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Alabasta – Certain measures affecting digital goods and services

Wano
(Complainant)

vs

Alabasta
(Respondent)

SUBMISSION OF THE COMPLAINANT

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1. *General Agreement on Tariffs and Trade* ('GATT 1994' or 'GATT'), Annex 1A to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 1867 UNTS 190
2. *General Agreement on Trade in Services* ('GATS' or 'GATT'), Annex 1B to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 1869 UNTS 183
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GATT Panel Reports	
Short Title	**Full Title and Citation**
Japan – Semi-Conductors	Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD XX, p. 28
WTO Panel Reports	
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Argentina – Hides and Leather	Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001, DSR 2001:V, p. 1779
Canada – Autos	Panel Report, *Canada — Certain Measures Affecting the Automotive Industry*, WT/DS139/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
China – Electronic Payment Services	Panel Report, *China - Certain Measures Affecting Electronic Payment Services*, WT/DS413/R, adopted 31 August 2012, DSR 2012:X, p. 5305

China – Publications and Audiovisual Products	Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/R, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2012:X, p.5305
Colombia – Ports of Entry	Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, DSR 2009:VI, p. 2535
EU and Certain Member States — Palm Oil (Malaysia)	Panel Report, *European Union and certain Member states — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WT/DS600/R, adopted 26 April 2024
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018, appealed 21 September 2018
Indonesia – Chicken	Panel Report, *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, adopted 22 November 2017, as modified by Appellate Body Report, DSR 2017:VII, p. 3131
Indonesia – Raw Materials	Panel Report, Indonesia — *Measures Relating to Raw Materials*, WT/DS592/R, circulated to WTO Members 30 November 2022, appealed 8 December 2022

Mexico – Telecoms	Panel Report, *Mexico – Measures Affecting Telecommunications services*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, p. 1537
US – Export Restraints	Panel Report, United States — Measures Treating Export Restraints as Subsidies, WT/DS194/R, adopted 23 August 2001, DSR 2001:XI, 5767
US – Gambling	Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797
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Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
China – Publications and Audiovisual Products	Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS36/AB/R, adopted 19 January 2010, DSR 2010:I, p.3

China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663
US - Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

III. Books and Journal Articles

Atadoga et al. (2024)

A. Atadoga, O. Farayola, B. Ayinla, O. Amoo, T. Abrahams, F. Osasona, 'A comparative Review of Data Encryption Methods in the USA and Europe' 5:2 Computer Science & IT Research Journal (2024), pp. 447-460

Nookala et al. (2019)

G. Nookala, N. Dulam, S. Thumburu, 'End-to-End Encryption in Enterprise Data Systems: Trends and Implementation Challenges' 5:1 Innovative Computer Science Journal (2019), pp. 1-22

Oladoyinbo et al. (2024)

T. Oladoyinbo, O. Oladoyinbo, A. Akinkunmi, 'The Importance of Data Encryption Algorithm In Data Security', 11:2 IOSR Journal of Mobile Computing & Application (2024), pp. 10-16

Wolfrum et al., Trade in Services (2008)

R. Wolfrum, P. Stoll, C. Feinäugle, 'Trade in Services', Max Planck Commentaries on World Trade Law Vol. 6, 2008

IV. Other Sources

Fatemi (2022)

F. Fatemi, ‘How TV Viewing Habits Have Changed’, Forbes 2022, (https://www.forbes.com/sites/falonfatemi/2022/11/14/how-tv-viewing-habits-have-changed)

List of Abbreviations

Abbreviations	**Full Form**
AB	Appellate Body
ABR	Appellate Body Report
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article(s)
AU	Alabastan University
BB	Buggy Barrier
CDTS	Competitive Digital Transformation Strategy
cf.	confer
CPC	United Nations Central Product Classification
DEL	Digital Economy Law
DMA	Digital Market Authority
DPL	Data Protection Law
i.a.	Inter Alia
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs 1994
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation)
LCR	Local Content Requirement
LGPD	General Personal Data Protection Act of Brazil (Law 13,709, of August 14, 2018)
PR	Panel Report
Prof.	Professor
VCLT	Vienna Convention on the Law of Treaties of 1969
WF	Wega-Flix

WP	Wega-Pad(s)
WTO	World Trade Organisation
The Schedule	The Schedule of Specific Commitments

Statement of Facts

1. Alabasta and Wano are both Members of the World Trade Organization (WTO). Alabasta is located on the Mainan peninsula together with Allos and Karda, together sharing the same culture and cultural identity.

2. Following IMF projections and a study lead by later Alabasta's Minister of the Economy, Prof. Buggy, attesting Alabasta a lack of "digital competitiveness", Alabasta passed the DEL centred around protectionism of the Alabastan digital industry.

3. The DEL includes, firstly, a 30% local content requirement for providers of audiovisual content, fulfilled when 50% of the production costs are incurred in Alabasta.

4. Secondly, the DEL establishes the requirement to commit to storing data generated by Alabastan users in Alabasta when acquiring a controlling share of a provider of audiovisual content located in Alabasta. Companies from countries with a data-flow MoU with Alabasta are exempted, including Allos.

5. Thirdly, the DEL establishes the DMA, tasked with DEL enforcement. The DMA is financed through an increase in tariffs on electronic goods, including tablet computers.

6. Wegapunk is a company located in Wano, subject to the DEL requirements. It focusses on e-commerce, streaming of audiovisual services through their streaming platform Wega-Flix, and electronic goods, namely their own tablet computer, the Wega-Pads. WegaBasta is Wegapunk's subsidiary in Alabasta. It performs customer support, content determination and subscription management with Alabastan customers.

7. The Alabastan competition to Wegapunk and Wega-Flix consist of the television provider ATV1, the cable TV provider Able1 and the film production studio Achilles Films. Moreover, Atlas is a video streaming service based in Allos.

8. The DMA enacted various decisions on the basis of the DEL towards Wegapunk. In 2019 the DMA denied the Wegapunk takeover of Achilles Films while approving the takeover by Atlas disregarding the USD 500 million difference between the offers. In 2021 the DMA imposed a halting of promotional activities for Wega-Pads on Wega-Spend, Weapunks own e-commerce platform. In addition, the DMA imposed a quota on the sale of Wega-Pads containing Wega-Flix subscriptions in large technology stores. After those interim measures were eventually lifted, the DMA imposed in 2022 a prohibition for the sale of Wega-Pads with the preinstalled Wega-Flix app.

9. Pursuant to the tariff increase and the DMA's conduct, the imports of WPs have steeply decreased from 2018 to 2023: from 440,000 units to 370,000 – a decrease of 15%, while the tablet market grew internationally by 20%.

10. In December 2022, Prof. Buggy terminated the tenure of one member of the DMA, after the latter stated that he was a fervent WF viewer and which he considers better than Atlas.

11. All those mentioned measures – the LCR, the requirement to store user data in Alabasta, the tariff increase and the DMA's conduct – tie into Alabasta's industrial policy trying to establish the competitiveness of their own domestic digital industry at the expense of foreign competition.

Summary of Arguments

Sect. 4.2 DEL is inconsistent with Art. XVII GATS

- Wegapunk and Wega-Flix (WF) fall under the Respondent's national treatment commitment regarding CPC 9631 – Radio and Television – as those generic terms are to be interpreted to include streaming services.
- The foreign Wegapunk and WF are like the domestic ATV1, Able1 and their respective services.
- The local content requirement in Sect. 4.2 DEL *de facto* modifies the conditions of competition to the detriment of foreign service suppliers and services, namely Wegapunk and WF.

Sect. 4.2 DEL cannot be justified under Art. XIV(a) GATS

- Sect.4.2 inconsistency with Art. XVII GATS cannot be justified by public morals exception in the sense of Art. XIV(a) GATS as it is not designed to protect public morals
- Sect. 4.2 DEL is not necessary as it is too trade restrictive in relation to its limited contribution to the objective and there are less trade restrictive alternatives reasonably available to Alabasta to achieve its policy objective.
- Sect. 4.2 DEL is applied in a manner resulting in arbitrary and unjustifiable discrimination under the chapeau of Art. XIV(a) GATS, thereby also constituting a disguised restriction to trade.

Sect. 4.3 and 4.4 DEL are inconsistent with Art. II:1 GATS

- Art. VII GATS does not exempt the DEL from Art. II GATS as Sect. 4.3(c) DEL purely establishes an exemption based on soft law natured data flow MoUs and not a precise and enforceable requirement in the sense of Art. VII:1 GATT.
- Wegapunk with WF from Wano and Atlas with their respective services from Allos are like service and service supplier.
- Wegapunk and WF are accorded treatment less favourable as conceded by the Respondent.

Sect. 4.3 and 4.4 DEL cannot be justified under Art. XIV(c)(ii) GATS

- Sect. 4.3 and Sect. 4.4 DEL are not necessary in the sense of Art. XIV(c)(ii) GATS as there are equally effective and less trade restrictive alternatives.
- Sect. 4.3 and Sect. 4.4 DEL constitutes arbitrary and unjustifiable discrimination under the chapeau of Art. XIV GATS since the differentiation based on data flow MoUs does not correlate with the objective of data protection enforcement given their soft law nature.

The tariff increase and the DMA's ongoing conduct constitute an overarching measure, the Buggy Barrier, which is inconsistent with Art. XI:1 GATT

- The Buggy Barrier (BB) is an unwritten and overarching measure consisting of the 2019 tariff increase on electronic products and the DMA's ongoing conduct, since those individual components work together under a common policy objective set out in the CDTS and in their combination create a single measure.
- Art. XI:1 GATT applies to the BB as it is a border measure specifically targeting imports of Wega-Pads (WPs).
- The BB is a restriction to imports as it has a limiting effect to the importation of WPs in its design, architecture and structure, confirmed by trade data.

The Buggy Barrier is not justified under Art. XX(d) GATT

- The BB is not necessary in the sense of Art. XX(d) GATT as it is too trade restrictive in relation to its limited contribution to the objective and there are less trade restrictive alternatives reasonably available to Alabasta to achieve its policy objective.
- The BB constitutes a disguised restriction on trade as it creates an environment hostile to the importation of WPs under the veil of competition law enforcement.

Identification of Measures at Issue

The first measure at issue is Sect. 4.2 DEL. It stipulates that at least 30% of the content offered by a provider of audiovisual content needs to be sourced in Alabasta, subject to at least 50% of the production costs being incurred in Alabasta. The second measure at issue are Sect. 4.3 and 4.4 DEL, which require the DMA's approval to acquire a controlling interest in a provider of audiovisual content located Alabasta. The DMA's approval is subject to a Letter of Intent containing *i.a.* a binding legal commitment to store personal information generated by Alabastan users in Alabasta and refrain from transferring this data outside Alabasta. Countries with a data flow MoU with Alabasta are exempted. The third measure at issue is the Buggy Barrier. It is an overarching measure restricting the importation of WPs, which consists of five components centred around the DMA's conduct and the 2019 tariff increase.

Legal Pleadings

1 SECT. 4.2 DEL IS INCONSISTENT WITH ART. XVII GATS

The Complainant submits that (i) the national treatment commitment made in subsector 2.D.(c) of Respondent's Schedule covers WF streaming services; (ii) Sect. 4.2 DEL is covered by the GATS; (iii) Wegapunk with WF are 'like' ATV1 and Able1 and their television broadcasting services and (iv) the former are accorded treatment less favourable than the latter.

1.1 Alabasta has made a national treatment commitment in respect of the Radio and Television services, which correspond to the WF streaming services

The Complainant submits that the Respondent made a national treatment commitment in respect of services provided by WF as Radio and Television services listed under Subsector 2.D.(c) of the Respondent's Schedule.

The Complainant argues that the services at issue must be understood as included in CPC category 9613: Radio and Television services. The Appellate Body held that Schedules have to be interpreted according to 31(1) and 32 VCLT[1] while bearing in mind that sufficiently generic terms and what they apply to may change over time. In this regard, the audiovisual services sector has technologically evolved in recent years with the advent of streaming. Streaming is the new television since the adoption of streaming by consumers for the same needs and purposes as television demonstrates the evolution of the concept of television.[2] As

[1] ABR, *China-Publications and Audiovisual Products* [396-397].

[2] F. Fatemi, 'How TV Viewing Habits Have Changed', Forbes 2022.

such, and in line with the principle of technological neutrality[3], streaming services are to be included in the UN CPC of Radio and Television services.

The Complainant further submits that services like WF cannot be included in CPC category 843: Data Processing Services. Pursuant to the Panel in *China – Electronic Payment Services,* this category consists of services rendered by a network operator, providing certain authorization, clearing, and settlement services in respect of the data collected, which affect the functioning of a specific sector, like the financial sector.[4]

The Complainant also submits that WF is not a Telecommunication Service in category CPC 843 as it does not contain the real-time transmission of customer-supplied information between two or more points without end-to-end change in the form or content of the customer's information.[5] Since WF is only engaging in the transmission of information between the customer and itself and is not facilitating the interaction between customers it is not undertaking a transmission between two or more points.[6]

The Complainant further submits that the measure at issue affects the supply of WF services by mode 3, supply via commercial presence of WegaBasta. The latter is Wegapunk's fully owned subsidiary in Alabasta, and the commercial presence in the Respondent's territory materialises through the performance of customer support, marketing, local pricing, content determination and subscription management functions, by WegaBasta.[7] In addition, it is compulsory for Alabastan users to sign a contract with WegaBasta if they want to access WF proving that the possibility for Alabastan consumers to access WF services is tied to the commercial presence of WegaBasta.[8] Thus, the Complainant submits that mode 3 is affected.

1.2 The measure is covered by the GATS

The Complainant submits that Sect. 4.2 DEL is 'a measure by a Member affecting trade in services' under Art. I:1 GATS. Sect. 4.2 DEL is a provision of the Respondent's national law, qualifying as 'a measure by a Member' pursuant to Art. XXVIII(a) GATS and Art. I:3(a)(i) GATS. It concerns television broadcasting services that are supplied on commercial basis and in competition between various service suppliers, thus not in the exercise of governmental authority, falling under Art. I:3(b) and not (c) GATS.[9] Sect. 4.2 DEL 'affects' trade in services. Indeed, it bears upon the conditions of competition by influencing the market to converge towards the local content requirement, affecting the provision of services provided

[3] PR, *US-Gambling* [6.287, 6.290].
[4] PR, *China-Electronic Payment Services* [7.27].
[5] Sect. 3(b) Annex on Telecommunications.
[6] PR, *Mexico-Telecoms* [7.34].
[7] Case file, p°2 [11].
[8] Clarifications, p. 9 [30].
[9] ABR, *China-Publications and Audiovisual Products* [224].

through the commercial presence of foreign service suppliers like Wegapunk through WegaBasta in the sense of Art. I:2(c) GATS since it limits content providers' production choices by requiring 50% of production costs to occur in Alabasta.

1.3 Wegapunk with its WF services are 'like' Able1 and ATV1 with their services

The Complainant submits that Wegapunk with WF services on the one side and ATV1 and Able1 with their respective television broadcasting services on the other side are 'like' since they are competing services and service suppliers pursuant to a broad scope of likeness.[10] Indeed, following a holistic analysis of likeness, (i) they share the same characteristics; (ii) the consumers preferences align; and (iii) their end-use is the same.

Both Wegapunk with WF on the one side and ATV1 and Able1 with their television broadcasting services on the other side broadcast a wide range of audiovisual content, whether via streaming or television. Indeed, Able1 and ATV1 provide general content, by displaying various types of movies, series and documentaries just like Wegapunk through WF. Additionally, ATV1 live-streams news and sport events and, from a technical viewpoint, WF is also able to livestream sports content.[11]

In this regard, the Complainant argues that the on-demand nature of WF does not affect the competitive relationship between these services and services suppliers, since in the news and sports segments, where viewing is predominantly live, the on-demand nature of WF has no effect on its competitiveness. Indeed, the primary nature of this audiovisual content provided by ATV1 is to enjoy it with a certain intensity in the moment, without (re)watching it. The same principle applies to live news since there is no point in replaying the news when it is updated in real time

Moreover, as modern TVs often have an internet access feature, Wegapunk's content on WF can be displayed through the same devices as Able1 and ATV1, further strengthening their competitive relationship.

The Complainant argues that the consumer preferences align, confirming a competitive relationship between on the one hand Wegapunk with WF and on the other hand ATV1 and Able1 and their respective services. The sole fact that surveys take place, indicating viewing percentages and the average viewing hours per household, further demonstrates that Wegapunk with WF on the one side and ATV1 and Able1 with their television broadcasting services on the other side are in a competitive relationship.[12] Since all audiovisual services above

[10] ABR, *Argentina-Financial Services* [6.31]; PR, *China-Electronic Payment Services* [7.700].

[11] Clarifications, p. 2 [e], p. 10 [36]; Case file, p. 3 [12, 18-19].

[12] Case file, p.°5 [28].

mentioned are consumed to some extent simultaneously throughout the day, they are in a competitive relationship. This further demonstrates that consumers consider streamed audiovisual services interchangeable with similar broadcasted content. As such, the technical mean of content provision is of no relevance for consumers, provided through cable or internet.

The consumers' viewing behaviour[13] and the negligible impact of the "scandal" on subscriptions, occurred after Sun Miski's declarations on the globalised nature of Wegapunk and its services,[14] demonstrates that Alabastan consumers do not inherently prefer local content. Rather, they are treating Wegapunk with WF and ATV1 and Able1 and their television broadcasting services as competing services and service suppliers.

The Complainant asserts that Wegapunk with WF on the one hand, and ATV1 and Able1 on the other hand, share the same end-use. The end use in a broad sense of the term, is the same for all these services and service suppliers: offering audiovisual content for viewership to entertain and inform Alabastan viewers. The 55% of screen time spent on WF between 2011 and 2017 linked to the small impact of Sun Miski's declaration on WF subscriptions, supports this argument: the local character of the content provided does not affect the end use of the audiovisual services and service providers.[15]

On the basis of the above, the Complainant argues that the characteristics of Wegapunk with WF on one hand and Able1, ATV1 with their television broadcasting services on the other hand, lack distinction. Moreover, the largely similar nature of the audiovisual services they provide and the absence of consumer preferences for local content, demonstrate that these services and service suppliers are in a sufficiently close competitive relationship to be regarded as 'like' under Art. XVII GATS.[16]

1.4 Wegapunk with its WF services are accorded 'treatment less favourable'

The Complainant asserts that Sect. 4.2 DEL is applied in a manner providing treatment less favourable to Wegapunk with its WF services than Able1, ATV1 and their television broadcasting services as it modifies conditions of competition to the detriment of the former.
Suppliers of audiovisual services are required to offer at least 30% local content. This local content is defined as content for which 50% or more of the cost of production have been incurred in Alabasta.[17] This request for national sourcing favours domestic service suppliers since they can more easily comply with such a requirement due to their place of establishment. Indeed, it obliges foreign service suppliers like Wegapunk to adopt a strategic shift regarding

[13] Case file, p. 5 [28].
[14] Case file, p. 6 [33].
[15] Case file, p. 6 [33].
[16] ABR, *China-Electronic Payment Services* [7.463].
[17] Case file, p. 8 [43].

content production. This can be costly and consequentially make them loose competitiveness. The LCR is also enforced with an excessive fine equal to 7,5% of domestic revenue corresponding to the previous fiscal year, provided in case of non-compliance.[18] Furthermore, there is no inherent disadvantage pursuant to Footnote 10 arguable in WF's case that would excuse the disadvantage imposed by Respondent's LCR. The conditions of competition are modified by Sect. 4.2 DEL itself, there is no inherent competitive disadvantage arising from the foreign nature of Wegapunk and WF.

In conclusion, the Complainant claims that Sect. 4.2 DEL is inconsistent with Art. XVII GATS as the Respondent committed to provide full national treatment to television services, understood to include streaming services, in mode 3 yet the LCR contained in Sect. 4.2 DEL and its enforcement treats Wegapunk with WF less favourably than ATV1, Able1 and their television broadcasting services despite them being like service and service suppliers.

2 THE INCONSISTENCY OF SECT. 4.2 DEL WITH ART. XVII GATS IS NOT JUSTIFIED UNDER ART. XIV(A) GATS

The Complainant submits that the violation of Art. XVII GATS is not justified under Art. XIV(a) GATS as (i) the Respondent have no moral concern regarding Mainan culture; (ii) Sect. 4.2 DEL is not necessary in the light of its trade restrictiveness and alternatives available; and (ii) it is applied in a manner constituting arbitrary and unjustifiable discrimination.

2.1 Sect. 4.2 DEL is not provisionally justified under Article XIV(a) GATS

Firstly, the Complainant argues that Sect. 4.2 DEL is not designed to protect public morals in the sense of Art. XIV(a) GATS, as there is no moral concern regarding Mainan culture.[19] This lack of moral concern is highlighted by the outcome of a proclaimed cultural scandal within the audiovisual content market. After inadequately displaying Mainan culture within a historical themes series, most of subscribers quickly returned to WF to consume content. This is in line with an Alabastan newspaper demonstrating that a majority of the population expressed no concern regarding the cultural display on the audiovisual market.[20] Furthermore, the Alabastan Ministry of Culture demonstrated that the viewing time on WF drastically declined since the introduction of the LCR in 2019.[21] As such, it demonstrates that the citizens do not take their culture into account when determining their way of consuming audiovisual content since the LCR guaranteed a volume of (adequate) cultural display and consumers only consumed less of it.

[18] *Ibid.*
[19] PR, *US-Gambling* [6.461].
[20] Case file, p. 6 [31].
[21] Case file, p. 12 [66].

Secondly, the Complainant asserts that the measure is not necessary as the required weighing and balancing approach demonstrates its insufficient necessity.[22] Indeed, (i) the objective pursued and (ii) the material contribution of the LCR and its enforcement system to the objective of public morals protection do not outweigh (iii) the trade restrictiveness of Sect. 4.2 DEL. While the Complainant does not contest the importance of the objective it argues that its level of contribution to the objective is negligible. The LCR does not guarantee (a certain quality of) cultural display. Undoubtedly, 50% of production costs can incur in Alabasta without or inaccurately showcasing Alabastan culture in the end production. Moreover, the contribution of the measure is to be interpreted as limited in light of the high cultural protection achieved through the already existing policies *i.a.* the establishment of new museums.[23] The Complainant argues that the objective is pursued in a manner highly trade restrictive as foreign content providers have to major costs and navigate an unfamiliar (legal) environment to set up production in Alabasta, which is a high trade threshold. Therefore, the Respondent submits that Sect. 4.2 DEL is not necessary as the limited contribution to the objective does not outweigh its high trade-restrictiveness.

Furthermore, the Complainant argues that less trade restrictive alternatives achieving even greater level of contribution to the Respondent's policy objective, while being reasonably available to it, exist. Indeed, a veritable local content requirement, which assesses the locality of the content not by its place of the production costs' origin, but by the actual content, would be less trade restrictive and more efficient as content providers can create local content that represent the Mainan culture without the costs being incurred in Alabasta. This is underlined by the possibility of production within the Mainan cultural area but outside of Alabasta, namely in Allos or Karda, which – together with Alabasta – all share mutually-intelligible languages and the same culture.[24] As the production cost requirement in Sect. 4.2 DEL does not ensure the actual display of Mainan culture, a requirement that evaluates the actual content and culture depicted and not the production costs' origin has a greater contribution while being less trade restrictive. In addition, such requirement would be even more available to Alabasta than the current one, since Alabasta would not need to check how much costs were incurred, where and by which service provider, but only what is the content of the production.

In conclusion, the Complainant argues that the second element of the two-tier test under Art. XIV(a) GATS is not met as the measure is not designed and necessary to protect

[22] ABR, *US-Gambling* [304-305].
[23] Clarifications, p. 11 [44].
[24] Case file, p.2 [7].

Alabasta's public morals. Therefore, the Complainant requests the Panel to reject the provisional justification of GATS inconsistency of Sect. 4.2 DEL with Art. XVII GATS under Art. XIV(a) GATS.

2.2 Sect. 4.2 DEL does not comply with the chapeau under Art. XIV GATS

The Complainant further argues that Sect. 4.2 DEL cannot be justified under the chapeau of Art. XIV GATS as the application of the measure results in an arbitrary and unjustifiable discrimination. The measures' application constitutes an arbitrary and unjustifiable discrimination as it insufficiently takes into account conditions prevailing in the similarly situated countries of Allos and Karda and does not correspond with the objective pursued. Indeed, the fact that the local content requirement is complied with only if is the production costs are incurred in Alabasta, and not in other Mainan states sharing intelligible languages and the same culture[25] confirms this. The Minister of Economy, Prof. Buggy, even identified the preservation of 'shared Mainan culture' as the objective of the Sect. 4.2 DEL.[26]

3 SECT. 4.3 AND 4.4 DEL ARE INCONSISTENT WITH ART. II GATS

The Complainant submits that Sect. 4.3 and 4.4 DEL are inconsistent with Art. II.1 GATS as: (i) the GATS and Art. II GATS apply; (ii) Wegapunk and Atlas and their respective services 'like'; and (iii) the 'like' services and service suppliers are accorded treatment less favourable.

3.1 The GATS and Art. II GATS apply

Firstly, the Complainant submits that Sect. 4.3 and 4.4 DEL are 'measures by a Member affecting trade in services' within the meaning of Art. I:1 GATS since they are provisions of the Respondent's national law in the sense of Art. I:3(a)(i) GATS. Moreover, Sect. 4.3 and 4.4 DEL affect trade in services as they regulate the acquisition of controlling interests in audiovisual service providers. Indeed, as emphasised by case law, the mere act of regulating is affecting trade in services by bearing upon the conditions of competition, *in casu* conducted through mode of supply 3.[27]

Secondly, the Complainant argues that the exemption from Art. II GATS in Art. VII GATS does not apply. In this regard, the Complainant argues that (i) the measure at issue does not fall within the scope of Art. VII GATS and, in the alternative, (ii) the Respondent did not provide adequate opportunity to the Complainant to obtain the recognition in form of a MoU required in Art. VII:2 GATS.

[25] *Ibid*.
[26] Case file, p. 6 [34].
[27] ABR, *Canada-Autos* [10.228]; PR, *China-Publications and Audiovisual Products* [7.971].

The measure at issue does not fall within the scope of Art. VII GATS as it is not recognizing "requirements met […] in a particular country".[28] The MoUs are not recognizing that a specific standard, criteria or requirement is fulfilled in the case of MoU-countries. Indeed, they do not accept regulatory conditions for services between Alabasta and the respective MoU-country as equal[29] since the MoUs are merely soft law and therefore do not guarantee equal standards of data protection in MoU countries. They only require the MoU contries to undertake efforts to increase the respective standard of protection but not the standard itself. [30]

Alternatively, the Complainant argues that, pursuant to Art. VII:2 GATS, the Respondent did not provide the Complainant adequate opportunity to obtain and negotiate a MoU. As such, it was not possible for the Complainant to demonstrate its capabilities to develop a legal framework for the protection of personal data and privacy and undertake efforts in the field of data security. Only preliminary and nonconclusive diplomatic discussions have taken place between the Complainant and the Respondent.[31] Thus, the absence of serious negotiations shows that the Respondent did not provide adequate opportunity to obtain a MoU in the sense of Art. VII:2 GATS.[32]

On the basis of the above, the Complainant submits that Art. II GATS is applicable as the exemption in Art. VII GATS does not apply.

3.2 Atlas and Wegapunk are 'like' service suppliers providing like services

The Complainant is aware that the presumption of likeness does not apply in this case, since the distinction between Atlas, Wegapunk and their respective services is not based exclusively on their origin, but also on the existence of a MoU with Alabasta.[33] Therefore, the Complainant asserts the 'likeness' of Atlas, Wegapunk and their respective services by arguing that they are in a competitive relationship based on the holistic assessment of the similarity of their characteristics, end-use and consumers preferences.

The Complainant notes that Wegapunk and Atlas are both streaming platforms and offer audiovisual services. As such, they share the same kind of activities within the same economic market – the audiovisual content industry. Moreover, Wegapunk, and Atlas with their respective services share the same on-demand broadcasting of content characteristics.[34]

The only difference between the two service providers is the existence of a Data Flow MoU for Allos in the case of Atlas and the lack thereof for Wano in the case of Wegapunk. The

[28] Art. VII:1 first sentence GATS.
[29] Wolfrum et al., Trade in Services (2008), Art. VII [1].
[30] Case file, p. 8 [44]
[31] Clarifications, p. 4 [9].
[32] Wolfrum et al., Trade in Services (2008), Art. VII [2].
[33] ABR, *Argentina-Financial services* [6.39, 6.40, 6.43]
[34] Clarifications, p. 10 [40]

conclusion of a MoU does not depend upon characteristics of services and service suppliers or the regulatory conditions in the respective home country as the MoU only requires to undertake efforts in data protection. Thus, it cannot be considered as a relevant distinction between providers and their respective services, indicating once more that they are in a competitive relationship.

Additionally, consumer preferences remain unaffected by this difference since they continue to consume both Wegapunk and Atlas audiovisual content. This was further highlighted by the fractional impact of a so-called scandal regarding a WF series about Mainan history on WF subscriptions[35] as the users who cancelled their subscriptions mostly reactivated them within a short time span.[36]

Regarding the consumers preferences between Wegapunk, Atlas and their respective services, the Complainant highlights the irrelevance of Atlas locally oriented content on its competitiveness with Wegapunk. Indeed, since Atlas' viewing time has drastically increased in recent years, it expands its competitive relation with Wegapunk despite offering less global content. Consequently, consumers consider their content as alternatives to each other.

The Complainant therefore argues that Wegapunk and Atlas and their respective services are in a competitive relationship[37] and therefore 'like' services and service suppliers.

3.3 Sect. 4.3 and 4.4 DEL provide 'less favourable treatment'

As conceded by the Respondent at the stage of the consultations,[38] Sect. 4.3 and 4.4 DEL are providing treatment less favourable, pursuant to Art XVII:3 GATS, to Members which Alabasta did not sign a MoU with, thereby modifying the conditions of competition in Alabasta's audiovisual market to the detriment of Wegapunk.

Consequently, the Complainant argues that Sect. 4.3 and 4.4 DEL are inconsistent with Art. II GATS.

4 THE INCONCISTENCY OF SECT. 4.3 AND 4.4 WITH ART. II GATS IS NOT JUSTIFIED UNDER ART. XIV(C)(II) GATS

The Complainant does not contest that Sect. 4.3 and 4.4 DEL are designed to ensure compliance with the Alabastan DPL. However, it argues that Sect. 4.3 and 4.4 DEL are not justified by Art. XIV(c)(ii) GATS as (i) they are not necessary in the light of alternatives available and (ii) they are applied in a manner constituting an arbitrary and unjustifiable discrimination under the chapeau of Art. XIV GATS.

[35] Case file, p.°6 [33].
[36] Case file, p. 6 [34].
[37] ABR, *Argentina-Financial Services* [6.4].
[38] Case file, p. 15 [77]; Clarifications, p. 12 [52].

4.1 Sect. 4.3 and 4.4 DEL are not provisionally justified under Art. XIV(c)(ii) GATS

The Complainant submits that Section 4.3-4 DEL are not necessary measures in the sense of Art. XIV(c) GATS. In this regard, the Complainant concedes that the measure is prima facie necessary to achieve Alabasta's policy objectives but argues that there are less trade restrictive alternatives, such as an encryption requirement of personal data. Such a measure is less trade restrictive since it does not limit service providers in the transfer of user data required to provide audiovisual services. Additionally, it at least equals the level of contribution to the objective of data security since the encryption of data is an effective safeguard against illegitimate third-party access.[39] An encryption requirement is also reasonably available to the Respondent. Data encryption is a generally used as mean of data protection in the technological sector and included in data protection laws of several Members.[40]It is a widespread and vital instrument for data protection in the private sector,[41] which demonstrates that it is not a mere theoretical alternative.[42] Finally, it would not be too costly and burdensome for Alabasta to implement this alternative as its implementation stands on the supplier's side and not the country's.

4.2 Sect. 4.3 and 4.4 DEL do not comply with the chapeau of Art. XIV GATS

The Complainant argues that Section 4.3 and 4.4 DEL are not applied in a manner consistent with the chapeau of Art. XIV GATS as they result in (i) an arbitrary and unjustifiable discrimination and (ii) a disguised restriction to trade.

The Complainant submits that the exemption of MoU countries pursuant to Sect. 4.3.(c) DEL is an arbitrary discrimination as it does not allow for non-MoU Members to demonstrate that their data protection standards equal the ones of MoU Members and is, thus, rigid and inflexible.[43]

Furthermore, the differentiation is also arbitrary and unjustifiable as it does not correlate with and undermines the objective[44] of data protection since the MoU as soft law does not secure equal standards of data protection in national law and is only requiring the undertaking of efforts in data protection, not guaranteeing the actual protection of consumers data.

Lastly, the measure is also a disguised restriction to trade as the measure does not extend to non-controlling take-overs. This is not justifiable from a data protection perspective as data protection should also be guaranteed in non-controlling take overs. Hence, the Respondent abuses Art. XIV:(c) GATS to protect domestic companies from foreign takeovers.

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[39] Atadoga et al. (2024), pp. 448-449.
[40] *cf. i.a.* Art. 32 GDPR; Art. 46 LGPD; Art. 32 UK GDPR.
[41] *cf.* Nookala et al., (2019), p. 5; Oladoyinbo et al. (2024), p. 10.
[42] ABR, *US-Gambling* [308].
[43] ABR, *US-Shrimp* [177].
[44] ABR, *Brazil-Retreaded Tyres* [229].

5 THE ONGOING CONDUCT OF THE DMA, TOGETHER WITH THE TARIFF INCREASE CONSTITUTE AN OVERARCHING MEASURE INCONSISTENT WITH ART. XI:1 GATT

5.1 The ongoing conduct of the DMA in combination with the tariff increase constitute an overarching measure

The Complainant argues that the ongoing conduct of the DMA together with the 2019 tariff increase on tablet computers constitute an unwritten and overarching measure and have to be dealt with as one single measure (*hereinafter referred to as the Buggy Barrier or BB*) as its challenged components, namely the conduct of the DMA and the tariff increase, are (i) attributable to Respondent, (ii) operate together as a single and distinct measure, and (iii) the inclusion of tariffs as a component does not exclude the possibility of an overarching measure.

5.1.1 The BB is composed of the 2019 tariff increase and various instances of DMA conduct

The Complainant submits that the precise content[45] of the single, overarching BB measures consists of the following five components.[46]

Component 1 is the 2019 tariff increase from 5% to 13% on different electronic products including tablet computers, such as the WP.[47] Components 2-5 relate to the conduct of the DMA. Component 2 consists of the rejection of Wegapunks' offer to takeover Achilles Films on 9 December 2020, while approving the takeover by Atlas.[48] Component 3 is the DMA's first interim measures decision imposed on Wegapunk from February 2021 to June 2022.[49] Through this decision DMA ordered Wegapunk to halt promotional activities for the latest versions of the WP on Wega-Spend and requested the imposition of temporary quotas on the sale of the WP containing a free subscription of WF in large technology stores.[50] Component 4 is DMA's second interim measures decision of 22 September 2022, requiring Wegapunk to sell the WP in a stripped-down version without the WF app being preinstalled.[51] Component 5 is the DMA's ongoing treatment of Wegapunk's complaint against Atlas for the violation of the prohibition of algorithmic boosting filed on 6 December 2022.[52] Almost three years have passed without a decision over this complaint, [53] exceeding the maximum time frame of thirteen months for DMA investigations.[54]

Together, Components 1-5 constitute one single overarching measure: the BB.

[45] ABR, *Argentina-Import Measures* [5.108].
[46] Case file, p. 14 [75].
[47] Case file, p. 8-9 [47].
[48] Case file, p. 9-10 [48-53].
[49] Case file, p. 10-11 [56-59].
[50] Case file, p. 10 [58].
[51] Case file, p. 11 [61].
[52] Case file, p. 11 [64-65].
[53] Case file, p. 11 [65]; Clarifications, p. 13 [61].
[54] Case file, p. 11 [69] footnote 12.

5.1.2 The components of the BB are attributable to Respondent

The Complainant asserts that the five components of the BB are all attributable to the Respondent since component 1, the 2019 tariff increase, as a law is an act of Respondent's state organs. Moreover, components 2-5 concerning the DMA's conduct are attributable to the Respondent as the DMA is empowered by Respondent's law to exercise and enforce competition law, namely the DEL.[55]

5.1.3 The components operate together as the single, distinct BB

The Complainant argues that the additional requirements for an overarching measure established by the AB in *Argentina – Import Measures* are fulfilled in the case of the BB since (i) the different components operate together as parts of a single measure with a common policy objective,[56] which is (ii) distinct from its components.[57]

5.1.3.1 The components of the BB enact the CDTS' policy objectives

The Complainant submits that the five identified individual components work together as parts of the Respondent's overarching measure. The BB's components are glued[58] together through the objective of using industrial policy to promote the international competitiveness of domestic electronic goods and digital services, developing the Respondent's electronic goods industry.[59] This objective is set out in the CDTS as it establishes the guiding principles of the Respondent's industrial policy to develop its digital industry. Indeed, its proposed measures were enacted directly via *i.a.* DEL into the Respondents' legal order, showing that the Respondent accepts the proposed policy by the CDTS as his own.

The close connection between the CDTS and the BB's components is further highlighted by the person in charge of both CDTS and DEL, Prof. Buggy. Indeed, both these projects are highly attached to Prof. Buggy's status within Alabasta. As a member of the Tech Innovation Commitee he took part in in drafting the DEL's text,[60] which he subsequently introduced in Respondent's parliament as Minister of Economy.[61] This legislation is based upon key principles previously articulated in the CDTS of which Prof. Bunny was the main architect as the head of AU's law department.

Following IMF's projections that attributed the 2003 Respondent's recession to the lack of digital competitiveness,[62] the commissioned study underlying the CDTS identifies the liberalization of market access for imported electronic goods as a central problem and an

[55] Sect. 2.1. DEL; PR, *US-Gambling* [6.128] with reference to Art. 5 ARSIWA.
[56] PR, *Argentina-Import Measures* [5.126, 5.132].
[57] ABR, *Argentina-Import Measures* [5.108].
[58] PR, *Indonesia-Chicken* [7.675-7.677].
[59] PR, *Argentina-Import Measures* [5.126, 5.132].
[60] Case file, p. 4 [25], p. 7 [41].
[61] Case file, p. 7 [41].
[62] Case file, p. 4 [23].

obstacle to exploiting the potential of the domestic digital industry. Hence, the CDTS calls for a targeted industrial policy to aid the development of the domestic digital industry through contingent protection.[63] The development of the Respondent's domestic industry through protectionism is the common theme of the CDTS' Key Recommendations as three out of the five recommendations explicitly call for protection of the domestic digital industry.[64] That last argument can be corroborated by the fact that in September 2023 an announcement by several Mainan audiovisual players highlighted that the production of the first Mainan tablet computer is to be launched in 2026.[65]

The components concerning the DMA's conduct (Components 2-5) are directly linked to the CDTS's protectionist objective. The DMA is established as an authority to *i.a.* enforce competition law and the DEL.[66] This aligns with the CDTS' fourth recommendation, to use competition law as a means of protection of domestic innovation and industries. The DMA's conduct is specifically targeting the Complainant's tablet computer industry under the veil of competition law to distort the competitive playing field and protect the Respondent's domestic industry, which is evident in the interim measures imposed on the Complainants' companies, Wegapunk and Wega-Spend (Components 3 and 4). Moreover, the denial of Wegapunk's takeover of Achilles Films, with the subsequent approval of the takeover by Atlas, an Alabastan company (Component 2), served to protect the development of Respondent's domestic industries since it allowed Atlas to develop a tablet that can be bundled with a streaming service in competition to WF, artificially protecting the development of a domestic tablet industry through the means of competition law in the form of merger control. The bundling of the WP with WF is an important part of their selling point and competitive advantage,[67] which would have been elevated through Wegapunk's intended takeover, blocked by the DMA.

Additionally, by leaving Wegapunk's complaint undecided and not taking action against the competitor regarding steering practices (Component 5), Respondent's competition law is turned into a targeted instrument of protectionism. As the Minister of Economy's complaints take priority over other complaints made, the Minister of Economy can ensure, which complaints are investigated and taken action on and which are not.[68] In the absence of procedural safeguards this allows for the investigations and measures of the DMA to be used as an instrument of protectionism in Respondent's industrial policy.

[63] Case file, Annex 3 p. 21 [i].
[64] Case file, Annex 3 p. 21 [i, ii, iv].
[65] Case file, p.°13 [71].
[66] Sect. 2.4 DEL.
[67] Case file, p. 3 [16] footnote 4.
[68] Case file, p. 11 [65].

Lastly, the Complainant argues that the tariff increase (Component 1), foreseen in the CDTS as the importance of tariff flexibility is emphasized,[69] also ties into the common policy objective as it is established to offset the budget deficit and investments taken in establishing the DMA.[70] This in turn is established to protect the domestic industries, using competition law.

5.1.3.2 The BB is distinct from its components

The Complainant submits that the BB, which enacts the Respondent's industrial policy to protect its domestic industry, constitutes an "instrument with a functional life of its own" that does "something concrete, independently of any other instruments".[71] Indeed, the BB is more than just the sum of its parts as it has an element of persistence, making the impact of the individual components only understandable as a whole. Interim measures can be cancelled, negative takeover decisions are reduced to a point in time and non-action on a complaint can be discontinued. What always remains, however, is the hostile market environment created by the sum of the components, characterised by protectionism.

5.1.4 The inclusion of tariffs does not harm the BBs existence

The Complainant acknowledges that tariffs on their own are not challengeable under Art. XI:1 GATT.[72] However, the tariffs are part of Respondent's protectionist strategy and as such part of the BB as a single overarching measure. Therefore, it is challengeable as part of the overarching measure giving rise to an independent violation of Art. XI:1 GATT, which can be challenged independently from its components including the tariffs.

5.2 The BB constitutes an 'other measure' in the sense of Art. XI:1 GATT

The Complainant submits that the BB falls within the scope of Art. XI:1 GATT as it is a border measure that qualifies as an 'other measure' in the sense of Art. XI:1 GATT.

Firstly, the Complainant, argues that the BB is a border measure since it is not triggered by an internal event.[73] In *Indonesia – Raw Materials* the Panel held that a measure applied to domestic producers was not to be considered an internal measure as there were no other producers to be regulated since importations of raw materials into Indonesia were not to be expected.[74] The Complainant submits that the same situation exists in the present case as the Respondent itself has no domestic tablet computer production. Therefore, every measure affecting tablet computers naturally affects the importation of tablet computers. Moreover, the

[69] Case file, Annex 3 p. 21 [iii].
[70] Case file, p. 8-9 [47].
[71] PR, *US-Export Restraints* [8.85].
[72] ABR, *China-Raw Materials* [321];
PR, *Argentina-Financial Services* [7.1067].
[73] PR, *Indonesia-Raw Materials* [7.57-7.58].
[74] PR, *Indonesia-Raw Materials* [7.61].

BB as an overarching measure specifically targets the importation of WPs and undermines their ability to enter the Alabastan market. As the BB specifically targets importation, it is not triggered by an internal event.

Secondly, the Complainant argues that the term 'other measures' is to be understood as a broad residual category[75] which, therefore, can include the BB.

On the basis of the above, the Complainant submits that Art. XI:I GATT applies to the BB.

5.3 **The BB constitutes a restriction on the importation in the sense of Art. XI:1 GATT**

The Complainant submits that the BB constitutes a restriction on importation of WP in the sense of Art. XI:1 GATT. The BB falls within the broad[76] meaning of the term restriction as demonstrated by (i) its design, architecture and revealing structure; and (ii) its measurable effects as shown by trade data.[77]

5.3.1 <u>The BB has a potential limiting effect on the importation of WP by its architecture, design and revealing structure</u>

The Complainant submits that the BB has a potential limiting effect on the importation of WPs by its architecture, design and revealing structure as it creates a hostile regulatory environment disincentivising imports. The BB has the potential to adversely affect the competitive situation of imported WPs through its underlying protectionism.[78]

The Complainant argues that the BB, under the veil of competition law, creates a regulatory environment where competition law is used to impose several harmful interim measures upon importers. While those measures are interim by name, their application extends over an indeterminate timeframe creating difficulties for importers to sustain their presence on the market. In addition, incomprehensible takeover decisions are a further obstacle for importers. The unidirectional application of competition law also shown by the failure to process the Wegapunk's complaint. In their sum, these different components create a hostile regulatory environment, where competition law is systematically used to disincentives the importation of WPs. Such hostile environment rooted in the BB has the potential to limit imports of WPs.

5.3.2 <u>Trade data shows the BB's limiting effect on the importation of WPs</u>

In addition to the potential limiting effect embedded in the BB's design, the Complainant submits that trade data shows the BB's quantifiable limiting effect on the importation of WPs, which can additionally be used as evidence of BB being a quantitative restriction within the

[75] GATT PR, *Japan-Semi-Conductors* [104]. PR, *Argentina-Hides and Leather* [11.17].
[76] PR, *EU and Certain Member States-Palm Oil (Malaysia)* [7.969].
[77] ABR, *Argentina-Import Measures* [5.217]; PR, *EU and Certain Member States-Palm Oil (Malaysia)* [7.970].
[78] PR, *Colombia-Ports of Entry* [7.240].

meaning of Art. XI GATT.[79] The Complainant submits that the comparatively steep relative decrease in imports of WPs shows the BB's limiting effect on the importation of WPs.

The first interim measures decision of the DMA was in force from 1 February 2021 until 17 June 2022 (Component 3). This coincides with the sharp decrease in the importation of WPs in 2021 compared to all other tablets: 5.1% v. 0.84%, a decrease six times larger. The second interim measures decision of the DMA was in force from 22 September 2022 without ever being lifted (Component 4). This coincides with a sizeable difference in decline of imported tablets: 2.5% for WPs v. 1.2% for all other tablets, a decrease double in size. Even though there is an overall import decrease of tablet computers, the decrease is comparatively and noticeably steeper for WPs and is persisting in 2022 and 2023. Thus, the Complainant submits that the BB has a quantifiable and specific limiting effect on the importation of WPs specifically. The limiting effect is further highlighted by the contrast to 20% growth in trade flows on the global market for tablets.[80]

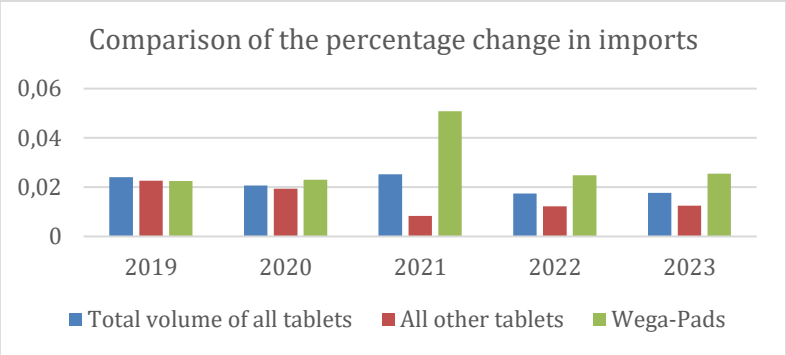

Figure 1 – Extracted data from Figure 4 of the case file through visual analysis

6 THE INCONCISTENCY OF THE BB WITH ART. XI:1 GATT IS NOT JUSTIFIED UNDER ART. XX(D) GATT.

The Complainant asserts that Art. XX(d) GATT cannot be invoked to justify inconsistencies with Art. XI:1 GATT. Indeed, the BB does not meet the cumulative requirements set out in Art. XX(d) GATT as (i) it is not necessary to secure compliance with Respondents' DPL and competition law contained in Sect. 6-9 DEL and (ii) it does not comply with the chapeau of Art. XX GATT.

6.1 The BB is not provisionally justified by Art. XX(d) GATT

The Complainant concedes the first element of the required two-tier test of Art. XX(d) GATT as the BB is designed to secure compliance with Respondents' competition law within

[79] PR, *Indonesia-Import Licensing Regimes* [7.50].

[80] Case file, p. 13 [69].

the digital economy contained in Sect. 6-9 DEL. However, the Complainant argues that the BB is not necessary to secure such compliance in the light of the weighing and balancing test.

In this context, the Complainant does not deny the importance of ensuring compliance with competition law nor the fact that the BB is apt to contribute to secure compliance with the applicable competition law in Sect. 6-9 DEL. However, the Complainant argues that the contribution of the BB is limited as it specifically targets WPs and their compliance. By not aiming at enforcing Sect. 6-9 towards every competitor, namely also Atlas, the contribution to the overall compliance with Sect. 6-9 DEL is limited. Further, the Complainant points out that measure is too trade restrictive relative to its limited contribution to competition law since the Respondents' market of tablet computers has seen a decrease in importation of 15%,[81] which is a severe competition distortion. The fact that the market share of certain market players such as WP has remained stable does not contradict this point as it could have further increased without the tariff increase and the shrinking of the market. Moreover, prior to a final, impartial and binding verdict of Alabasta's national court deeming WP sales inconsistent with competition law, the Complainant considers the interim measures to be excessive, their trade-restrictiveness is not outweighed by their contribution when taking into account the limited scale of the possible infringement being investigated. This is exemplified in the first interim measures decision being lifted.[82] As such, the measure is unnecessarily harming the competitors in a highly trade restrictive way, influencing competitiveness on the market in the long run.

Additionally, the Complainant argues that alternative measures could be employed in a less trade restrictive way while contributing to the achievement of the policy objective to the same level and being reasonably available to the Respondent. The DMA could be financed through sanctions such as fines or service fees or a different kind of tax, *i.a.* a raise of income tax, instead of trade restrictive tariffs. Such measures would ensure the same level of protection as the BB but in a less trade restrictive way with less market barriers. Indeed, they would provide the DMA with the required funds to enforce competition law. Such alternative would be reasonably available to the Respondent which has the right to introduce new taxes and fees.

As the BB is not necessary to secure compliance with Sect. 6-9 DEL, the Respondent fails to meet the cumulative two-tiered-test under Art. XX(d) GATT. Therefore, the Complainant argues that that the violation of Art. XI:1 GATT is not provisionally justified by Art. XX(d) GATT.

[81] Case file, p. 13 [68].

[82] Case file, p. 11 [59].

6.2 The BB does not comply with the chapeau of Art. XX GATT

The Complainant further argues that the BB is not applied in a manner consistent with the chapeau of Art. XX GATT. The Complainant asserts in this regard that the BB is a disguised restriction on trade.

The main objective of the BB is to prevent foreign producers of tablet computers to compete on the Respondents' market of digital products. Indeed, the DMA applies the competition rules unidirectionally, specifically targeting foreign producers of tablet computers as part of their industrial policy to boost domestic competitiveness in the digital sector. It targets specific entities and allows the Minister of Economy, Prof. Buggy, to pursue investigations targeted against foreign competition. As such, the Complainant contends that compliance with competition law is not the main policy goal of the measures. Indeed, it favours and protects domestic companies active in the digital economy, distorting rather than protecting the conditions of competition. The Respondent argues that the difference in time that claims took to be processed by the DMA is direct proof thereof.[83]

To conclude, the Complainant asserts that the BB is applied in a manner inconsistent with the chapeau of Art. XX GATT. Therefore, the Respondent's BB cannot be justified under Art. XX GATT.

[83] Case file, p. 11 [64-65].

Request for Findings

With regard to Sect. 4.2 DEL, the Complainant respectfully requests the Panel to:

i. Find that Wegapunk's Wega-Flix services fall under the Respondent's national treatment commitment regarding UNCPC 9613;
ii. Find that Sect. 4.2 DEL is inconsistent with Art. XVII GATS;
iii. Find that the inconsistency with Art. XVII GATS is not justified by Art. XIV(a) GATS.

With regard to Sect. 4.3 and 4.4 DEL, the Complainant respectfully requests the Panel to:

iv. Find that Sect. 4.3 and 4.4 DEL are inconsistent with Art. II:1 GATS;
v. Find that the inconsistency with Art. II:1 GATS is not justified by Art. XIV(c) GATS.

With regard to the 2019 tariff increase and the ongoing conduct of the DMA, the Complainant respectfully requests the Panel to:

vi. Find that the 2019 tariff increase and the ongoing conduct of the DMA constitute an overarching measure;
vii. Find that this overarching measure is inconsistent with Art. XI:1 GATT;
viii. Find that the inconsistency with Art. XI:1 GATT is not justified by Art. XX(d) GATT.

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Alabasta – Certain measures affecting digital goods and services

Wano
(Complainant)

vs

Alabasta
(Respondent)

SUBMISSION OF THE RESPONDENT

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2. *General Agreement on Trade in Services* ('GATS' or 'GATT'), Annex 1B to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 1869 UNTS 183
3. *Vienna Convention on the Law of Treaties* ('VCLT'), 23 May 1969, 1155 UNTS 331

II. WTO and GATT Panel Reports

GATT Panel Reports	
Short Title	**Full Title and Citation**
Canada – FIRA	Panel Report, *Canada – Administration of the Foreign Investment Review Act*, L/5504, BISD 30S, p. 140
US – Section 337	Panel Report, *United States – Section 337 of the tariff act of 1930*, L/6439, BISD 36S, p. 345.
WTO Panel Reports	
Short Title	**Full Title and Citation**
Brazil – Retreated Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
China – Electronic Payment Services	Panel Report, *China-Certain Measures Affecting Electronic Payment Services*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p.6251

EU – Energy Package	Panel Report, *European Union and its member States-Certain Measures Relating to the Energy Sector*, WT/DS476/R, adopted 10 august 2018, DSR, appealed 21 September 2018
India – Autos	Panel Report, India – *Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
Indonesia-Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017: VIII, p. 3769
Russia – Railway Equipment	Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Gambling	Panel Report, *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services* – Arbitration under Article 21.3(c) of the DSU, WT/DS285/13, 19 Augustus 2005, DSR 2005:XXIII, p. 11639

WTO Appellate Body Reports	
Short Title	**Full Title and Citation**
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243

EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DSDS161/AB/R, WT/DS169/AB/R adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Russia – Railway Equipment	Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R and Add.1, adopted 5 March 2020
US-Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5475
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

III. Books and Journal Articles

Wolfrum et al., Trade in Goods (2011)

R. Wolfrum, P. Stoll, H. Hestemeyer, 'Trade in Goods', Max Planck Commentaries on World Trade Law Vol. 5, 2011

IV. Other Sources

Billo et al. (2004)

G. Billo, W. Chang, 'Cyber Warfare an analysis of the means and motivations of selected nation states', Institute for Security Technology Studies at Dartmouth College, 2004 (Retrievable: https://web.elastic.org/~fche/mirrors/www.cryptome.org/2013/07/cyber-war-racket-0003.pdf)

Dredge (2014)

S. Dredge, 'Meassaging app Telegram added 5m new users the day after WhatsApp outage', the Guardian, 2014,
(Retrievable: https://www.theguardian.com/technology/2014/feb/24/telegram-messaging-app-whatsapp-down-facebook)

List of Abbreviations

Abbreviations	**Full Form**
AB	Appellate Body
ABR	Appellate Body Report
ACMs	Alabastan Competition Measures
APPI	Act on the Protection of Personal Information of Japan, Act 57 of May 30, 2003
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article(s)
AU	Alabastan University
CDTS	Competitive Digital Transformation Strategy
CPC	United Nations Central Product Classification
DEL	Digital Economy Law
DMA	Digital Market Authority
DPL	Data Protection Law
EU	European Union
i.a.	inter alia
GADA	Wano's Government Access to Data Act
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs 1994
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation)
LCR	Local Content Requirement
LGPD	General Personal Data Protection Act of Brazil (Law 13,709, of August 14, 2018)
MoU	Memorandum of Understanding

PR	Panel Report
Prof.	Professor
VCLT	Vienna Convention on the Law of Treaties of 1969
WF	Wega-Flix
WP	Wega-Pad(s)
WTO	World Trade Organization
The Schedule	Alabasta's Schedule of Specific Commitments

Statement of Facts

1. Alabasta and Wano are both Members of the World Trade Organization (WTO). Alabasta is located on the Mainan peninsula together with Allos and Karda, which share culture and mutually-intelligible languages.

2. Wegapunk is a company incorporated in Wano with a focus on e-commerce, media, streaming and electronic goods. Wegabasta is Wegapunk's fully owned subsidiary established in Alabasta.

3. The independent global consultancy company McEasy identified that the percentage of local content on the audiovisual market in Alabasta was limited to a mere 4% of total content in 2017. According to an Alabastan news website, 40-45% of Alabastan citizens have concerns regarding the volume and adequate display of their culture on audiovisual platforms. Within this context, a scandal emerged in May 2018 since Wegapunk produced a series regarding Mainan history that was historically inaccurate. The widespread reaction among Alabastan citizens demonstrates their deep concerns for the preservation of their culture.

4. Alabasta enacted a LCR within Sect. 4.2 DEL, requiring audiovisual content providers to offer at least 30% local content, to reflect the concerns of Alabastan citizens regarding the sufficient display of their culture.

5. Wano consistently ranks very low in data protection indexes. Moreover, its government often discloses consumer data, based on Sect. 3 of the GADA. Such disclosure also encompasses data of Alabastan users as demonstrated by a whistleblower working for WegaBasta. Conversely, Alabasta's regulatory framework is one of the strictest regarding the protection of personal data.

6. The DEL aims to guarantee fairness, sustainability and consumer protection in various technological sectors of the Alabastan economy. It regulates algorithmic advertisement "boosts" (Sect. 6), tying and bundling of goods and services (Sect. 8), and anti-steering practices (Sect. 9). The competition law framework of Alabasta follows general international trends.

7. The DMA was established to implement the objectives of the DEL and enforce its provisions. It is an independent regulatory authority, with a view to fostering the integrity of its regulatory functions.

8. The DMA requires approval for all acquisitions of a controlling interest in Alabastan audiovisual content providers. This is done via the submission of a letter of intent, requiring companies to store Alabastan user data in Alabasta unless contrary approval by the DMA. Such requirement does not apply to providers established in countries with which a Data Flow MoU is concluded. The MoUs are based on international guidelines on data protection, such as the OECD Principles for Government Access to Personal Data held by Private Sector Entities.

Summary of Arguments

Sect. 4.2 DEL is consistent with Art. XVII GATS

- Wegapunk and Wega-Flix (WF) do not fall under the Respondent's national treatment commitment regarding CPC 9631, as this category does not include streaming services, which have their own UN CPC heading. As such, the Respondent did not inscribe a commitment in its Schedule regarding the services at issue.
- Wegapunk and its WF services, on the one side, are not like Able 1 and ATV1 with their respective services, on the other side, since they are not in a competitive relationship.

Sect. 4.2 DEL is justified under Art. XIV(a) GATS

- Sect. 4.2 DEL is designed and necessary to protect public morals since Alabastan citizens are concerned about the preservation of their culture.
- Sect. 4.2 DEL complies with the chapeau of Art. XIV GATS since it is not applied in a way that constitutes an arbitrary or unjustified discrimination nor a disguised restriction on international trade.

Sect. 4.3 and 4.4 DEL are consistent with Art. II:1 GATS

- Sect 4.3 and 4.4 DEL are exempt under Art. VII GATS since Sect. 4.3(c) DEL and the data flow MoUs recognise a requirement to refrain from restricting data flows and to align data protection laws with the OECD's Declaration on Government Access to Personal Data Held by Private Sector Entities.
- Wegapunk and its streaming service WF are not like Atlas and its respective services since they are not in a competitive relationship.

Sect. 4.3 and 4.4 DEL are justified under Art. XIV(c)(ii) GATS

- Sect. 4.3 and 4.4 DEL are designed and necessary to secure compliance with the DPL, a domestic law that is not GATS inconsistent itself.
- Sect. 4.3 and 4.4 DEL are not applied in a manner constituting arbitrary and unjustifiable discrimination under the chapeau since the limitation of the measure's scope to controlling interests is justifiable by the increased risk of foreign data disclosure that a controlling interest generates in this domain.

The tariff increase and the DMA's ongoing conduct do not constitute an overarching measure inconsistent with Art. XI:1 GATT

- The Alabastan competition measures (ACMs) do not constitute a single overarching measure since each element is to be regarded as an individual measure with its own objective.
- Art. XI:1 GATT does not apply to the ACMs as they are a tariff increase and internal measures outside the scope of Art. XI:1 GATT.
- The ACMs do not restrict the importation of Wega-Pads (WPs) in the sense of Art. XI:1 GATT.

The ACMS are justified under Art. XX(d) GATT

- The ACMs are designed and necessary to secure compliance with Sect. 6-9 DEL, domestic legislation that is not GATT-inconsistent itself.
- The ACMs comply with the chapeau of Art. XX GATT since they are not applied in a way that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Identification of Measures at Issue

The first measure at issue is Sect. 4.2 DEL which requires at least 30% of the content offered by a provider of audiovisual content to be sourced in Alabasta to protect public morals. The second measure at issue is Sect. 4.3 and 4.4 DEL, which require the DMA's approval to acquire a controlling interest in a provider of audiovisual content located Alabasta. The DMA's approval is subject to a Letter of Intent containing *i.a.* a binding legal commitment to store personal information generated by Alabastan users in Alabasta to protect it from disclosure to foreign governments. Countries with a data flow MoU with Alabasta are exempted. The third measure at issue is the ACMS consisting of five individual measures comprising the DMA's conduct and the tariff increase on electronic products.

Legal Pleadings

1 SECT. 4.2 DEL IS CONSISTENT WITH ART. XVII GATS

While the Respondent concedes that the services and service suppliers at issue are not accorded no less favourable treatment, it argues that (i) the Respondent did not make a national treatment commitment as WF services do not fall in the category of Radio and Television Services and that the Respondent did not make a different commitment covering streaming services. Moreover, the Respondent argues that (ii) Wegapunk and its streaming service WF are not 'like' Able1 and ATV1 and their respective services.

1.1 Alabasta did not make a (unlimited) national treatment commitment for streaming services like WF

The Respondent submits that it did not make a national treatment commitment for streaming services as Wegapunk and WF services are not classified within CPC 9613 "Radio and Television Services". Alternatively, Respondent argues that the limitation inscribed for mode 1 in its Schedule permits the LCR contained in Sect. 4.2 DEL.

An interpretation of Respondent's Schedule pursuant to Art. 31 VCLT shows that the Respondent did not make a national treatment commitment for streaming services as the ordinary meaning of the terms, in the context of Respondent's Schedule, and in light of the

object and purpose of the GATS[1] exclude streaming services such as WF supplied by Wegapunk from being classified under "Radio and Television Services".

Respondent argues that the ordinary meanings of the terms "radio" and "television" share the defining characteristic of being linear mass media since both have programmes that are broadcast to a mass public audience.[2] This linearity is a distinguishing feature of radio and television, the content is predetermined by the media provider in a set and scheduled programme without control or agency of the consumer. Because such linearity is absent from on-demand structured streaming services such as WF,[3] Respondent argues their exclusion. This is supported by the common intention of the parties at the time of the negotiations. At that time, streaming services did not exist. Therefore, they could not be understood as being covered by the terms "Radio and Television Services" given the latter's distinct linear nature. Moreover, as they are terms with a specific meaning attached, they are not sufficiently generic[4] and thus, evolutionary interpretation is not applicable. Therefore, streaming services are to be regarded as an entirely new specific service distinct from radio and television.

Respondent submits that this interpretation is confirmed using supplementary means of interpretation pursuant to Art. 32 VCLT.[5] The subsector 2.D.c for "Radio and Television Services" corresponds with code 9613 of the CPC used during the negotiations of the Respondent's commitments. This class and its subclasses revolve around the production of radio and television progammes for subsequent broadcast, highlighting their linear characteristic. The separate nature of linear radio and television is further upheld in the current version UN CPC 2.1, which indicates that streaming services such as WF fall under UN CPC 84332 "Streamed Video Content", which is a different subclass than radio and television under UN CPC 96121 and UN CPC 96122, further highlighting that streaming services such as WF do not fall under "Radio and Television Services."

In addition, the Respondent submits that the mode affected by the measure at issue is mode 1. Indeed, the Panel in *EU – Energy Package* stated that when an entity is commercially established in the host country, it can be relevant to assess both mode 1 (cross border) and mode 3 (commercial presence) and what really matters is to determine the modes affected by the measure at issue.[6] The Respondent argues that mode 1 is affected because Sect. 4.2 DEL does not prevent or threaten the establishment of a commercial presence in Alabasta. It's LCR

[1] ABR, *China-Publications and Audiovisual Products* [348-349].
[2] *Cf.* Oxford English Dictionary (2008), radio; Oxford English Dictionary (2016), television.
[3] Case file, p. 3 [12].
[4] ABR, *China-Publications and Audiovisual Products* [396].
[5] ABR, *China-Publications and Audiovisual Products* [404].
[6] PR, *EU-Energy Package* [6.39-6.41].

specifically targets the type of content permitted to be shown on WF, which is streamed from Wegapunk's servers established in Wano.[7] Thus, it affects the content streamed across the border and thereby affecting supply in mode 1. Consequently, even if the Panel were to include Wegapunk's streaming service WF in UN CPC 9631 "Radio and Television Services", mode 1 and not mode 3 would be affected. The LCR would fall under the limitation inscribed in mode 1 which corresponds to the measure at issue. Such LCR existed between 1990 and 2000, thus at the time the Respondent made a national treatment commitment for this service in this mode of supply.[8]

1.2 Wegapunk with WF's streaming service are not 'like' ATV1 and Able1 with their respective services.

The Respondent submits that Wegapunk and WF are not 'like' ATV1 and Able1 with their respective services as they are not in a competitive relationship as their characteristics are very different and consumers do not view them as interchangeable but rather serving separate markets.

Concerning characteristics, Wegapunk provides WF as an online streaming platform, unlike Able1's and ATV1's respective television broadcasting services which are not provided over the internet, not requiring an internet connection.[9] Additionally, the latter lack the on-demand nature, which is an essential characteristic of a streaming platform.[10] Moreover, Wegapunk is a service provider focusing on e-commerce, media streaming and electronic goods,[11] whereas ATV1 and Able1 focus mainly on television services.[12] As such, the services offered by Wegapunk are broader in range and more diverse. Furthermore, while WF offers international content, ATV1 and Able1 mainly broadcast local content.

The consumer preferences indicate that WF, ATV1 and Able1 content are viewed during different parts of the day in Alabasta. TV, cinema, DVD/Blu-ray and cable services are used primarily at night or on Sunday whereas WF is consumed during parts of the day.[13] As such, consumers associate each service with a well differentiated time range, qualifying them as separate markets. This separation is further underlined by the different devices used for the consumption of the respective services, WF is mainly watched through an app on tablet computers,[14] whereas both ATV1 and Able1 are unavailable as apps.[15] Only ATV1's website

[7] Clarifications, p. 9 [31].
[8] Case file, p. 8 [43 footnote 9].
[9] Cambridge Dictionary (https://dictionary.cambridge.org/dictionary/english/streaming-platform).
[10] Case file p. 3 [18-19].
[11] Case file, p. 2 [10].
[12] Case file, p. 3 [18-19].
[13] Case file, p. 6 [32].
[14] Case file, p. 5 [29].
[15] Case file, p. 5 [29 footnote 7].

can be accessed through the browser on tablet computers.[16] ATV1's website, however, shows only news and sports events – content unavailable on WF. [17] Thus, the devices on which the content is consumed further constitute separate markets. The different consumer preferences are further reflected in the high demand for and favouring of Mainan produced content. Indeed, this preference is underlined by the scandal in May 2018 and the subsequent reaction of Alabastan consumers on social media.[18] Moreover, when Sun Miski declared in May 2018 that Wegapunk's policy was to offer globalized and not local services, some people cancelled their subscription, further demonstrating that consumers give consideration to the local character of their content.[19]

The Respondent therefore submits that the services and service suppliers under consideration are not in a competitive relationship.[20] As they are not like, the less favorable treatment by Respondent does not lead to a violation of Art. XVII GATS.

2 SECT. 4.2 DEL IS JUSTIFIED BY ART. XIV(A) GATS

Should the Panel find that Sect. 4.2 DEL inconsistent with Art. XVII GATS, the Respondent invokes Art. XIV(a) GATS to justify such inconsistency. Indeed, Sect. 4.2 DEL meets the required two tiered-test of Art. XIV(a) GATS since the measure is (i) designed and (ii) necessary to protect public morals as the measure relates to protecting a standard of right and wrong regarding Alabastan culture even if a quantifiable standard has not been set.[21] Additionally, the application of Sect. 4.2 DEL cannot be qualified as either (iii) an arbitrary or unjustifiable discrimination between countries where similar conditions prevail, or (iv) a disguised restriction on trade under the chapeau of Art. XIV GATS.

The Respondent emphasizes that it enjoys broad discretion to determine its public morals according to the standing WTO case law.[22] Additionally, the Respondent further highlights that the Panel in *US-Gambling* established that Members can define and apply the meaning of the term "public morals" autonomously according to their own scales of values and system

2.1 Sect. 4.2 DEL is designed and necessary to protect public morals

The Respondent submits that Sect. 4.2 DEL is provisionally justified since it is (i) designed and (ii) necessary to protect public morals as it protects the standards of right and wrong held by Alabastans regarding their culture.[23]

[16] *Ibid*.
[17] Case file, p. 3 [12, 18].
[18] Case file, p. 6 [33].
[19] *Ibid*.
[20] PR, *China-Electronic Payment Services* [7.463].
[21] PR, *US-Gambling* [6.461]; Clarifications, p. 11 [45].
[22] ABR, *US-Gambling* [291]; ABR, *Korea-Various Measures on Beef* [176]; PR, *US-Gambling* [6.461].
[23] ABR, *US-Gambling* [296].

2.1.1 Sect. 4.2 DEL is designed to protect public morals

The Respondent argues that Sect. 4.2 DEL is designed to protect public morals since the LCR and its enforcement system requires content providers to offer local content and upholds it through sanctions. As such, it addresses citizens' moral concerns regarding a lack of reflection and display of Alabastan culture by audiovisual content providers such as Wegapunk and its audiovisual content platform WF. Alabastans cherish and highly value the local character of their content.[24] This has been highlighted by a third-party study. An Alabastan news site showed that 40-45% of Alabastans agreed that not enough culture was displayed on WF and that Alabastan culture was threatened if no action was undertaken.[25] This shows that a significant portion of the population is aware of the threat posed to Alabastan culture. This concern can be objectively observed since the independent global consulting firm, McEasy, identified that only 4% of content made available to Alabastans was of local origin.[26] Additionally, WF viewership stagnated due to not considering citizens' devoted cultural concern.[27]

The Respondent submits that the local content required by the LCR is capable[28] to protect public morals since Alabastan citizens are strongly incentivized to be included in the production of content as a necessary consequence of 50% of the production costs having to be incurred in Alabasta. The inclusion of Alabastan citizens ensures more culturally accurate content as they are not expected to produce content detracting from their own morals. Thus, Sect. 4.2 DEL is designed to protect public morals. The Respondent highlights in this regard that Sect. 4.2 DEL does not specifically have to refer to the protection of public morals.[29]

2.1.2 Sect. 4.2 DEL is necessary to protect public morals

The Respondent argues that Sect. 4.2 DEL is necessary to protect public morals based on the required weighing and balancing approach.[30]

Firstly, the Respondent argues that the policy objective to protect Alabastan public morals regarding cultural preservation is highly important. As such, it is perceived as an important objective within society to display culturally accurate content and the protection of public morals regarding Alabastan cultural preservation has been proven to be an important domestic policy objective. Indeed, the Alabastan government implemented a wide range of measures in this domain, such as the establishment of new museums, cheaper tickets to archaeological sites

[24] Case file, p. 6 [31-32].
[25] Case file, p. 6 [31].
[26] Case file, p. 6 [30].
[27] Case file, p. 6 [32].
[28] ABR, *Columbia-Textiles* [5.68].
[29] ABR, *Colombia Textiles* [5.69].
[30] ABR, *US-Gambling* [310].

and theaters, increased financial support to the National Arts and Drama University, and administrative support to regional film production companies.[31] All these measures underline the importance being given to the correct display and preservation of Alabastan culture throughout society.

Secondly, Sect. 4.2 DEL is apt to significantly contribute to public morals regarding cultural protection in Alabasta due to the importance of the audiovisual sector. Indeed, as consumption of audiovisual content is done by a huge fraction of the population, (accurate) display of Alabastan culture within this audiovisual sector has an important impact on cultural protection. By requiring companies to incur 50% of their production costs in Alabasta, it strongly incentivizes content production inside of Alabasta. This can include *i.a*. the hiring of Alabastan actors and actresses, the use of Alabastan scenarists, the use of traditional Alabastan clothing or the filming in Alabastan locations. As such, the cultural display remains authentic and possible inaccuracies are avoided during production.

Thirdly, the trade restrictiveness of Sect. 4.2 DEL must be considered as limited since the LCR does not place an absolute limit on the provision of international content in Alabasta but only limits it relative to domestically produced content. Indeed, Sect. 4.2 DEL does not contain a fixed quota regarding content produced abroad, but solely limits the share of such content by balancing it relative to local, culturally appropriate content.

Thereby, the high importance of the objective at issue and the significant contribution of the measure outweigh its limited trade restrictiveness.

The Respondent does not bear the burden of proof to demonstrate further that no reasonably available alternative measures to section 4.2 DEL exist that would achieve its objectives in the light of interests or values being pursued as well as the Members' desired level of protection.[32] It is up to the Complainant to identify such alternatives. In this regard, the Respondent nonetheless submits that alternative definitions for "local content" would not equally contribute to the objective. Indeed, by producing content displaying Alabastan culture abroad, it is likely inaccuracies would arise due to lack of authenticity, just as happened in the past with a series about Mainan history on WF without Mainan actors or filming in Maina, which was widely report as historically inaccurate.[33]

[31] Clarifications, p. 11 [44].
[32] ABR, *US-Gambling* [309].
[33] Case file, p. 6 [33].

2.2 Sect. 4.2 DEL complies with the chapeau of Art. XIV GATS

Sect. 4.2 DEL is not applied in a manner constituting an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The Complainant may argue that the lack of exemption for content originating from and demonstrating culture of other Mainan peninsula states results in arbitrary and unjustifiable discrimination between similarly situated countries since the Mainan states have a shared culture. However, excluding production costs incurred in those states is connected to the measure's objective[34] of protecting public morals as it enables the enforcement of the LCR. This is because Alabasta lacks jurisdiction to verify the payment from one foreign company to another.[35] As such, it could not verify whether an audiovisual content producer incurred at least 50% of its production costs in Allos or Karda. Therefore, excluding content produced in other parts of the Mainan peninsula cannot be regarded as an arbitrary and unjustifiable application of Sect. 4.2 DEL.

In conclusion, Sect. 4.2 DEL is justified by Art. XIV(a) GATS as it is designed and necessary to protect public morals and is applied in a manner compliant with the chapeau of Art. XIV GATS.

3 SECT. 4.3 AND 4.4 DEL ARE CONSISTENT WITH ART. II GATS

While the Respondent concedes treatment less favourable of non-MoU countries, it submits that Sect. 4.3 and 4.4 DEL are still not inconsistent with Art. II GATS as (i) Art. VII GATS exempts Sect. 4.3 and 4.4 DEL from Art. II GATS and (ii) Wegapunk and its streaming service WF are not 'like' Atlas and its respective services.

3.1 Sect. 4.3 and 4.4 DEL are exempt from Art. II:1 GATS by Art. VII GATS.

The Respondent concedes that Sect. 4.3 and 4.4 DEL are measures falling within the scope of the GATS. However, the Respondent submits that Sect. 4.3 DEL is exempt from the application of Art. II:1 GATS under Art. VII:1 GATS. Indeed, (i) Sect. 4.3(c) DEL is to be regarded as a recognition of a requirement in the sense of Art. VII:1 GATS and (ii) an adequate opportunity is provided to non-MoU Members to obtain such recognition or to negotiate a comparable one.

Firstly, the Respondent claims that the recognition of compliance with international standards of data storage protection, arising from the Data Flow MoU with the Respondent, falls in the scope of Art. VII GATS. Indeed, by this MoU, the Respondent recognizes a requirement met in a particular country, namely a requirement to refrain from restricting data

[34] ABR, *Brazil-Retreaded Tyres* [227].

[35] Clarifications, p. 2 [7].

flows and to align data protection laws with the OECD's Declaration on Government Access to Personal Data Held by Private Sector Entities. As the parties to a MoU commit to comply with the OECD declarations and thereby to align with the Respondent's domestic policy objectives in terms of data storage, Sect. 4.3 and 4.4 DEL fall within the scope of Art. VII GATS.

Secondly, Art. VII:2, second sentence, GATS specifies that where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate the requirements met in that other Member's territory. The Respondent submits that this requirement is fulfilled since it started negotiating similar MoUs with other states in 2024. Such negotiations are currently still ongoing.[36] In addition, the Respondent asserts that it has effectively given the opportunity for the Complainant to conclude an MoU, but the Complainant jeopardized that possibility by the hostile Sun Miski declarations on the globalized nature of Wegapunk content and the screening of the Achilles Films takeover, which stopped negotiations of an MoU between Wano and Alabasta.[37] The Respondent submits that the wording of Art. VII GATS does not specify a time limit for negotiations for accession to an existing MoU.[38] Thus, Art. VII GATS does not require an immediate extension of recognition to other countries.

On the basis of the above, the Respondent argues that an adequate opportunity was granted to the Complainant, and thus, the requirements for the exemption of Art. VII GATS are met.

3.2 Wegapunk and its streaming service WF are not 'like' Atlas and its services

The Respondent submits that the presumption of likeness does not apply here as an "other factor" for the determination of likeness, the consideration for data protection in Alabasta, affects their competitive relationship.[39] Therefore, the Respondent argues that the distinction between MoU and non-MoU countries is not solely based on origin. In addition, The Respondent asserts that Wegapunk with its streaming service WF and Atlas with its service are not in a competitive relationship, since consumer preferences diverge in the light of different regulatory environments and data protection regulation.

Firstly, the consumer preferences in Alabasta strongly oppose the argument of likeness of Wegapunk with its streaming service WF and Atlas with its services. The Respondent submits that different regulatory environments between Allos and Wano regarding data protection have to be taken into account as Alabastan consumers are heavily concerned with data protection

[36] Case file, p. 2 [8 footnote 3].
[37] Clarifications, p. 4 [9].
[38] Case file, p°2 [8 footnote 3].
[39] ABR, *Argentina-Financial Services* [6.6].

and, more specifically, foreign governments having access to their user data without their consent.[40] A first major concern was expressed in October 2018, when it surfaced that foreign big tech companies were transferring consumers data to their Head Office jurisdictions and some of these jurisdictions enforced the disclosure of Alabastan consumers data without their consent.[41] Moreover, a whistleblower stating that Alabastan user data had been disclosed to the Wanian government spurred an intense reaction throughout Alabastan consumers.[42] Indeed, Wano consistently ranks very low in data protection indexes and their law on government access is routinely invoked by the Wanian government.[43] Even though access is subject to grounds of public order, a request for access is not subject to judicial review by courts rendering that criterion ineffective and exposed to discretion of the Wanian government.[44] Allos on the other side faces no known accusations against the access of non-residents' data to this day. Additionally, a higher level of protection from government access in Allos is highlighted by the concluded data-flow MoU between Allos and Alabasta. As the standards for government access are vastly different between Wano and Allos and consumers are highly concerned about their user data, Wegapunk, Atlas and their respective services are not in a competitive relationship in the eyes of Alabastan consumers, since they offer unequal data protection guarantees to Alabastan users. This point is reflected in the consumers' behaviour as the Respondent submits that the steep decrease in viewing time from 2018 to 2023 is attributable to the concerns of Alabastan consumers with the lack of data protection.[45]

Secondly, Wegapunk and its streaming service WF and Atlas with its services do not share the same characteristics. Indeed, all the content on WF is produced by well-known global studios whereas Atlas services are based on local Mainan content.

In addition to that, the Respondent argues that a difference of end-use materializes by differences in nature and use between WF and Atlas' services. Atlas' services are used by viewers seeking preservation of shared Mainan culture, while WF represents globalization at its most advanced stage and therefore WF viewers are necessarily fans of global content.

Wegapunk and its streaming service WF and Atlas and its services are thus not 'like' services and service suppliers. Therefore, the Respondent submits that Sect. 4.3 and 4.4 DEL are not inconsistent with Art. II GATS.

[40] Case file, p. 7 [36].
[41] *Ibid*.
[42] Case file, p. 7 [36-40].
[43] Case file, p.°6 [35].
[44] Sect. 3 GADA.
[45] Case file, p. 12 [66].

4 SECT. 4.3 AND 4.4 DEL ARE JUSTIFIED BY ART. XIV(C) GATS

Alternatively, the Respondent submits that, any inconsistency of Sect. 4.3 and 4.4 DEL with Art. II GATS is provisionally justified by Art. XIV(c) GATS as they are (i) designed and (ii) necessary to secure compliance with the DPL, domestic legislation that is not GATS inconsistent itself. Furthermore, Sect. 4.3 and 4.4 DEL are not applied in a manner which constitutes (iii) an arbitrary or unjustifiable discrimination between MoU countries and non-MoU countries or (iv) a disguised restriction on international trade.

4.1 Sect. 4.3 and 4.4 DEL are designed and necessary to secure compliance with the GATS-consistent DPL

The Respondent submits that Sect. 4.3 and 4.4 DEL are provisionally justified by Art. XIV(c) GATS since they are (i) designed and (ii) necessary to secure compliance with the DPL, which is not GATS-inconsistent itself.

4.1.1 Sect. 4.3 and 4.4 DEL are designed to secure compliance with the DPL

Sect. 4.3. and 4.4 DEL fulfill the "design" test since the usage of Data Flow MoU's and letters of intent in the context of acquisitions of a controlling interest is apt to contribute to data storage and processing security within the digital economy. Indeed, by requiring data collectors to store their data in Alabasta, data storage is subject to the Respondents' strict legislation, contributing to data safety. As such it secures compliance with Alabastan data security policy and regulation, specified under the DPL. The DPL provisions fall within the scope of "law or regulation" under Art. XIV(c) GATS as they cover "rules that form part of the domestic legal system of a WTO member".[46] Indeed, the DPL was introduced through a legal, parliamentary adoption process within the Respondents' legal system in 2017.

The Respondent argues that in the absence of a challenge by the Complainant, the DPL cannot be considered as GATS inconsistent since there is no indication of this being the case.

4.1.2 Sect. 4.3 and 4.4 DEL are necessary to secure compliance with the DPL

Secondly, Sect. 4.3 and 4.4 DEL are necessary to secure compliance with the DPL since the local storage of personal data largely contributes to data security by preventing foreign public and private entities from accessing personal data. Moreover, data security is a highly important objective worldwide. Governments are creating major data security regulations all around the globe such as the EU's GDPR, Japanese APPI or Brazilian LGPD. The use of cyberattacks in modern warfare further demonstrates the importance of adequate data security.[47] Additionally, the trade restrictiveness of the measure is extremely limited since it does not restrict trade in

[46] ABR, *Mexico-Taxes on Soft Drinks* [79].

[47] *cf.* G. Billo et al. (2004).

the digital economy in a qualitative or quantitative way. Nor does it limit digital companies to rightfully access data. It solely requires companies to store data in Alabasta to prevent illegitimate access due to lenient foreign legislation or unjustifiable governmental policy. The measure is highly contributing since the storage of data has to be either in Alabasta with its robust data protection laws or in countries with a Data Flow MoU, thus preventing the illegitimate disclosure of user's data to foreign governments, like Wano‘s. The Respondent argues that, taken together, the high importance of the objective at issue and the significant contribution of the measure outweigh its limited trade restrictiveness.

The Complainant thus far failed to identify alternative measures that are less trade restrictive while at least equally contributing to the objective and reasonably available to Alabasta, despite bearing the burden of proof in this regard.[48] Should the Complainant still propose an encryption requirement of personal data, the Respondent submits that it is not reasonably available as it imposes an undue burden[49] through demanding specific technological knowledge and means. Following that, the Respondent asserts that there is low technical capacity in Alabasta, as emphasized by the finding of the IMF that it lacks digital competitiveness. Additionally, the encryption of data does not contribute to the same extent to the objective of securing data security since encryption does not mitigate the threat of foreign governments, such as Wano, accessing data of Alabastan users. Indeed, the government of Wano could still force service providers to provide the encryption keys and access user data. Therefore, it does not contribute to the objective to the same extent as Sect. 4.3. and 4.4 DEL. Since no suitable alternatives exists, Sect. 4.3 and 4.4 DEL are necessary under Art. XIV(c) GATS.

4.2 Sect. 4.3 and 4.4 DEL comply with the chapeau of Art. XIV GATS

The Respondent submits that Sect. 4.3 and 4.4 DEL are not applied in a manner which constitutes an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. The limitation of the measure’s scope to the acquisition of controlling interests is justifiable by the increased risk of transborder relocation of Alabastan users’ personal data that the acquisition of a controlling interest enables. If a foreign entity obtains a controlling stake in a company, it becomes very plausible that consumers’ data is stored and processed abroad. The materialization of such a risk is shown by the whistleblower’s alert that data generated by Alabastan residents on Wega-Spend and WF had been disclosed without their consent to the Wanian government on the

[48] PR, Brazil-Retreated Tyres [5.142]

[49] ABR, *China-Publications and Audiovisual Products* [319].

latter's request.[50] In the case of acquisition of non-controlling interests by foreign entities, the company's main functions and influence remain within Alabastan jurisdiction and, the company is more likely to store the consumers data in Alabasta. Subsequently, such a company is not subject to the requirements of foreign governments, such as that of Wano. As such, the place of effective management of the company is highly important for data storage. Therefore, it does not lead to an arbitrary or unjustifiable discrimination as it is calibrated to the increased risk to data security from foreign control of audiovisual service providers. Moreover, the limitation of the field of application of Sect. 4.3 and 4.4 DEL to takeover of a controlling interests is not a disguised restriction to trade as it does not pursue a protectionist[51] objective but aims to strengthen data protection. The acquisition of a controlling interest can disturb a consumer's decision about which company they consent to sharing their data with. As such, takeovers are an especially critical situation for data protection. To illustrate, the Facebook takeover of Whatsapp in February 2014 lead to consumers' fears regarding the storage of their data, causing many users to divert to other platforms such as Telegram.[52]

On the basis of the above, the Respondent submits that the measure is not applied in a manner which constitutes an arbitrary or unjustifiable discrimination or disguised restriction on international trade. Hence, the measure is justified under Art. XIV GATS.

5 THE ONGOING CONDUCT OF THE DMA TOGETHER WITH THE TARIFF INCREASE ON TABLET COMPUTERS DOES NOT CONSTITUTE AN OVERARCHING MEASURE INCONSISTENT WITH ART. XI:1 GATT

5.1 The overarching measure as described by the Complainant does not exist

The Respondent contests neither the attribution of the alleged overarching measure's components nor the precise description of the measures' content. However, the Respondent submits that the challenged measure (*referred to as: the Alabastan competition measures or the ACMs*) does not exist. The Respondent contests the Complainant's characterization[53] of the ACMs as an unwritten,[54] overarching measure[55] with systematic application[56] as (i) the elements listed by the Complainant[57] do not operate in combination,[58] (ii) the ACMs do not have a functional life of their own,[59] and (iii) the measures exemplify sporadic and unrelated treatment instead of a systematic effort.[60]

[50] Case file, p.°7, [37].
[51] ABR, *EC-Asbestos* [8.236].
[52] Dredge (2014).
[53] ABR, *Argentina-Import Measures* [5.108].
[54] Case file, p. 14 [75].
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*.
[58] ABR, *Argentina-Import Measures* [5.108]; PR, *Indonesia-Chicken* [7.668-7.669].
[59] PR, *US-Export Restraints* [8.85].
[60] ABR, *Argentina-Import Measures* [5.142]; PR, *Russia-Railway Equipment* [7.947].

5.1.1 The elements listed by the Complainant do not operate in combination so as to constitute a separate measure

The ACMs have not been designed, structured or operated in combination to constitute a separate measure and lack the necessary cohesion[61] as (i) the alleged components do not operate together[62] and (ii) the CDTS cannot be seen as a common policy objective behind the challenged components.

5.1.1.1 The alleged components do not operate together

The Respondent argues that the alleged components do not work together as they all pursue different aims through different means instead of one common objective.

Firstly, the DMA's decision to reject the takeover of Achilles Films by Wegapunk, subsequently allowing the takeover by Atlas is not an expression of protectionism but rather a decision aimed at protecting the data of Alabastan users from access through foreign governments.[63]

Secondly, the first interim measures decision responds to the algorithmic boosting of Wegapunk's electronic goods on their e-commerce platform Wega-Spend, and to the tying and bundling of goods and services through integrated subscriptions of WF.[64] Consequently, those measures are directed against anti-competitive practices.

Thirdly, the second interim measures decision tackles the inoperability of the preinstalled WF App with the Atlas App.[65] This is also a specific measure, targeting a specific issue of free market competition.

Fourthly, the treatment of Wegapunk's complaint is not an expression of a greater common objective, but a manifestation of the DMA's high workload and subsequent delays in the treatment of complaints.[66]

Lastly, the tariffs are artificially included into the alleged overarching measure. Their aim is to finance the DMA.[67] However, the Respondent argues that the raising of public funds without a specific purpose is not inherent to a tariff increase, making it freely interchangeable with other means of generating public funds, such as taxes. If a financing function is recognized as a sufficient contribution to an overarching measure, any method of state financing could be understood as part of such a measure. This would dilute the scope of application and the concept of overarching measures.

[61] ABR, *Russia-Railway Equipment* [5.218].
[62] ABR, *Russia-Railway Equipment* [5.239]
[63] Case file, p. 9 [50].
[64] Case file p. 10 [56, 58].
[65] Case file, p. 11 [60-61].
[66] Case file, p. 11 [65].
[67] Case file, p. 8 [47].

As the alleged components are means to entirely different ends – data protection, specific instances of competition disturbances, raising of public funds or simply high workload, the Respondent argues that the alleged components do not operate together.

5.1.1.2 The CDTS does not set out a common policy objective

The Respondent further argues that the CDTS cannot be seen as a common policy objective of an overarching measure as it is only an academic endeavor conducted independently from the Alabastan government. The mere fact that Respondent's government commissioned the study in 2005[68] does not prove that the study's results and recommendations outlined in the CDTS were incorporated years later by the Respondent, neither into its government policy nor through the ACMs.

Moreover, the Respondent submits that the person of Prof. Buggy is also not sufficient to tie the CDTS to the Respondent's government policy. He referred to the CDTS in his campaign for parliament in 2010,[69] but there is neither an indication that he still holds those views today, over ten years later, nor that his views made it into Alabastan policy. The ideas of a politician can evolve over time, and the reality of power often leads politicians to reconsider their political trajectory by having to balance various state interests. Therefore, taking into account Prof. Buggy's distant past before he became a politician is not convincing.

Additionally, even if he still held his views regarding the CDTS, the Complainant would also need to show his connection to the DMA's conduct. However, the DMA is set up as an independent authority without direct control of the Alabastan government in substantive decisions.[70] Hence, the DMA's decisions do not reflect any governmental policy.

On the basis of the above, the Respondent argues that the different components of the ACMS deal with different issues and pursue different ends and are not connected to the CDTS, which is unable to pose as a singular common objective.

5.1.2 The ACMs do not have a functional life of their own

The Respondent argues that the ACMs further lack a functional life of their own[71] as they are not more than the sum of the parts and do not give rise to any violation independent of their components. Because the components mentioned are just a random collection of individual measures without a larger overall objective tying them together, the ACMs are void of life of their own.

[68] Case file, p. 4 [24].
[69] Case file, p. 4 [25].
[70] Sect. 2.1 DEL.
[71] PR, *US-Export Restraints* [8.85].

5.1.3 The listed elements demonstrate sporadic and unrelated treatment

The Respondent also argues that the ACMs do not show any systematic application as there is no underlying system, plan or organized method or effort.[72] The listed elements of the ACMs rather demonstrate sporadic and unrelated treatment.[73] The components challenged by the Complainant centering around the DMA's conduct concern disconnected decisions of the DMA, regarding different underlying subject matter and different applicable laws. Thus, the Complainant cannot show systematic but only sporadic and unrelated treatment.

5.2 Alternatively, the ACMs fall outside the scope of Art. XI:1 GATT

Should the Panel disagree and find that an unwritten overarching measure exists, the Respondent alternatively submits that it falls outside the scope of Art. XI:1 GATT as it is an internal measure not covered by the provision at issue. Following *India – Autos*, the Complainant submits that Art. XI:1 GATT only covers border measures and not internal measures.[74] The ACMs are internal measures as their center of gravity[75] in addition to their nature[76] lie on the domestic market., Respondent argues in addition that the challenged components are actions taken by a domestic agency without any specific connection to importation in the application of competition law, which does not differentiate between domestic and imported products. Moreover, they are triggered by the anticompetitive practices of Wegapunk on the Alabastan digital market, which is an internal event. As the ACMs are internal, they are unable to constitute a violation of Art. XI:1 GATT.

5.3 The ACMs do not restrict the importation of WPs in the sense of Art. XI:1 GATT

Even if the Panel was to find that Art. XI:1 GATT applies to the ACMs, the Respondent alternatively submits that they would not violate Art. XI:1 GATT as (i) they have no potentially limiting effect on the importation of WPs by *i.a.* their design and (ii) trade data shows no limiting effect either.

Firstly, the Respondent argues that the ACMs have no potentially limiting effect on the importation of Wega-Pads by their architecture, design and revealing structure as any common architecture could only be seen in their design to combat anti-competitive practices in the digital economy. The Respondent rather submits that the various corrective measures by the DMA are designed to offset the effects of Wegapunk's unfair promotion practices for its products and services in the streaming services market,[77] not to limit the sale of tablet

[72] ABR, *Russia-Railway Equipment* [5.240]; PR, *Russia-Tariff Treatment* [7.295-7.311].
[73] ABR, *Argentina-Import Measures* [5.142]; PR, *Russia-Railway Equipment* [7.947].
[74] PR, *India-Autos* [7.215]; PR, *Canada-FIRA* [5.14].
[75] ABR, *China-Auto Parts* [171].
[76] PR, *Brazil-Retreaded Tyres* [7.372].
[77] Case file, p. 10 [56].

computers. Therefore, the measures taken by the DMA are unrelated to the quantity of imported WPs. Additionally, tariffs are expressly excluded from the application of Art. XI:1 GATT,[78] thus, the Respondent argues that the structure of the ACMs does not show a potentially limiting effect on the importation of WPs.

Secondly, the Respondent argues that trade data shows no actual limiting effect of the ACMs on the importation of WPs as their market share even increased from 2018-2023.[79] Consequently, the ACMs did not have a limiting effect on the importation of Wega-Pads specifically.

6 THE ACMS ARE JUSTIFIED UNDER ART. XX GATT

Should the Panel find that the conduct of the DMA and tariff increase are an overarching measure violating Art. XI:1 GATT, the Respondent argues that such violation is justified under Art. XX(d) GATT. Indeed, the ACMs fulfill the requirements under (i) XX(d) GATT and (ii) the chapeau of Art. XX GATT.[80]

6.1 The ACMs are justified under Art. XX(d) GATT

The Respondent submits that the ACMs are provisionally justified under Art. XX(d) GATT as they are (i) designed and (ii) necessary to secure compliance with competition law that is not GATT inconsistent. [81]

6.1.1 The ACMs are designed to secure compliance with the GATT-consistent Sect. 6-9 DEL

The Respondent argues that Alabasta's competition measures fulfill the threshold examination under Art. XX(d) GATT as they are designed to secure compliance with Sect. 6-9 DEL, a domestic legal instrument qualifying as "laws and regulations" within the meaning of Art. XX(d) GATT, which is not inconsistent with GATT.

First, Sect. 6-9 DEL are part of the Respondent's domestic law as they are an enforceable normative instrument containing rules of conduct related to competition law, imposed by the Respondent's legislative power under domestic law.[82] They stipulate a specific normative binding set of rules concerning advertisement boosts (Sect. 6), tying and bundling by dominant digital enterprises (Sect. 8) and steering practices by dominant enterprises (Sect. 9). The ACMs prevent deceptive practices within digital economy law as they hinder market distortion. Such instruments were explicitly qualified as "laws and regulations" within the meaning of Art. XX(d) GATT.[83]

[78] Wolfrum et al., Trade in Goods (2011), GATT Art. XI [1].
[79] Case file, p. 12 [67].
[80] ABR, *US-Gasoline* [22]. ABR, *Korea-Various Measures on Beef* [157].
[81] ABR, *Korea-Various Measures on Beef* [157].
[82] ABR, *Mexico-Taxes on Soft Drinks* [69-70].
[83] ABR, *Mexico-Taxes on Soft Drinks* [70].

Secondly, the Respondent argues that Sect. 6-9 DEL are GATT-consistent in the absence of any claims to the contrary by the Complainant as the Complainant did not challenge the DEL in its entirety and has only made claims in respect of Sect. 4.2-4 DEL. Consequently, no indication exists that Sect. 6-9 DEL are GATT-inconsistent.

Furthermore, the ACMs are designed to secure compliance with Sect. 6-9 DEL since the different provisions of DEL operate together as a comprehensive framework with the single objective of protecting competition in the digital economy. In this context it is permissible for the ACMs to secure compliance with multiple provisions of the DEL.[84] Indeed, the interim measures imposed upon Wegapunk by the DMA aim at remedying a *prima facie* recognizable violation of Sect. 6-9 DEL by prohibiting or imposing a quota on the respective prohibited conduct until a final decision on the violation has been made. In this respect, the (interim) measures implement the prohibitions laid down in Sect. 6-9 DEL and apply them to the individual case of algorithmic boosting, bundling or steering. The tariff increases' inclusion in the ACMs also serves the enforcement of Sect. 6-9 DEL as the financing obtained through the tariffs allows the DMA to fulfill its tasks as independent regulatory authority, enforcing Sect. 6-9 DEL. Consequently, the measures' design is capable of securing compliance with Sect. 6-9.[85]

6.1.2 The ACMs are necessary to secure compliance with the GATT-consistent Sect. 6-9 DEL

The Respondent argues that the ACMs are necessary to secure compliance with Sect. 6-9 DELas (i) the objective of ensuring compliance with Sect. 6-9 DEL is highly important to the Respondent, (ii) the ACMs contribute to the realization of this objective to a high degree and (iii) this outweighs the degree of trade restrictiveness of the measures.

The Respondent firstly submits that the securance of a competitive digital market through *i.a.* Sect. 6-9 DEL is of high importance to the Respondent as its digital market is deemed to have potential for its economic development.[86] Indeed, the IMF attested Alabasta a lack of digital competitiveness and attributed to that its lack of economic growth.[87] Such potential in a growing market can only be realized in a market without anti-competitive distortions. Therefore, the enforcement of Sect. 6-9 DEL is highly important to the Respondent, and it is within the Respondent's discretion to determine a high level of such enforcement.[88]

Secondly, the Respondent points out the limited degree of trade restrictiveness of the ACMs as all individual components deal with specific issues, solving them individually and with

[84] ABR, *Argentina-Financial Services* [6.208, footnote 505];
[85] ABR, *Colombia-Textiles* [5.126, 5.131]
[86] Case file, p. 4 [23].
[87] *Ibid.*
[88] PR GATT, *US-Section 337* [5.26].

limited trade restrictiveness. The prohibition of algorithmic boosting of Wega-Spend does not restrict Wegapunk's ability to sell WPs in general. The Respondent acknowledges that the quota on bundled WPs is generally a trade restrictive instrument. However, Respondent emphasizes that it is not a quota on *importation* of WPs but rather a quota on *the sale* of WPs *bundled with a WF subscription*.[89] The restrictiveness of the quota is also lowered by it only being applicable on the sale in large technology stores.[90] The limitation to physical retailers allowed Wegapunk to freely sell bundled WPs online *i.a.* through Wega-Spend.[91] Moreover, Respondent highlights that the *importation* of WPs, bundled or unbundled, was not subject to the quota.[92] The requirement to sell WPs without the WF App being preinstalled allows Wegapunk to freely sell WPs while fixing the steering arising from the lack of interoperability between the preinstalled WF App and the Atlas App. The Respondent argues that each of those components are not very trade restrictive as they all touch upon specific issue that they – almost surgically – fix.

The Respondent further submits, despite the Complainant bearing the burden of proof in this regard,[93] that an increase in VAT on all electronic products from 17% to 22%, while being equally effective to finance the DMA,[94] is not a reasonably available alternative as an increase of tax burden imposes an undue burden[95] on the recession-plagued Alabastan economy.[96]

The Respondent lastly submits that alternative financing of the DMA though fines and administrative fees is not a reasonably alternative measure since it does not guarantee adequate and sufficient financing. Indeed, under these circumstances, preventive investigation could not be carried out on a sufficiently large scale as the financing would depend upon earlier investigations and infringements.

Based on the weighing and balancing of the high importance of the objective and the material contribution of the measures against their trade-restrictiveness, and the unavailability of an alternative, the Respondent submits that the ACMs are necessary within the meaning of Art. XX(d) GATT, and therefore, provisionally justified.

6.2 The ACMs comply with the chapeau of Art. XX GATT

The Respondent argues that the ACMs is further justified since it complies with the chapeau of Art. XX GATT. Indeed, they are not applied in a way that constitutes (i) an arbitrary or

[89] Case file, p. 10 [58].
[90] *Ibid*.
[91] Clarifications, p. 7 [22].
[92] Clarifications, p. 7 [21].
[93] PR, *Brazil-Retreated Tyres* [5.142]
[94] Clarifications, p. 6 [19].
[95] ABR, *China-Publications and Audiovisual Products* [319].
[96] Case file, p. 4 [23].

unjustifiable discrimination between countries where the same conditions prevail or (ii) a disguised restriction on international trade.

Even though there are differences in investigation time regarding complaints by Wegapunk concerning Atlas and complaints by the Respondent's Minister of the Economy concerning Wegapunk, those are not unjustifiable but due to the required termination of the tenure of one member of the DMA displaying bias towards WF.[97] The termination was inescapable to ensure the fundamental principle of objective and neutral decision making, although unfortunately leading to severe delays in handling the claim. Such a decision was however required to prevent anticompetitive practices. Thus, the temporary effect on the DMA's investigation power is justified by the valid protection of legitimate policy goal of ensuring objective enforcement of the DEL.

Additionally, the Respondent argues that the fact that complaints by the Minister of Economy are prioritized does not constitute a disguised restriction on trade as it can be assumed that a minister will not misuse his power and fulfil his tasks in a due diligent way. A priority provided by law is not, in and of itself, sufficient to assume its abuse, but needs to be assessed in light of the discretion granted to state authorities.[98] In this case, the discretion is not restricted in a material way,[99] allowing the Minister of Economy to use the discretion in compliance with WTO-obligations.

On the basis of the above, the Respondent argues that the ACMs are compliant with the chapeau of Art. XX GATT since they are not applied in a manner constituting arbitrary or unjustifiable discrimination or disguised restriction on international trade. Therefore, any inconsistency of the ACMs with Art. XI:1 GATT is justified by Art. XX(d) GATT.

[97] Case file, p. 11 [64-65].
[98] ABR, *EU-Biodiesel (Argentina)* [6.229].
[99] *Ibid.*

Request for Findings

With regard to Sect. 4.2 DEL, the Respondent respectfully requests the Panel to:

i. Find that Wegapunk and WF do not fall under the Respondent's national treatment commitment regarding UNCPC 9613;
ii. Find that Sect. 4.2 DEL is consistent with Art. XVII GATS;
iii. In the alternative, find that the alleged inconsistency with Art. XVII GATS is justified under Art. XIV(a) GATS.

With regard to Sect. 4.3 and 4.4 DEL, the Respondent respectfully requests the Panel to:

iv. Find that Sect. 4.3 and 4.4 DEL are consistent with Art. II:1 GATS;
v. In the alternative, find that the alleged inconsistency with Art. II:1 GATS is justified by Art. XIV(c) GATS.

With regard to the ACMs, the Respondent respectfully requests the Panel to:

vi. Find that the ACMs are separate and distinct measures and do not constitute an overarching measure;
vii. Find that the ACMs are not inconsistent with Art XI:1 GATT;
viii. In the alternative, find that the alleged inconsistencies of the ACMs are justified by Art. XX(d) GATT.