

Team: 39

John H. Jackson Moot Court Competition
23rd edition

**Alabasta – Certain measures affecting
electronic goods and digital services**

Wano
(Complainant)

vs

Alabasta
(Respondent)

**SUBMISSION OF THE
RESPONDENT**

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LIST OF ABBREVIATIONS

Abbreviation	Description
ABR	Appellate Body Report
Art./Arts.	Article/Articles
AV/ AVC	Audiovisual/ Audiovisual content
CDTS	Competitive Digital Transformation Strategy
CPC	Central Product Classification
DEL	Alabasta's Digital Economy Law
DMA	Alabasta's Digital Markets Authority
DPL	Alabasta's Data Protection Law
DVD	Digital Video Disc
GADA	Wano's Government Access to Data Act
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
GDP	Gross Domestic Product
LC	Local content
LoI	Letter of Intent
MA	Market access
MFN	Most-Favoured-Nation
MoU	Memorandum of Understanding
NT	National treatment
OECD	Organization for Economic Cooperation and Development
OTT	Over-the-top
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PR	Panel Report
s./ss.	Section/ Sections
Schedule	Schedule of Specific Commitments
TV	Television
UN	United Nations
US	United States
WTO	World Trade Organization

STATEMENTS OF FACTS

Wano and Alabasta are both founding WTO Members. Alabasta is a developing country with a middle-income economy and a robust entertainment industry. Alabasta is recognized for its strong regional presence in Maina and economic reliance on agriculture, tourism, and entertainment in the past. Its digital infrastructure has been developing in response to calls for economic modernization. Therefore, Alabasta adopted the DEL which regulates data flows, competition, and local AVC in the digital economy. Alabasta has a TV channel called ATV1 as well as a cable TV platform called Able1, but no video streaming platform.

Wano has a high-income economy and leads the global market in electronic goods and digital services. Its flagship company, Wegapunk, operates globally through subsidiaries like WegaBasta, its Alabastan arm which distributes and warrants Wegapunk's products and services in Alabasta. These include its video streaming platform Wega-Flix, its e-commerce platform Wega-Spend and its tablet computers Wega-Pad. Wega-Flix is the world's second largest subscription-based streaming platform dominating the Alabastan market since its launch in 2011. It prioritizes content produced by Wegapunk. Wega-Pad is a tablet computer bundled with a free Wega-Flix subscription, integral to Wegapunk's market strategy. Wega-Spend is the world's largest e-commerce platform known for leveraging user data to optimize its algorithms which favour Wegaunk's electronic goods. Data generated by Wega-Flix's and Wega-Spend's users is transferred to and stored in servers in Wano.

Alabasta is one of the three Mainan states besides Karda and Allos. They share cultural similarities and have signed bilateral Data Flow MoUs, which contain the commitment to align data protection laws with the OECD Declaration. Wano has not signed MoUs with any Mainan state. Some preliminary discussions were held in 2019 between Wano and Alabasta on potentially signing an MoU but they were halted after Wegapunk made complainants to the Wanian government about the screening of the Achilles Films takeover. Atlas is a streaming service provider in Allos. Its services were launched in Alabasta in 2018.

In 2003, Alabasta experienced a recession, which prompted a government-commissioned study advocating for a Competitive Digital Transformation Strategy (CDTS). This emphasized digital economic competitiveness, protectionism in electronic goods, and local content promotion. By 2017, Wega-Flix accounted for 55% of Alabastan viewership, overshadowing traditional media platforms like TV channels and cable TV. According to an online poll in 2018, almost half of Alabastan citizens believe there is not enough Alabastan culture displayed on Wega-Flix due to its limited offerings of local content (4% compared to 85% on traditional TV

channels and 55% in cable TV) and Alabastan culture is threatened by being exposed to too much foreign content on Wega-Flix. Mainan citizens complained that a Wega-Flix series released in 2018 dealing with Mainan history featuring no Mainan actors and no filming in Maina is historically inaccurate.

The 2018 revelations of unauthorized data transfers by WegaBasta to Wano under its Government Access to Data Act (GADA) heightened Alabasta's focus on data sovereignty. The GADA allows the Wanian government to compel local tech companies to disclose various types of data generated by its users, including users who do not reside in Wano. This raises concerns about privacy and compliance risks in foreign companies. According to a whistleblower working for WegaBasta, data generated by Alabastan residents on Wega-Spend and Wega-Flix had been disclosed without their consent to the Wanian government upon the latter's request.

The DEL was adopted in 2019. Its key provisions include mandates for 30% local content for AV suppliers, requirements for storing user data within Alabasta unless exempted by the Data Flow MoU and a regulation of competitive practices like algorithmic boosts and product bundling. To fund digital infrastructure improvements Alabasta increased its tariffs on electronic goods, including tablet computers, from 5% to 13%, in the same year.

Wegapunk's attempted acquisition of Alabastan film studio Achilles Films was blocked by Alabasta's Digital Markets Authority (DMA) due to non-compliance with local data storage requirements. Conversely, Atlas, the Mainan competitor, successfully acquired Achilles Films because of Allos' MoU with Alabasta.

After the complaint submitted by Minister of Economy against Wegapunk in February 2021 concerning the prioritization of Wega-Pads on Wega-Spend as well as Wega-Pads being bundled and tied with Wega-Flix, the DMA imposed interim measures ordering halt in its promotional activities for the latest versions of Wega-Pad and a temporary quota on the sale of Wega-Pad providing a free subscription of Wega-Flix. In September 2022, the DMA self-initiated proceedings against Wegapunk's anti-steering practices in the tablet computer market. It ordered interim measures requiring the sale of a stripped-down version of Wega-Pad. In December 2022, Wegapunk filed a complaint against Atlas, proceedings of which were then delayed due to priority of other complaints and personnel change of the DMA.

Wega-Pad's market share stabilized, but Alabasta reported declining imports of tablet computers and growing local investments in digital infrastructure.

In 2023, a consortium of Alabastan entities announced plans for a Mainan tablet optimized for local content.

SUMMARY OF ARGUMENTS

- I. DEL s. 4.2 is consistent with GATS Art. XVII**
- DEL s. 4.2 does not violate GATS Art. XVII since AVC is a good and therefore the GATS is not applicable, Alabasta did not make a full NT commitment regarding AV streaming services since it limits its commitment to minimum 30% local content, video streaming platforms are not like TV channels or cable TV platforms and Alabasta does not accord foreign AVC suppliers treatment less favourable.
- II. DEL ss. 4.3 and 4.4 are consistent with GATS Art. II**
- DEL ss. 4.3 and 4.4 do not fall within the scope of GATS Art. I:1, since online streamed AVCs are not services, but goods.
 - Wegapunk is not “like” Atlas and Wegapunk’s Wega-Flix streaming services are not “like” streaming services offered by Atlas.
- III. The conduct of the DMA and the 2019 tariff increase in tablet computers do not constitute a single unwritten and overarching measure which restricts the importation of Wega-Pads contrary to GATT Art. XI:1**
- A single unwritten and overarching measure does not exist, since its components (i) do not work together towards a common policy goal, (ii) are not distinct from the overarching measure itself and (iii) are not applied systematically. This does not fall under GATT Art. XI:1.
 - There is no restriction of Wega-Pads importation within the meaning of GATT Art. XI:1, as it does not (i) cut the market access of Wega-Pads, (ii) create uncertainties for Wegapunk and (iii) make the importation of Wega-Pads prohibitively costly.
- IV. If DEL s. 4.2 is inconsistent with GATS Art. XVII the measure is justified under Art. XIV(a)**
- DEL s. 4.2 falls within the scope of GATS Art. XIV(a) since it is (i) designed to “protect public morals” and (ii) necessary to do so.
 - DEL s. 4.2 satisfies the requirements laid down by the chapeau of GATS Art. XIV, since its application constitutes neither (i) a “disguised restriction on trade in services” nor (ii) “a discrimination between countries where like conditions prevail”, and (iii) the discrimination is not arbitrary or unjustifiable.
- V. If DEL ss. 4.3 and 4.4 are inconsistent with GATS Art. II the measure is justified under Art. XIV(c)(ii)**

- DEL ss. 4.3 and 4.4 are justified under GATS Art. XIV(c)(ii) because a measure protecting residents from personal data violations is provisionally justified as a necessary measure to secure compliance with the DPL.
- DEL ss. 4.3 and 4.4 satisfy the requirements laid down in the chapeau of GATS Art. XIV since Alabasta's rejection of the Achilles Films' acquisition by Wegapunk constitutes neither (i) an arbitrary or unjustifiable discrimination between countries where the like conditions prevail nor (ii) a disguised restriction on trade.

VI. If the conduct of the DMA is inconsistent with GATT Art. XI:1, the measure is justified under Art. XX(d)

- The conduct of the DMA is justified under GATT Art. XX(d) since it falls within the scope of subparagraph (d) as it is (i) designed to secure compliance with the DEL protecting fair competition and (ii) necessary to secure such compliance.
- The conduct of the DMA follows the chapeau under GATT Art. XX since it is not applied in a manner (i) that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and (ii) is not a disguised restriction on international trade.

IDENTIFICATION OF THE MEASURE AT ISSUE

Measure 1: the local content (LC) requirement and the established fine in DEL s. 4.2;

Measure 2: the requirement of undertaking a binding legal commitment to store personal information generated by Alabasta users in Alabasta and to refrain from transferring it outside Alabasta applicable for companies in countries not having an MoU with Alabasta, wanting to acquire a controlling interest in AV service providers pursuant to DEL s. 4.3 and the discretion of the DMA to reject the acquisition if these requirements are not met (DEL s. 4.4);

Measure 3: the tariff increase in tablet computers and the DMA's conduct, including the blocking of Achilles Films' acquisition by Wegapunk, the approval of the acquisition by Atlas, the DMA's investigation and imposition of interim measures against Wegapunk, and Alabasta's treatment of Wegapunk's complaint in relation to Atlas.

LEGAL PLEADINGS

A. Alabasta's DEL s. 4.2 is consistent with GATS Art. XVII

To determine a measure's inconsistency with GATS Art. XVII, the complainant must demonstrate that (I) the Member's measure affects trade in services, (II) an NT commitment was made, (III) the foreign and domestic services and service suppliers are "like" and (IV) the foreign services and service suppliers are accorded treatment less favourable.¹

I. DEL s. 4.2 does not fall under the scope of GATS Art. I

The GATS applies to (1) a measure by a Member that (2) affects trade in services.²

1. DEL s. 4.2 is a measure by a Member

Alabasta is a WTO member.³ The DEL⁴ was adopted by its parliament in April 2019.⁵ Hence, DEL s. 4.2 is a measure of the central government within the meaning of GATS Art. I:3(a)(i).

2. DEL s. 4.2 is not affecting trade in services within the meaning of GATS Art. I:1

It must be proven that (i) there is "trade in services" in the sense of GATS Art. I:2 that (ii) the measure "affects".⁶ Since AVC is a good and not a service, there is no trade in services. AVC used to be distributed in physical form like DVDs and are, therefore, classified as goods.⁷ Today, AVC is mostly intangible and distributed in electronic form.⁸ The classification as a good under the GATT or as a service under the GATS is determined by the nature of the product rather than its means of delivery.⁹ A change in the means of delivery of a product does not

¹ PR, *China – Publications and Audiovisual Products*, [7.944].

² ABR, *Canada – Autos*, [151 – 152]; PR, *US – Gambling*, [6.250; 6.254].

³ Case, [6].

⁴ Case, Annex 5.

⁵ Case, [41].

⁶ ABR, *Canada – Autos*, [155].

⁷ I. Willemyns (2021), p.12.

⁸ I. Willemyns (2021), p.12.

⁹ WTO Council for Trade in Services, [37]; R. Weber and M. Burri (2013), 37; I. Willemyns (2021), p.19.

change its nature or functional characteristics.¹⁰ This follows the principle of technological neutrality^{11, 12} The change in the mode of delivery from physical to electronic distribution of AVC does not change its nature and should therefore remain a good. Furthermore, if physical AVC is to fall within the GATT while its equivalent online streamed AVC falls within the GATS, two products that are supposed to be considered “like” would be subject to different obligations and commitments¹³, which might lead to inconsistencies with both GATT and GATS, although transactions are economically the same. Therefore, in the present dispute there is no trade in services. Hence, there is not a measure that “affects” such trade in services.

II. Alabasta made no NT commitment

If the Panel finds that DEL s. 4.2 affects trade in services, it must be determined whether and to what extent an NT commitment was made in respect of the relevant services sector and the relevant mode of supply¹⁴. Alabasta made no NT commitment regarding the AV streaming services sector. Its “Radio and TV Services (CPC 9613)” commitments under sub-sector 2.D. “Audiovisual Services”¹⁵ do not cover streaming services or so-called OTT services like Wegapunk’s online video streaming platform Wega-Flix¹⁶. Alabasta used the W/120 as well as the corresponding CPC numbers for scheduling its commitments.¹⁷ When WTO Members made use of these documents it must be assumed that they follow their definitions.¹⁸ The relevant CPC category 9613 including its three sub-categories use the wording “broadcasting” which shows that it only covers broadcasting services, but no streaming or OTT services.

Even if the Panel finds that AV streaming services are covered by “Radio and TV Services”, Alabasta still made no full NT commitment for their cross-border supply. To determine the extent of a Member’s NT commitment, its schedule must be examined to see whether there are any limitations inscribed with respect to the relevant mode of supply.¹⁹ The services at issue are supplied from Wano through internet connection into the territory of Alabasta.²⁰ This constitutes “mode 1”, as defined in GATS Art. I:2(a) as the supply of a service from the territory of one Member into the territory of any other Member, and not “mode 3”, as defined in GATS Art. I:2(c) as the supply of a service through commercial presence. Even though WegaBasta is

¹⁰ WTO Work Programme on Electronic Commerce, [7]; I. Willemyns (2021), pp.17, 21.

¹¹ PR, *US – Gambling*, [6.285]; PR, *China – Publications and Audiovisual Products*, [4.269].

¹² I. Willemyns (2021), p.14.

¹³ I. Willemyns (2021), p.19; F. Farrokhina and C. Richards (2016), p. 813; WTO Council for Trade in Services, [10].

¹⁴ PR, *China – Publications and Audiovisual Products*, [7.944].

¹⁵ Case, Annex 2.

¹⁶ Case, [12]

¹⁷ Case, [9].

¹⁸ PR, *US – Gambling*, [6104 ff.].

¹⁹ PR, *China – Publications and Audiovisual Products*, [7.950].

²⁰ Clarification Questions, [31].

incorporated in Alabasta²¹, it does not have servers there²². Because Wega-Flix is streamed directly from Wegapunk's servers situated in Wano to end-users in Alabasta²³, the streaming services are supplied cross-border (mode 1) from Wegapunk in Wano to consumers in Alabasta. With respect to "Radio and TV Services" Alabasta made a mode 1 NT commitment with the limitation of "minimum of 30% local content"²⁴ in line with DEL s. 4.2. In the DEL "LC" is defined as "more than 50% of its production costs [...] incurred in Alabasta". Even though Alabasta did not define "LC" in its schedule, the 30% LC rule does not have to cover any foreign content. Therefore, for this 30% even 100% of the production costs could be required to be incurred locally. In any case, requiring 50% production costs to incur locally is supported by the McEasy study²⁵. Therefore, DEL s. 4.2 is in line with Alabasta's NT commitment.

III. WegaBasta, Able1 and ATV1 are not like service suppliers offering like services

The determination of likeness under GATS Art. XVII "should be made on a case-by-case basis"²⁶ considering both the services and service suppliers²⁷. They are like when they are in a competitive relationship with each other²⁸ considering their characteristics and consumers' preferences.²⁹ Video streaming platforms like Wega-Flix³⁰ are neither like TV channels as ATV1³¹ nor like cable TV platforms as Able1³². Wega-Flix is available on demand.³³ In contrast, ATV1 and Able1 are not and cannot be paused or played.³⁴ Besides, Wega-Flix is available as an app, can algorithmically tailor its content to user preferences and has up-to-date content.³⁵ In contrast, on ATV1 and Able1 series and shows are available approximately two years after becoming available on Wega-Flix, on average.³⁶ Besides, while Wega-Flix is available on tablet computers³⁷, cable TV is not. Only ATV1's website can be accessed on tablet computers via browsers.³⁸ However, ATV1 is for free³⁹ while consumers have to pay a monthly subscription for Wega-Flix⁴⁰. Furthermore, the McEasy study shows that Wega-Flix is used during different parts of the day, whereas TV and cable services are used primarily at night or on Sundays.⁴¹ This shows different consumer preferences which indicates that they are in no competitive relationship. Consumers seem to use them additionally, not substitutionally.

²¹ Case, [11].

²² Case, [15].

²³ Clarification Questions, [31].

²⁴ Case, Annex 2.

²⁵ Case, footnote 8, p.6.

²⁶ PR, *China – Electronic Payment Services*, [7.701].

²⁷ ABR, *Argentina – Financial Services*, [6.29].

²⁸ ABR, *Argentina – Financial Services* [6.31].

²⁹ ABR, *Argentina – Financial Services* [6.32].

³⁰ Case, [12].

³¹ Case, [18].

³² Case, [19].

³³ Case, [28].

³⁴ Case, [18, 19].

³⁵ Case, [28].

³⁶ Case, footnote 6, p.5.

³⁷ Case, [16, 28].

³⁸ Case, footnote 7, p.5.

³⁹ Clarification Questions, [64].

⁴⁰ Case, [12, 16].

⁴¹ Case, [32].

Even if the Panel finds that the services are like, WegaBasta, ATV1 and Able1 are not like suppliers. The fact that like services are offered does not mandatorily raise a presumption that their suppliers are like.⁴² The determination of likeness between their suppliers remains on a case-by-case basis⁴³ considering factors, like the size of the suppliers, their assets, and the nature and extent of their expertise.⁴⁴ WegaBasta is a global studio.⁴⁵ As its fully owned subsidiary⁴⁶ WegaBasta has different assets than ATV1 and Able1 as only Alabasta's largest providers of its services.⁴⁷ Besides, WegaBasta also distributes WegaBasta's products like its electronic goods.⁴⁸ It shows that WegaBasta engages in many sectors while ATV1 and Able1 provide only TV services. Therefore, they are not like service suppliers offering like services.

IV. DEL s. 4.2 does not provide treatment less favourable

Regarding the supply of AVC DEL s. 4.2 neither provides for *de jure* nor *de facto* discrimination. It requires a supplier of AVC to purchase LC regardless of its origin. Therefore, DEL s. 4.2 does not formally distinguish service suppliers on the basis of national origin. Domestic as well as foreign suppliers are obliged to provide a minimum of 30% LC.⁴⁹

If the Panel finds that there is formally different treatment regarding AVC, since DEL s. 4.2 is a regulation on content quota that gives AVC produced in Alabasta preference over AVC produced in Wano, this "treatment may be accorded to foreign services and service suppliers, as long as [it] does not modify the conditions of competition in favour of like domestic services and service suppliers"⁵⁰. As stated under GATS Art. XVII:2 and further in the 1993 Scheduling Guidelines, the NT standard does not require formally identical treatment of domestic and foreign suppliers.⁵¹ GATS Art. XVII:1's objective is to ensure equal competitive opportunities for like services and service suppliers.⁵² Formally different measures can result in effective equality of treatment.⁵³ DEL s. 4.2 provides for equal treatment with respect to the horizontal competition between foreign and domestic content. Local broadcasters who supply services within a Member's jurisdiction like ATV1 and Able1 are at a significant disadvantage compared to OTT service suppliers who housed their servers outside the Member's territory and deliver AVC via the internet like WegaBasta.⁵⁴ This is because the former is as pay-TV highly regulated

⁴² PR, *China – Electronic Payment Services*, [7.705].

⁴³ PR, *China – Electronic Payment Services*, [7.705].

⁴⁴ P. Van den Bossche and W. Zdouc (2022), p. 368.

⁴⁵ Case, [10].

⁴⁶ Case, [11].

⁴⁷ Case, [18, 19].

⁴⁸ Case, [11].

⁴⁹ Case, footnote 13, p. 24.

⁵⁰ PR, *China – Publications and Audiovisual Services*, [7.1130 – 7.1132].

⁵¹ PR, *China – Publications and Audiovisual Products*, [7.1130 – 7.1132]; 1993 Scheduling Guidelines, [7].

⁵² PR, *China – Electronic Payment Services*, [7.700].

⁵³ 1993 Scheduling Guidelines, [7].

⁵⁴ S.Y. Peng (2016), pp. 21 – 23.

while OTT TV remains totally unregulated.⁵⁵ Therefore, there is unequal competition between domestic pay-TV and foreign OTT TV⁵⁶ as there is between Wega-Flix, ATV1 and Able1. ATV1 and Able1 were subject to regulations in the past since there was a 1990 law that required a minimum LC for all TV channels, cable service providers and cinemas.⁵⁷ In contrast, Wega-Flix has never been subject to any regulation in Alabasta. DEL s. 4.2 simply provides for equal treatment of foreign and domestic suppliers of AVC. Therefore, DEL s. 4.2 provides treatment no less favourable and in conclusion, is consistent with GATS Art. XVII.

B. DEL ss. 4.3 and 4.4 are consistent with GATS Art. II

GATS Art. II:1 requires (I) the measure at issue to fall under the scope of GATS, (II) “likeness” of the services and service suppliers, and (III) analysis of “treatment no less favourable”.⁵⁸

I. DEL ss. 4.3 and 4.4 do not fall into the scope of the GATS Art. I:1

DEL ss. 4.3 and 4.4 constitute a measure within the scope of GATS Art. I:1. However, it does not affect the supply of a service, since online streamed AVC is not a “service”, but a “good”.

II. WegaFlix and Atlas are not “like” service suppliers offering like services

The presumption of likeness cannot be applied because the distinction between WegaFlix and Atlas, as well as between Wega-Flix and Atlas’ streaming services is not *exclusively* based on their origin⁵⁹, but on certain criteria establishing likeness⁶⁰. Since the likeness assessment is to be made on a case-by-case basis, certain elements might carry more weight than others.⁶¹ In this case, such weight is on the characteristics of the services and its suppliers and the consumers’ preference. Moreover, it addresses whether and to what extent they are in a competitive relationship.⁶² The regulatory framework of the country of origin can play a role in shaping the characteristics of services and service suppliers.⁶³ There are differences between WegaFlix situated in Wano and Atlas in Allos⁶⁴. Atlas is subject to a Data Flow MoU and WegaFlix to the GADA⁶⁵. The MoU contains commitments to align data protection laws with the OECD Declaration.⁶⁶ In contrast, the GADA allows Wano’s government requesting companies to disclose user data including those of non Wanian residents.⁶⁷ This amounts to a threat of disclosing Alabastan users’ data without their consent. Therefore, the risk implied in its nature of supply distinguishes Wega-Flix and Atlas’ services.

⁵⁵ S.Y. Peng (2016), p. 40.

⁵⁶ S.Y. Peng (2016), p. 41.

⁵⁷ Case, footnote 9, p. 8.

⁵⁸ ABR, *Canada – Autos*, [170-1]; PR, *Argentina – Financial Services*, [7.149].

⁵⁹ ABR, *Argentina – Financial Services*, [6.44-6.45].

⁶⁰ PR, *Argentina – Financial Services*, [7.170].

⁶¹ ABR, *EC – Asbestos* [101, 161].

⁶² ABR, *EC – Asbestos* [103]; PR, *China – Electronic Payment Services*, [7.700].

⁶³ PR, *Argentina – Financial Services*, [7.176]; ABR, *US – Clove Cigarettes*, [116-117].

⁶⁴ Case, [10, 21].

⁶⁵ Case, [8, 35]; Case, Annex 4.

⁶⁶ Case, [8]; Case, Annex 1.

⁶⁷ Case, [35].

Furthermore, commitments to data protection standards set out by the MoU affects not only the characteristics of services, but also consumers' preference defined as "the extent to which consumers perceive and treat the products as alternative"⁶⁸. Although Wega-Flix and Atlas' services both satisfy the demand for consuming on demand AVC online, consumers do not view Wega-Flix as an equivalent alternative to the services offered by Atlas. After the 2018 data disclosure concerns, the viewership of Wega-Flix suddenly dropped and continued this downward trend until today⁶⁹. It shows the hesitance of Alabastan viewers after learning about the risk of data disclosure without their consent.⁷⁰ Hence, consumers are not just aware of the suppliers' differences but also prefer those that guarantee data protection. Furthermore, Alabastan citizens demand authentic Mainan content⁷¹, which Wega-Flix does not provide⁷². Therefore, Atlas is not an alternative to Wega-Flix and not directly competing with Wegapunk.

III. DEL ss. 4.3 and 4.4 favour Atlas and its services

If there is "likeness", "Alabasta concedes that /.../ there is less favourable treatment"⁷³.

C. The DMA's conduct and the 2019 tariff increase in tablet computers do not operate as a single unwritten and overarching measure which systematically restricts the importation of Wega-Pads contrary to GATT Art. XI:1

There is no violation because (I) there is no single unwritten overarching measure falling under GATT Art. XI:1, and (II) there is no restriction on tablet computer importation.

I. A single unwritten overarching measure does not exist and is not covered by Art. XI:1

First, the components of the alleged ongoing conduct of the DMA do not all fall under the scope of the GATT, but rather GATS.⁷⁴ For instances, the second interim measure concerns measures taken to address the unfair promotion in the streaming services market, not the sale of tablet computers. It was issued after the DMA self-initiated proceedings citing anti-steering practices by Wegapunk, in breach of DEL s. 9⁷⁵. There was limited interoperability between the Atlas app and Wega-Pad's operating system, due to the pre-installed preferences for Wega-Flix⁷⁶. The problem was confirmed by Wegapunk. This demonstrates the unfair promotion in favour of Wega-Flix and to the detriment of Atlas. Therefore, the subsequent 2022 interim measure deals with the matter of GATS, not GATT. If one component does not fall under the scope of the GATT, the alleged overarching measure cannot also fall under the GATT. As a result, the scope of the GATT does not apply to the alleged overarching measure.

⁶⁸ ABR, *EC – Asbestos*, [101].

⁶⁹ Case, Figure 2, p. 12.

⁷⁰ Case, [39].

⁷¹ Case, [31].

⁷² Case, [30].

⁷³ Case, [77].

⁷⁴ Case, [79].

⁷⁵ Case, [60].

⁷⁶ Case, [60].

If the Panel were to find that an overarching measure falls under the scope of GATT, there is no unwritten overarching measure. The alleged unwritten overarching measure, has to be attributable to Alabasta. Alabasta does not rebut the attribution of the measure and its content. However, (1) the tariff increase and the ongoing conduct of the DMA do not operate as one single measure and (2) they were not applied systematically as components of an unwritten overarching measure.

1. The tariff increase and ongoing conduct of the DMA do not constitute a single measure

The 2019 tariff increase and the ongoing conduct of the DMA (a) do not work together as one single measure (b) which is distinct from its components⁷⁷.

a. The components do not work together as one single measure

A measure operates as a single measure if the components of the alleged measure have a common policy goal.⁷⁸ Here, they have different goals. The 2019 tariff increase aims to cover the budget deficit made to establish and implement the DMA,⁷⁹ and aligns with Alabasta's strategy to moderate its already "largely liberalized"⁸⁰ MA conditions for imported electronic goods. The rejection and approval of Achilles Films acquisition in 2020 was adopted to comply with DEL ss. 4.3 and 4.4 and protect consumers' data. The investigation and interim measures against Wegapunk in 2021 and 2022 were imposed to comply with DEL s. 2.10 and to reduce the risk described in DEL ss. 6 and 8. The compulsory administrative delay of Wegapunk's 2022 complaint was taken to comply with DEL ss. 2.3, 2.4. They share no common goal. It is, however, alleged that all components aim to support the function of the DMA and to comply with the DEL, which adopted the CDTS, therefore, contribute to the realisation of the study. However, the CDTS has never been officially adopted by the government.⁸¹ The fact that the study was commissioned by the Ministry of Economy⁸² and included policy suggestions that could be implemented in the future⁸³ does not necessarily mean that the CDTS would be certainly adopted in a policy. What matters is the government's actual actions on it. The DEL and its introduction in 2019 have made no reference to the CDTS issued in 2009. The fact that Prof. Buggy was the same person that led the CDTS, promised to make it a reality and introduced the DEL does not render the link between them. In any case, the CDTS does not

⁷⁷ PR, *Russia – Railway Equipment*, [7.946]; ABR, *Argentina- Import Measures*, [5.104, 5.108]; ABR, *US – Zeroing (EC)*, [198]; PR, *Indonesia – Chicken*, [7.616, 7.656]; PR, *Russia – Tariff Treatment*, [7.283, 7.338, 7.341].

⁷⁸ ABR, *Argentina – Import Measures*, [5.108].

⁷⁹ Case, [47].

⁸⁰ Annex 3, section (h), p. 20.

⁸¹ Clarification Questions, [58].

⁸² Case, [24].

⁸³ Clarification Questions, [60].

constitute a governmental policy, but remains a “theoretical endeavour”⁸⁴ of independent academics.

b. The alleged overarching measure is not distinct from its components

To be distinct from its components, a measure would have to constitute an instrument with a functional life of its own.⁸⁵ As the components do not have a goal in common, they cannot work together as a whole to form an independent, functional life creating a concrete impact.

2. There is no systematic application

If the Panel were to find that there is a single measure, whose components share a goal, it is yet not of systematic nature, which can be evidenced by and manifested in the fact that (a) the measure is applied to economic operators in a broad variety of different sectors (b) as part of an organized effort, coordinated and implemented at the highest levels of government.⁸⁶

a. The unwritten measure is not applied to a broad variety of different sectors

The tariff increase is only applied to Tariff Item Numbers 8471.30 and 8461.41.⁸⁷ These are both related to the sector of data processing machines.⁸⁸ Additionally, the ongoing conduct of the DMA solely concerns to audiovisual content streaming services and the mentioned Tariff Item Numbers, no other economic sector can be taken into consideration. In comparison to the measure at issue in *Argentina – Import Measures* covering various sectors from automobiles to electronics,⁸⁹ the range of sectors affected in the current case is significantly more limited. Therefore, the tariff increase is not applied to a broad variety of different economic sectors.

b. There is no system, plan or organized method at the highest levels of government

The 2019 tariff increase had been planned for a long time and is not related to other components. It aims to align with Alabasta’s strategy to moderate its already “largely liberalized” MA conditions for imported electronic goods by bolstering the competitiveness of its domestic industry, as recommended in the CDTs⁹⁰, which was issued in 2009. Therefore, the tariff increase had been planned over ten years before the first conducts of the DMA challenged by Wano in 2020,⁹¹ which would be a significant time gap for an “organized method” where all components are supposed to operate together systematically. As a result, there is no organized method in support of the goals of the CDTs. Also, the conducts of the DMA are not repeatedly applied and it is not likely that there will be consistent application in the future.

⁸⁴ Case, [78].

⁸⁵ PR, *US-Export Restraints*, [8.85].

⁸⁶ ABR, *Argentina – Import Measures*, [5.142].

⁸⁷ Case, footnote 11, p. 9.

⁸⁸ Case, footnote 11, p.9.

⁸⁹ PR, *Argentina – Import Measures*, [6.119].

⁹⁰ Case, Annex 3, [h], p. 20.

⁹¹ Case, [51].

II. The overarching measure is no restriction on importation of tablet computers other than a duty

If the Panel were to find that there is an unwritten overarching measure that is applied systematically, it does not constitute a restriction contrary to GATT Art. XI:1.

1. There is no restriction within the meaning of GATT Art. XI:1

There is no total ban of Wega-Pads. The term “restriction” is to be understood broadly as “a limitation on action, a limiting condition or regulation” which has a limiting effect on the quantity of products being imported.⁹² This term applies to measures that e.g. (a) cut MA for imports⁹³; (b) create uncertainties⁹⁴ and (c) make importation prohibitively costly⁹⁵.

a. The overarching measure does not cut MA for imports of Wega-Pads

Although the imports of Wega-Pads showed a slight decline from 2018 to 2023,⁹⁶ Wega-Pads’ MA opportunities still remain unchanged. Regarding the rejection and approval of Achilles Films’ acquisition, even though Wega-Flix is the commercial appeal of Wega-Pads, not having the additional amount of Mainan content through the acquisition of Achilles Films on its Wega-Flix could not prevent Wega-Pads from accessing the market. Although with the interim measures, sales of Wega-Pads with certain characteristics were hindered, the stripped-down versions of Wega-Pads were still able to access the Alabastan market. Furthermore, Wegapunk was able to import standard Wega-Pads to Alabasta, if they are not sold either in physical stores or online.⁹⁷

b. The overarching measure does not create uncertainties for Wegapunk as the importer

Wano alleges that the tariff increase was abrupt and affected the business plan of Wegapunk. However, the increased percentage of the tariff is still within the allowed percentage (18%).⁹⁸ Furthermore, the tariff increase has been planned a long time ago. Although other components of the DMA’s conduct are implemented during a short period of time, this should not heavily affect Wegapunk’s business transactions as it is not a total ban of Wega-Pads, but the limitation to a stripped-down version. There is also no uncertainty that the interim measures are only valid until the case is resolved. Wano might allege that the conduct of Alabasta regarding Wegapunk’s 2022 complaint against Atlas provide for uncertainties since Wegapunk cannot expect when the decision of the main proceedings might be met. However, it is clearly regulated

⁹² PR, *India – Quantitative Restrictions*, [5.129]; ABR, *China – Raw Materials*, [319-320].

⁹³ GATT PR, *Canada – Provincial Liquor Boards (EEC)*, [4.24-4.25]; GATT PR, *EEC – Minimum Import Prices*, [4.9].

⁹⁴ PR, *China – Raw Materials*, [7.948; 7.957].

⁹⁵ PR, *Brazil – Retreaded Tyres*, [7.370-7.372].

⁹⁶ Case, [68].

⁹⁷ Clarification Questions, [21].

⁹⁸ Case, footnote 11, p. 9.

in the DEL, that the complaints filed by the Minister of Economy take priority by law.⁹⁹ Other complaints are expected to be resolved after these.

c. The overarching measure does not make Wega-Pads importation prohibitively costly

“Prohibitively costly” means imposing burdens that are unrelated to the normal importing activity.¹⁰⁰ The tariff increase and the interim measures are both related to the normal importing activity. Adjusting certain characteristics of a product is part of the normal importing activity. Furthermore, the Alabasta’s conduct regarding Wegapunk’s complaint does neither deal with the importation nor create burden for Wegapunk as it itself was willing to put the time and effort in the process.

D. If the Panel were to find DEL s. 4.2 inconsistent with GATS Art. XVII it is justified under GATS Art. XIV(a)

DEL s. 4.2 (I) falls within the scope of GATS Art. XIV(a); and (II) satisfies the chapeau test¹⁰¹.

I. DEL s. 4.2 falls within the scope of GATS Art. XVII(a)

The subparagraph (a) of GATS Art. XVII requires that the measure must be (1) designed to “protect public morals” or to “maintain public order”; and (2) “necessary” to do so.¹⁰²

1. DEL s. 4.2 is designed to “protect public morals” or to “maintain public order”

Public morals are “standards of right and wrong conduct maintained by or on behalf of a community or nation”.¹⁰³ Public order is “the preservation of the fundamental interests of a society, as reflected in public policy and law”.¹⁰⁴ The scope of both can overlap.¹⁰⁵ Members are free to define these concepts for themselves according to their own system and scales of values.¹⁰⁶ DEL s. 4.2 is designed to protect public morals. A cultural scandal broke when a Wega-Flix series was released dealing with Mainan culture in a historically inaccurate way featuring no Mainan actors and no filming in Maina.¹⁰⁷ The inaccurate presentation of Mainan culture on Wega-Flix, which dominates in viewership, affects the Mainan citizens’ perception of their culture and history. Culture and history cover standards of right and wrong conduct maintained by a community. Therefore, inaccurate representation affects public morals, which DEL s. 4.2 now protects. Furthermore, s. 4.2 responds to its citizens’ calls for cultural and historical preservation¹⁰⁸, a society’s fundamental interest. Almost 50% Alabastan citizens expressed concerns about the lack of Alabastan culture on Wega-Flix and the threat to their

⁹⁹ Case, Annex 5, p. 23.

¹⁰⁰ PR, *Brazil – Retreaded Tyres*, [7.372].

¹⁰¹ PR, *Argentina – Financial Services*, [7.586]; ABR, *US – Gambling*, [292].

¹⁰² PR, *US – Gambling*, [6.455]. See also PR, *EU – Energy Package*, [7.229–7.231].

¹⁰³ ABR, *US – Gambling*, [296].

¹⁰⁴ ABR, *US – Gambling*, [296].

¹⁰⁵ PR, *US – Gambling*, [6.468].

¹⁰⁶ PR, *US – Gambling*, [6.461].

¹⁰⁷ Case, [33].

¹⁰⁸ Case, [76].

culture by overrepresentation of foreign content¹⁰⁹, showing that Alabastan citizens value culture preservation as a fundamental interest. Furthermore, many proposals like new museums have been implemented over the years to preserve culture and history.¹¹⁰

2. DEL s. 4.2 is “necessary” to “protect public morals”

The “necessity” analysis includes (a) the assessment of the relative importance of the interests or values to be protected, (b) the measure’s contribution to the realization of the ends pursued by it, (c) the restrictive impact on international commerce, (d) a comparison between the measure and possible alternatives and (e) a weighing and balancing of all these factors.¹¹¹

a. The preservation of culture and history are of great importance to Alabasta

Crucial is the relative importance of such interest or value given by the Member taking the measure.¹¹² Culture and history form the identity of a community. With the increasing popularity of online AVC and access to foreign content, there is concern that Alabastan culture is under the risk of being under- and inaccurately represented on streaming platforms.¹¹³

b. DEL s. 4.2 is apt to contribute to achieve this subjective

The LC requirement helps to involve more Alabastan resources into production. This e.g., covers research costs conducted in Alabasta, personnel including actors from Alabasta, live set and studio use, bringing content closer to accurate culture and history. In modern society where AVC plays an increasingly important role in citizens’ consumption habits¹¹⁴, the LC addresses the threat to Alabastan culture and history caused by foreign content.

c. The restrictive impact of DEL s. 4.2 on international commerce is justified

A measure with a low restrictive impact may be justified.¹¹⁵ It is not required for the measure to have no trade-restrictive impact at all. Although the fine for non-compliance may discourage foreign AVC suppliers, DEL s. 4.2 does not cut MA and their opportunities to compete with local suppliers. Furthermore, Alabasta could have given a higher requirement for local production costs (e.g., 100%) which would still be WTO-consistent. As a result, DEL s. 4.2 has only limited restrictive impact on international commerce.

d. There are no “reasonably available” alternatives

It is on the complainant to show reasonably available alternatives.¹¹⁶ A more generous requirement as the 1990 law¹¹⁷ would not provide for the same level of protection needed now, as a study shows that digital transformation, such as the growth of streamed AVC, presents

¹⁰⁹ Case, [31].

¹¹⁰ Clarification Questions, [44].

¹¹¹ ABR, *US – Gambling*, [304 – 307], ABR, *Korea – Various Measures on Beef*, [162, 164 and 166].

¹¹² PR, *Colombia – Ports of Entry*, [7.551 – 7.566].

¹¹³ Case, [31, 33].

¹¹⁴ Case, Figure 1, p. 5.

¹¹⁵ ABR, *Colombia – Textiles*, [5.77].

¹¹⁶ ABR, *US – Gambling*, [309].

¹¹⁷ Case, footnote 9, p. 8.

significant socio-political challenges¹¹⁸, such as underrepresentation and inaccurate representation of culture on streaming platforms. Alabastan has taken various culture preservation measures¹¹⁹, but they are not as effective as a measure on AVC which Alabastan citizens consume almost daily¹²⁰. Therefore, there are no “reasonably available” alternatives.

e. Weighing and balancing

The more important the protected interests or values, the greater a measure’s contribution to the realization of the end pursued and the smaller the impact upon imported goods, the more likely is the measure considered necessary.¹²¹ The cultural preservation is crucial, as it is the core of a community’s identity easily affected through exposure to inaccurate portrayal. The threat may be amplified through the increasing popularity and globalization of streamed AVC. DEL s. 4.2 immensely contributes by regulating content that Alabastan citizens consume almost daily through the LC rule, bringing the content closer to Alabastan culture. DEL s. 4.2 has little restrictive impact on trade. Non-compliance only requires a fine and does not cut MA. Other alternatives do not provide for the same level of protection. Given the high importance of culture preservation, the contribution of DEL s. 4.2 to the aim pursued and the limited trade restriction, DEL s. 4.2 is necessary to “protect public morals”.

II. DEL s. 4.2 satisfies the requirements laid down in the chapeau of Art. XIV

A measure is not justified under the chapeau if (1) its application constitutes a means of arbitrary or unjustifiable discrimination between countries where the like conditions prevail, or (2) it constitutes a disguised restriction on international trade.¹²²

1. There is no arbitrary or unjustifiable discrimination

The measure’s application must result in (a) discrimination, which must (b) be arbitrary or unjustifiable in character and (c) occur between countries where the like conditions prevail.¹²³

a. The application of DEL s. 4.2 does not result in a discrimination

DEL s. 4.2 does not discriminate against Wano. The LC requirement and the fine are applied to both domestic and foreign AVC providers, regardless of origin and special conditions.

b. The discrimination is not “arbitrary or unjustifiable”

The chapeau does not prohibit discrimination per se, but an arbitrary and unjustifiable one.¹²⁴ The lack of relationship between the measure and its objectives could indicate arbitrary or

¹¹⁸ Case, Annex 3, p.21.

¹¹⁹ Clarification Questions, [44].

¹²⁰ Case, [32].

¹²¹ ABR, *Korea – Various Measures on Beef*, [162 – 163, 165].

¹²² ABR, *US – Shrimp*, [160].

¹²³ ABR, *US – Shrimp*, [150]; ABR, *EC – Tariff Preferences*, [7.225 – 7.235]; PR, *Brazil – Retreaded Tyres*, [7.226 – 7.251].

¹²⁴ ABR, *US – Gasoline*, p. 23; ABR, *US – Shrimp*, [150]; ABR, *EC – Seal Products*, [5.298].

unjustifiable discrimination.¹²⁵ However, such relationship exists in this dispute. The objectives of DEL s. 4.2 are to preserve and protect Alabastan culture, pursuant to the call of Alabastan citizens. The application of DEL s. 4.2 reflects this objective, since Wegapunk dominates the AVC market offering almost no LC¹²⁶. Besides, discrimination may be unjustifiable when it is applied unilaterally and without considering other Members' rights and interest.¹²⁷ There could have also been an even higher requirement for local production costs. Taking into consideration the great concerns over cultural reservation and the urgent call from its citizens, Alabasta has maintained a balance between its objective and the rights of other Members. The discrimination is also not arbitrary, because its application was not a "random" decision¹²⁸. The enforcement of the LC requirement is based on a 1990 law. While the LC requirement remains unchanged, the required production costs has been increased from 25% to 50%.¹²⁹ This increase was not a random decision since Alabasta has been facing socio-political challenges due to its digital transformation and liberalized market for foreign AVC suppliers.¹³⁰ Therefore, a stricter requirement is necessary and the application of DEL s. 4.2 is not arbitrary.

c. The discrimination does not occur "in countries where like conditions prevail"

As discussed, Alabastan citizens have raised great concern about cultural and historical preservation due to a threat to its culture imposed by foreign content. Besides, Alabasta has made a lot of effort to preserve culture.¹³¹ Meanwhile, there is no known cultural threat and preservation concern in Wano. Therefore, they are not countries where like conditions prevail.

2. There is no disguised restriction on trade in services

"Disguised" means an intention to conceal an arbitrary or unjustifiable discrimination "beneath deceptive appearances".¹³² The measure also bears deceptive appearance when it is not taken as a trade measure and not publicized as such.¹³³ As discussed, the application of DEL s. 4.2 does not constitute any arbitrary or unjustifiable discrimination. In any case, the application does not bear "deceptive appearances". By entering into force¹³⁴ the DEL is publicized. The statement of the Minister of Economy mentioning the DEL¹³⁵ confirms the measure's publicity.

¹²⁵ PR, *Argentina – Financial Services*, [7.761]; PR, *EU – Energy Package*, [7.1244].

¹²⁶ Case, [30].

¹²⁷ ABR, *US – Shrimp*, [172 – 175].

¹²⁸ ABR, *Brazil – Retreaded Tyres*, [232].

¹²⁹ Case, [43]; Case, footnote 9, p. 8.

¹³⁰ Case, Annex 3, p. 20 – 21.

¹³¹ Clarification Questions, [44].

¹³² ABR, *EC – Asbestos*, [8.236].

¹³³ PR, *US – Canadian Tuna*, [4.8].

¹³⁴ Case, [41].

¹³⁵ Case, [41].

E. If the Panel were to find that Alabasta violates GATS Art. II, DEL ss. 4.3 and 4.4 are justified under GATS Art. XIV(c)(ii)

I. DEL ss. 4.3 and 4.4 are provisionally justified under GATS Art. XIV(c)(ii)

A measure is provisionally justified under a paragraph of GATS Art. XIV(c) if the measure (1) is designed to secure compliance with laws or regulations that are not themselves GATS-inconsistent and (2) is necessary to secure such compliance.¹³⁶

1. DEL ss. 4.3 and 4.4 are designed to secure compliance with the GATS-consistent DPL

The “design” element is fulfilled since (a) the DPL is a “law” within the meaning of GATS Art. XIV (c)(ii), which (b) is not GATS-inconsistent and (c) DEL ss. 4.3 and 4.4 are “designed” to secure compliance with the DPL.¹³⁷

a. Alabasta’s DPL is a “law or regulation”

“Laws and regulations” refer to rules of conduct and principles governing behaviour or practice that form part of the Member’s domestic legal system.¹³⁸ This includes rules, obligations or requirements that derive from several elements of one or more instruments.¹³⁹ For Alabasta, the obligation to protect personal data derives from its DPL, its MoUs and the signed OECD Declaration¹⁴⁰. Through the MoUs¹⁴¹, as well as through signing the OECD Declaration¹⁴², Alabasta made a commitment to abide by international principles on data access¹⁴³. Rules deriving from international agreements which are incorporated into the Member’s domestic legal system are within the meaning of “laws and regulations”.¹⁴⁴ Through incorporating the MoUs as well as the OECD Declaration into the DPL¹⁴⁵, they form part of Alabasta’s domestic legal system. Hence, relating to the protection of the individuals’ privacy, the DPL is a “law” within the meaning of GATS Art. XIV(c)(ii). Regardless that the MoUs and the OECD Declaration were incorporated after the DEL was implemented, the DPL has been in force, already based on the OECD Guidelines, which ensure data protection as well.

b. The laws and regulations concerned are not GATS-inconsistent

The MoUs and the OECD Declaration, incorporated into the DPL, are GATS-consistent. Art. 5 of the MoUs states that the adoption of measures should be done without discrimination. This is in line with the GATS. T

¹³⁶ ABR, *Argentina – Financial Services*, [6.202]; ABR, *Korea – Various Measures on Beef*, [157]; PR, *US – Gambling*, [6.536 – 6.537]; PR, *Argentina – Financial Services*, [7.593].

¹³⁷ PR, *Argentina – Financial Services*, [7.595–7.596].

¹³⁸ ABR, *India – Solar Cells*, [5.106 – 5.107].

¹³⁹ ABR, *India – Solar Cells*, [5.111].

¹⁴⁰ Clarification Questions, [7].

¹⁴¹ Case, Annex 1.

¹⁴² Clarification Questions, [5].

¹⁴³ Case, [77].

¹⁴⁴ ABR, *Mexico – Taxes on Soft Drinks* [79]; ABR, *India – Solar Cells*, [5.140].

¹⁴⁵ Clarification Questions, [7].

c. DEL ss. 4.3 and 4.4 are “designed” to secure compliance with the DPL

A measure is designed to secure compliance when the assessment of its design, including its content and expected operation, shows that it is not completely incapable of securing compliance with specific rules, obligations, or requirements of the laws or regulations.¹⁴⁶ “To secure compliance” means to enforce obligations.¹⁴⁷ With the data localization and non-transfer requirement DEL ss. 4.3 and 4.4 are at least not incapable of enforcing the DPL, which pursue the protection of personal data. DEL ss. 4.3 and 4.4 enforces requirements of the OECD Declaration as well as the specific obligation of Art. 5 of the MoUs to adopt measures protecting individuals from personal data violations. The OECD Declaration requires establishing a legal framework that regulates government access to personal data by setting out limitations regarding any information relating to an identified or identifiable individual.¹⁴⁸ Through requiring personal data, including basic identifiers that can be reasonably linked to an individual, to be stored in Alabasta,¹⁴⁹ s. 4.3 sets out limitations regarding information relating to an identified or identifiable individual. Even though DEL ss. 4.3 and 4.4 only refer to Alabastan residents, this makes it not incapable of securing compliance. Besides, the OECD Declaration requires data localization to be minimized, but not prohibited.¹⁵⁰ Therefore, DEL ss. 4.3 and 4.4 are designed to secure compliance with the specific obligations of the DPL, specifically the MoUs and the OECD Declaration.

2. DEL ss. 4.3 and 4.4 are necessary to secure such compliance

a. The protection of personal data in the AV service sector is highly important

Personal data protection has great importance in Alabasta since it signed the OECD Declaration¹⁵¹ and the MoUs with Karda and Allos¹⁵² as well as started negotiating such MoUs with other states¹⁵³. Furthermore, Alabasta’s regulatory framework is one of the strictest regarding protection personal data protection¹⁵⁴ which also underlines its importance.

b. DEL ss. 4.3 and 4.4 contribute significantly to the realization of the end pursued

A measure contributes to its objective when there is a genuine relationship between the objective pursued and the measure.¹⁵⁵ The objective pursued is the protection of personal data. Through the localization and the non-transfer requirement in s. 4.3 as well as the possibility for the DMA to reject acquisitions according to s. 4.4, the protection of personal data can be

¹⁴⁶ ABR, *Argentina – Financial Services*, [6.203]; ABR, *India – Solar Cells*, [5.58]; PR, *Indonesia – Chicken*, [7.248].

¹⁴⁷ PR, *Colombia – Ports of Entry*, [7.538]; PR, *Colombia – Textiles*, [7.482 – 7.483].

¹⁴⁸ OECD Declaration.

¹⁴⁹ Case, Annex 5, Section 4.3 (b).

¹⁵⁰ OECD Declaration.

¹⁵¹ Clarification Questions, [5].

¹⁵² Case, [8].

¹⁵³ Case, footnote 3, p.2.

¹⁵⁴ Clarification Questions, [6].

¹⁵⁵ ABR, *Brazil – Retreaded Tyres*, [145].

guaranteed and enforced by the DMA. It prevents personal data from reaching countries like Wano which rank very low in data protection indexes¹⁵⁶ and protect consumers from arbitrary disclosures of personal data to governments. The fact that ss. 4.3 and 4.4 only relate to AV services does not make it contribute less to personal data protection.

c. The restrictive impact of the measures on international commerce is justified

DEL ss. 4.3 and 4.4 restricts cross-border data flows generated by AV service suppliers. However, the data flow is not prohibited. It just requires prior approval by the DMA [s. 4.3(b)] and only applies to personal data. The transfer of non-personal data is still possible without restriction. The degree of the trade restrictiveness is very small.

d. There are no WTO-consistent alternative measures which are reasonably available

In determining whether an alternative measure is “reasonably available”, the extent to which the alternative contributes to the realization of the end pursued as well as the difficulty of implementation must be considered.¹⁵⁷ The alternative of signing an MoU with countries whose companies want to acquire a controlling share is not reasonably available since its implementation is highly difficult as negotiations are time consuming¹⁵⁸ and their outcome is uncertain¹⁵⁹. It is therefore disproportionate and not feasible for a company to rely on countries’ negotiations. The other alternative, mentioned by Wano, requiring companies to adapt certain standards to their handling of personal data, could not prevent personal data disclosures. Governments like Wano’s can still compel companies to disclose data subject to their domestic laws. Therefore, this alternative does not contribute to personal data protection. Hence, there are no alternatives which are reasonably available.

e. Weighing and balancing

Weighing and balancing all these factors shows that DEL ss. 4.3 and 4.4 are necessary to secure compliance with the DPL. Data protection is highly important for Alabasta as shown by its effort towards data protection by signing the OECD Declaration¹⁶⁰ and the MoUs¹⁶¹ as well as its strict regulatory framework on the personal data protection¹⁶². This overweighs and justifies the small impact on cross-border data flow.

II. DEL ss. 4.3 and 4.4 are consistent with the chapeau of GATS Art. XIV

1. The application of DEL ss. 4.3 and 4.4 does not constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail

¹⁵⁶ Case, [35].

¹⁵⁷ PR, *Canada – Wheat Exports and Grain Imports*, [6.226].

¹⁵⁸ Case, footnote 3, p. 2.

¹⁵⁹ Clarification Questions, [9]

¹⁶⁰ Clarification Questions, [5].

¹⁶¹ Case, [8].

¹⁶² Clarification Questions, [6].

The application of DEL ss. 4.3 and 4.4, namely the rejected acquisition by Wegapunk, does not result in discrimination since Wano did not fulfil the requirements of s. 4.3, giving the DMA discretion for a rejection. In contrast, Atlas fulfilled the requirements. In this case, the DMA has to allow the acquisition, irrelevant of the fact that Atlas offered less money than Wegapunk¹⁶³. In line with s. 4.4, the DMA gave Wegapunk the possibility to acquire a non-controlling share.¹⁶⁴ In any case, it is no “arbitrary or unjustifiable” discrimination. The measure’s application results in an arbitrary or unjustifiable discrimination when its rationale is explained in a way that has no relation to the objective of the provisionally justified measure or even goes against that objective.¹⁶⁵ The rejection of Wegapunk’s attempt to acquire Achilles Films is explained on the grounds that Wano neither has a MoU with Alabasta nor wants to commit itself to data protection standards through a LoI. This is related to the measure’s objective which is the protection of personal data. According to GADA several Wanian governmental authorities are allowed to request the disclosure of data on the grounds of public order without defining what this means.¹⁶⁶ This could lead to arbitrary disclosures of personal data and contradicts the OECD Declaration because the undefined terms provide for a broad scope of application. Besides, government access to personal data in Wano’s GADA does not require a prior approval and cannot be reviewed. Furthermore, for a discrimination not to be unjustifiable the Member needs to make serious efforts, in good faith, to negotiate a multilateral solution before resorting to unilateral measures.¹⁶⁷ After the Whistleblower’ incident, there has been a bilateral meeting between Alabasta and Wano, where the latter denied the incident.¹⁶⁸ This shows that Alabasta made great efforts to negotiate a solution before establishing the DEL. Even if the Panel finds that the rejection of Wegapunk’s acquisition results in arbitrary or unjustifiable discrimination, it does not occur between countries where like conditions prevail. Through the GADA, Wano’s government can compel local tech companies to disclose data generated by users who do not reside in Wano.¹⁶⁹ Besides, Wano ranks very low in data protection indexes.¹⁷⁰ It has neither signed the OECD Declaration¹⁷¹ nor does it have any other relevant data privacy regulations¹⁷². In contrast, in Allos there is neither a general law on government access to data nor any accusations concerning access to data of non-residents

¹⁶³ Case, [54].

¹⁶⁴ Case, [50].

¹⁶⁵ ABR, *Brazil – Retreaded Tyres*, [232]; ABR, *EC – Seal Products*, [5.306].

¹⁶⁶ Case, Annex 4, WADA Section 3.

¹⁶⁷ ABR, *US – Shrimp*, [173 – 175].

¹⁶⁸ Case, [38].

¹⁶⁹ Case, [35].

¹⁷⁰ Case, [35].

¹⁷¹ Clarification Questions, [5].

¹⁷² Clarification Questions, [10].

without their consent.¹⁷³ Besides, Allos signed the OECD Declaration.¹⁷⁴ This shows, that the conditions regarding data protection are highly different in Allos and in Wano.

2. There is no disguised restriction on trade

In addition, DEL ss. 4.3 and 4.4 were not applied as a “disguised restriction on international trade”. Alabasta did not reject the acquisition beneath deceptive appearances nor intended to do so. In contrast, the rejection contributes to data protection. Furthermore, the rejection was not done under the guise of weakening Wegapunk. If Wegapunk would have signed the LoI, it would have been able to acquire Achilles Films. Besides, Alabasta did not deny Wano the possibility of signing an MoU since their negotiations were halted on the side of Wano.¹⁷⁵ In addition, the DEL has not been developed with the intend to weaken Wegapunk. The text for the DEL has been drafted from November 2018 to February 2019¹⁷⁶, right after the upcoming concerns regarding personal data being disclosed to governments¹⁷⁷, as the occasion for the DEL’s establishment. Therefore, DEL ss. 4.3 and 4.4 are justified under GATS Art. XIV(c) (ii).

F. If Alabasta violates GATT Art. XI:1, the inconsistency is justified under Art. XX(d)

I. The conduct of the DMA is provisionally justified under GATT Art. XX (d)

The measure must be (1) designed to secure compliance with laws or regulations and (2) necessary to secure such compliance.¹⁷⁸

1. The DMA’s conduct is designed to secure compliance with the GATT-consistent DEL

The respondent must show that (a) there are “laws or regulations” within the meaning of XX(d),¹⁷⁹ which (b) are not GATT-inconsistent and (c) the measure is designed to secure compliance with these laws or regulations.¹⁸⁰

a. The DEL is a “law or regulation” within the meaning of GATT Art. XX (d)

The DEL specifically sets out the rules of conducts for the enterprises engaging in Alabasta’s digital economy. As adopted by the Alabastan Parliament¹⁸¹, as a Member’s competent authority¹⁸², the DEL forms part of its domestic legal system. Even laws pursuing other policy objectives, not mentioned in GATT Art. XX (d), can fall within its scope.¹⁸³ As stated in s. 2.4, the DEL is about securing competition with ss. 5 to 9 preventing anticompetitive practices. Because of the similarities to the mentioned prevention of deceptive practices in paragraph(d), the DEL is a law within the meaning of GATT Art. XX(d).

¹⁷³ Case, footnote 5, p. 4.

¹⁷⁴ Clarification Questions, [5].

¹⁷⁵ Clarification Questions, [9].

¹⁷⁶ Case, [41].

¹⁷⁷ Case, [36].

¹⁷⁸ ABR, *Korea – Various Measures on Beef*, [157]; ABR, *Colombia – Textiles*, [5.123].

¹⁷⁹ ABR, *India – Solar Cells*, [5.113].

¹⁸⁰ ABR, *India – Solar Cells*, [5.58].

¹⁸¹ Case, [41].

¹⁸² ABR, *India – Solar Cells*, [5.107].

¹⁸³ P. Mavroidis (2020), 442.

b. The DEL is not GATT-inconsistent

A law should be treated as GATT-consistent until proven otherwise.¹⁸⁴ The burden of proving inconsistency rests on the complainant.¹⁸⁵ Wano has not demonstrated a *prima facie* inconsistency between the DEL and the GATT. Wano only claims inconsistency of parts of the DEL but only regarding the GATS not the GATT. Therefore, the DEL is not GATT-inconsistent.

c. The conduct of the DMA is “designed” to secure compliance with the DEL

The DMA’s blocking of the acquisition by Wegapunk as well as the granted approval to Atlas were designed to secure compliance with DEL ss. 4.3 and 4.4. The rejection was to enforce the obligation of this section which is giving approval *only* if the requirements are fulfilled. Furthermore, the interim measures against Wegapunk in 2021 were designed to secure compliance with ss. 6, 8.2(a) and 8.2(b). Wega-Spend’s algorithm favours Wegapunk’s electronic goods¹⁸⁶ contrary to s. 6. By ordering Wegapunk to halt its promotional activities for the latest versions of Wega-Pad on Wega-Spend¹⁸⁷, the DMA enforced the prohibition of algorithmic advertisement boost, namely the prioritization of Wega-Pads on Wega-Spend. The temporary quotas on the sale of Wega-Pads containing a free Wega-Flix subscription in large technology stores¹⁸⁸ enforced the prohibited bundling of Wega-Pads and Wega-Flix for Wegapunk as a dominant enterprise according to s. 8.2(b). The interim measures in 2022 were designed to secure compliance with s. 9. Through the limited interoperability between the Atlas-App and Wega-Pad’s operating system¹⁸⁹ Wegapunk prevents consumers from using Atlas’ competing streaming services which is prohibited under s. 9.1 (b). Alabasta’s treatment of Wegapunk’s complaint is designed to secure compliance with ss. 2.3 and 2.4. The DMA had to refrain from working on Wegapunk’s complaint in order to comply with the automatic suspension of pending proceeding subject to s.2.3 following Prof. Buggy’s termination of one DMA member’s tenure¹⁹⁰ as well as to comply with the prioritization of complaints filed by the Minister of Economy¹⁹¹ according to s. 2.4.

2. The conduct of the DMA is necessary to secure such compliance

a. Protecting consumers and fair competition in the digital economy is highly important

In general, fair competition is important to ensure dominant companies do not engage in harmful conduct.¹⁹² It is crucial that global players like Wegapunk neither use its market power

¹⁸⁴ PR, *Colombia – Textiles*, [7.511].

¹⁸⁵ PR, *Colombia – Ports of Entry*, [7.529]; GATT PR, *US – Malt Beverages*, [157]; PR, *Colombia – Textiles*, [157].

¹⁸⁶ Case, [14].

¹⁸⁷ Case, [58].

¹⁸⁸ Case, [58].

¹⁸⁹ Case, [60].

¹⁹⁰ Case, [64].

¹⁹¹ Case, [65].

¹⁹² J. Phillips and P. Hériard-Dubreuil (2010), p. 136.

to shut down competition¹⁹³ nor deceive consumers through misleading sales and marketing practices in order to ensure free consumer choice.¹⁹⁴ According to the CDTs Alabasta should reconsider priorities in competition law with regards to anti-competitive agreements in the digital economy sector.¹⁹⁵ As a developing country¹⁹⁶ the digital economy is crucial for Alabasta since it constitutes a key factor in the development of its economy¹⁹⁷. Therefore, fair competition and the fight against anti-competitive practices especially in the digital economy is highly important for Alabasta and more important than in other sectors.

b. The DMA's conduct contributes substantially to the realization of the end pursued

Through the promotion of Wega-Pads over other tablet computers on Wega-Spend¹⁹⁸ as well as the pre-installation of Wega-Flix¹⁹⁹ and limited interoperability between the Atlas app and Wega-Pads²⁰⁰, Wega-Punk engages in unfair competition practices which are prohibited according to DEL ss. 6 to 9, like the six-month free subscription of Wega-Flix offered with all Wega-Pad purchases. It misleads consumers into thinking they got a free subscription while in reality, the price difference between Wega-Pads and other tablet computers is exactly equal to the price of the subscription, so the consumer *de facto* pays for it.²⁰¹ The interim measures²⁰² contribute to the protection of fair competition regarding tablet computers and streaming services. Especially the order to start selling a stripped-down version²⁰³ gives consumers the possibility to choose Atlas' streaming platform and therefore contributes to free consumer choice. The rejection of Achilles Films acquisition by Wega-Punk²⁰⁴ is contributing to protect consumers from personal data disclosure without their consent.²⁰⁵

c. The restrictive impact of the measure on international commerce is justified

Wega-Pads' imports declined by approximately 16% from 2018 to 2023²⁰⁶. However, this is not subject to the DMA's conduct since the interim measures do not restrict the imports of Wega-Pads but its sale.²⁰⁷ Therefore, Wega-Pad's market share must be analysed. It remains stable and in total even had an upwards trend.²⁰⁸ Furthermore, the sale of Wega-Pads was not banned. Instead, the stripped-down version can still be sold unlimited.²⁰⁹ Also prioritizing its older versions on Wega-Spend as well as purchasing Wega-Pads containing a free Wega-Flix

¹⁹³ S. Gent (2021), p. 49.

¹⁹⁴ J. Phillips and P. Hériard-Dubreuil (2010), p. 136.

¹⁹⁵ Case, Annex 3.

¹⁹⁶ Clarification Questions, [54].

¹⁹⁷ Case, Annex 3, Key Recommendations, lit. a.

¹⁹⁸ Case, [14].

¹⁹⁹ Case, [16].

²⁰⁰ Case, [60].

²⁰¹ Case, footnote 4, p.3.

²⁰² Case, [58, 61].

²⁰³ Case, [61].

²⁰⁴ Case, [50].

²⁰⁵ Case, [35, 37].

²⁰⁶ Case, Figure 4, p.13.

²⁰⁷ Clarification Questions, [21].

²⁰⁸ Case, Figure 3, p.12.

²⁰⁹ Clarification Questions, [21].

subscriptions online remains possible.²¹⁰ Therefore, the DMA's conduct has no or at least only very little restrictive effects on the trade of Wega-Pads.

d. There are no less trade-restrictive alternative measures

Members have the right to determine the level of protection that they consider appropriate in each context.²¹¹ Regarding the interim measures, the alternative to investigate without putting interim measures in place does not contribute to the protection of consumers and fair competition equally. Therefore, the interim measures were the only measures considered appropriate for Alabasta. Regarding Alabasta's treatment of the Wega-Punk's complaint, the alternative of restricting the complaints filed by Prof. Buggy in order to file a decision, would contradict DEL s. 2.4 and is therefore not reasonably available.

e. Weighing and balancing

For Alabasta the prevention of unfair promotion practices in order to guarantee fair competition is highly important and mostly in its digital economy sector²¹², since Alabasta's low annual GDP growth rate at the early 2000s was due to its lack of digital competitiveness.²¹³ The interim measures²¹⁴ contribute to the realization of fair competition. Through the obligation to halt the promotional activities for Wega-Pads²¹⁵, consumer's choice is no longer influenced when buying tablet computers on Wega-Spend. Instead, all tablet computers available on Wega-Spend are subject to equal conditions of competition. The obligation to start selling stripped-down Wega-Pad versions²¹⁶ secures fair competition between Atlas and Wega-Flix. Therefore, the interim measures secure fair competition as well as consumer's free choice regarding tablet computers and AV streaming services. The impact upon imported Wega-Pads is not overly restrictive and this threshold is in line with the weighing and balancing test for the necessity. Therefore, given the high importance of fair competition in Alabasta's digital economy that the conduct of the DMA is designed to protect, as well as its impact on trade and its contribution to enforcing the objectives of the DEL, the conduct of the DMA is necessary to ensure its compliance.

II. The DMA's conduct satisfies the requirements of the chapeau of GATT Art. XX

The DMA's conduct constitutes neither an "arbitrary or unjustifiable discrimination between countries where same conditions prevail" nor a "disguised restriction on international trade".

1. There is no arbitrary or unjustifiable discrimination

²¹⁰ Clarification Questions, [22].

²¹¹ ABR, *Brazil – Retreated Tyres*, [210].

²¹² Case, Annex 3.

²¹³ Case, [23].

²¹⁴ Case, [58, 61].

²¹⁵ Case, [58].

²¹⁶ Case, [61].

The DMA's conduct does not discriminate against Wano. Even if it constitutes discrimination, it is not arbitrary or unjustifiable. The DMA's conduct is rationally connected to the objective of protecting fair competition. The interim measures are applied to serve as corrective measures which were necessary to offset the effects of Wegapunk's unfair promotion practices.²¹⁷ The DMA requested updates from Wegapunk concerning only its inventory in Alabasta.²¹⁸ In contrast, no broad disclosure of information concerning its global production or its number of sales has been requested and especially no disclosure of trade secrets. Therefore, the enforcement of the interim measure does not extent what is necessary to ensure Wegapunk complies with these measures in order to protect fair competition. However, any discrimination does not occur between countries where the same conditions prevail since Wano and Alabasta have very different conditions regarding competition in the digital economy. Wano does not have one single consolidated instrument regulating the digital economy.²¹⁹ In contrast, it has been lenient in anti-trust enforcement and market intervention when it comes to the digital economy.²²⁰ Contrary, Alabasta has the DEL regulating its digital economy and as a developing country²²¹ it has a unique interest in ensuring fair competition in this sector.

2. There is no disguised restriction on international trade

The conduct of the DMA is not applied under the guise of a purpose within the terms of Art. XX(d). Instead, their purpose is to protect fair competition in Alabasta. Therefore, the DMA's conduct is justified under GATT Art. XX(d).

²¹⁷ Case, [79].

²¹⁸ Clarification Questions, [21].

²¹⁹ Clarification Questions, [64].

²²⁰ Clarification Questions, [64].

²²¹ Clarification Questions, [54].

REQUEST FOR FINDINGS

Considering the above, Alabasta respectfully requests the Panel to reject Wano's claims and find:

- A. Section 4.2 of the DEL consistent with GATS Art. XVII;
- B. Sections 4.3 and 4.4 of the DEL consistent with GATS Art. II;
- C. the conduct of the DMA and the 2019 tariff increase in tablet computers consistent with GATT Art. XI:1 as they do not constitute a single unwritten overarching measure and do not systematically restrict the imports of Wega-Pads;
- D. that in case of any potential inconsistency with GATS Art. XVII Section 4.2 of the DEL is justified under GATS Art. XIV(a);
- E. that in case of any potential inconsistency with GATS Art. II Sections 4.3 and 4.4 of the DEL are justified under GATS Art. XIV(c)(ii);
- F. that in case of any violation of GATT Art. XI:1 the unwritten overarching measure is justified pursuant to GATT Art. XX(d).