellate Body Report, *Japan–Alcoholic Beverages II*, 29; Appellate Body Report, *EC–Seal Products*, para. 5.302) The Appellate Body in *US – Gambling* noted that isolated instances of enforcement should be assessed in their proper context:

> *"In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the overall number of suppliers, and on patterns of enforcement, and on the reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect*" (Appellate Body Report, *US – Gambling*, para. 356).

4.4.6.1 Respondent's Arguments

4.1. The Respondent has to **necessarily** prove how the alleged overarching and unwritten measure satisfy the requirements of Article XX(d) GATT, not each separate element.

4.2. Respondent will have to carefully frame the policy objective in order to consistently be able to justify the measure. As there is an assumption that the elements presented constitute an overarching measure consisting of an "**ongoing conduct**", Respondent should accordingly frame its analysis of subparagraph (d) and Chapeau (while maintaining, in the first instance, that no overarching measure exists). Teams are invited to be creative in framing this part. However, **it is necessary that they provide information with regards to the existence of the "law and regulation", its compliance with the GATT, the relation between CDTS and the "law and regulation", and alternative to the overarching measure (not a component)**.

4.3. **The Respondent should necessarily mention that the measure at hand was necessary to ensure compliance with Part III of the DEL** ("Competition in the Digital Economy"), **whose consistency with the WTO law is not disputed by Complainant** (other parts of the DEL are being challenged by Complainant).

4.4. The Respondent should **ideally** explain how the measure at hand is not highly trade restrictive (the tariff rate increase is small while all the DMA decisions were only provisionally applied), and the importance of fair competition in the digital economy, especially given the serious allegations against Wegapunk. Respondent should discuss how the various alternatives examined for the tariff increase were rejected (clarification 25). Finally, the Respondent should mention that the DMA took only necessary decisions given the relevant allegations (Article 2.10, Section 2 of DEL, Annex 5). For instance, Respondent should mention that in clarification 27 it is made clear that any potential

import restriction was only applied to direct online sales of Wega-Pads that included the pre-installed preference for Wega-Flix. To the contrary, the importation of such products was allowed if they were meant to be introduced for storage at the Alabastan regional fulfilment centre (clarification 27).

4.5. Respondent should **necessarily** be able to discuss the various alternatives proposed by Complainant in the oral rounds and **ideally** rebut an alternative in its written submissions

4.6. In the chapeau, Respondent will have to **necessarily** go through the main parts of the test and address how the measure does not "arbitrarily" or "unjustifiably" discriminate against Complainant's imports and that it does not constitute "***disguised restrictions on trade***".

4.7. Respondent **ideally** could indicate that the various elements of the measure were not imposed in a "capricious" or "random" manner since their rationale bears a relationship with the promotion of fair competition in the digital sector, as shown by the DMA decisions and the impact assessment report of the DEL (clarification 26). Respondent should also be able to present how the actions and inactions of the DMA with regards to enforcing the DEL and instigating proceedings do not have a discriminatory intent or effect. Respondent should argue that the DMA acted based on available evidence and substantive assessment of the competitive conditions in the relevant markets.

4.8. Respondent should demonstrate how the objective of the measure is not protectionist since it seeks to promote fair competition and economic development. Respondent should show how the relevant trends on importation do not show a protectionist application since imports only marginally fell, while importation of Wega-Pads which were the subject matter of the measure, followed the general trends.

4.4.6.2 Complainant's Arguments

4.1 **The Complainant should not spend much time in subparagraph (d)**. The Complainant could challenge how Respondent justifies the measure, if Respondent uses the totality of the DMA as the pertinent "law and regulation". With regards to the alternatives, the Complainant should **ideally** present an alternative to the totality of the measure, not each individual component.

4.2. In the chapeau, the Complainant should **ideally** argue that the measure "arbitrarily" discriminates against Wega-Pads as demonstrated by the various procedural irregularities and the interference of Prof. Buggy in the work of the DMA. The Complainant should point out the delays in the proceedings and the DMA's treatment of the 2022 complaint submitted by Wegapunk in relation to Atlas as evidence of arbitrary discrimination.

4.3. The Complainant could also argue that the measure at hand has protectionist objectives by focusing on the selection of import tariff increase as the source of revenue for establishing the DMA, instead of an increase in the VAT (clarification 25), the initiation of many proceedings by the DMA pursuant to complaints of the Minister of Economy that relate to foreign market players (clarification 66), and the quantitative data on the reduction of demand for Wegapunk's products and services (Case paragraphs 66 and 68), and how the practice benefitted domestic market players (paragraph 71 for domestic tablet computers). The Complainant should place the various DMA actions and inactions within the broader factual context in the Alabastan market and the CDTS. For instance, the Complainant should mention that the measure targets importation of Wega-Pads specifically as shown by the relevant trade statistics. (Case, paras. 66-69)

4.4.7 Indicative Questions

Complainant	**Respondent**
On what basis may an unwritten measure be shown to exist and what is the particular basis in this dispute?	Given that an overarching measure is distinct from the individual measures constituting it, does it matter whether the underlying measures are in themselves WTO-inconsistent when viewed in isolation?
Can the different decisions of the DMA against Wegapunk be considered to have a limiting effect on importation, given that they only apply to the domestic market?	Is it not a fact that imports of tablet computers from Complainant have dropped significantly, suggesting that the measure at hand has had a clear limiting effect on exports?
How should the Panel determine which policy objective is being pursued by the measure at issue?	Does the Panel have to find that the overarching measure exists on the basis of all individual elements invoked by the complainant, or would some of the elements be sufficient?
Can the tariff increase as part of the overarching measure be deemed inconsistent with Article XI:1 of the GATT 1994, given that "duties" fall outside the scope of Article XI:1?	Given that Prof. Buggy had an active role in the enactment of the DEL and the tariff increase, and he directly intervened in the practice of the DMA, and authored/advocated for the CDTS, does this demonstrate that the various actions and inactions pursue a common plan or policy objective?

Is it necessary for the Panel to first find that the individual measures are WTO inconsistent, before the Panel can examine the existence and WTO-consistency of the alleged overarching measure?	Which underlying "law and regulation" necessitates the measure at hand to ensure compliance? Who bears the burden of proof on its WTO-consistency?
Is there any evidence showing that there is a common plan or policy objective underlying the elements being challenged? Follow-up: Would a reference to an academic study be considered enough to demonstrate systematic application of the measure?	How is this measure "necessary" to protect fair competition? Should we assess the "necessity" of each element of the measure individually or holistically as part of the "unwritten measure"?
Is there evidence of actual restrictions on importation? The data show only minimal fluctuations in import volumes of tablet computers.	How does the measure satisfy the requirements of Chapeau of Article XX GATT 1994, given the actions of Prof. Buggy in the enforcement of DEL by the DMA?

5 Annex A - Scoring Sheet

Assessment Criteria		Points Available	Points Awarded
Analysis of the Legal Issues	**Claim 1**	**14 Points (total)**	
	Article XVII of the GATS (10) • Applicability of the GATS (0.5) • Sectoral classification (2) • Mode of supply (2) • Likeness (2) • Less favourable treatment (1.5) • Factual assessment (2)	**10**	
	Article XIV(a) of the GATS (3) • Public morals (1) • Necessity test (1) • Factual assessment (1)	**3**	
	Chapeau of Article XIV of the GATS (1) • Arbitrary/ unjustifiable discrimination or disguised restriction (0.5) • Factual assessment (0.5)	**1**	
	Claim 2	**7 Points (total)**	
	Article II of the GATS (2.5) • Likeness (1.5) • Factual assessment (1)	**2.5**	
	Article XIV(c) of the GATS (2.5) • Securing compliance with laws and regulations otherwise WTO-consistent (1) • Necessity test (0.5) • Factual assessment (1)	**2.5**	
	Chapeau of Article XIV of the GATS (2) • Arbitrary/ unjustifiable discrimination or disguised restriction (1) • Factual assessment (1)	**2**	

	Claim 3	**9 points (total)**	
	Unwritten and overarching measure (4.5) • Attribution and precise content (1) • Repeated Application and Likelihood of continuance (1.5) • Combined operation and existence of the measure as separate from its components (2)	**4.5**	
	Article XI:1 of the GATT 1994 (1) • Prohibition or restriction on imports (0.5) • Factual assessment (0.5)	**1**	
	Article XX(d) of the GATT 1994 (2.5) • Securing compliance with laws and regulations otherwise WTO-consistent (1) • Necessity test (0.5) • Factual assessment (1)	**2.5**	
	Chapeau of Article XX of the GATT 1994 (1) • Arbitrary/ unjustifiable discrimination or disguised restriction (0.5) • Factual assessment (0.5)	**1**	
ARGUMENTATION & WRITING STYLE	Structure, organisation, and weighting of arguments	**6**	
	Creativity of argumentation	**6**	
	Clarity and tone of written expression.	**4**	
	Correct use of legal terminology, grammar, spelling, and citation	**4**	
	OVERALL SCORE	**50**	