Team No – 122 R

IN THE INTERNATIONAL COURT OF JUSTICE

LA COUR INTERNATIONALE DE JUSTICE

PEACE PALACE, THE HAGUE

NETHERLANDS

2012 GENERAL LIST NO. …….

THE REPUBLIC OF ARPENIA

APPLICANT

v.

THE STATE OF BELLOMACH

RESPONDENT

ENTRE LA REPUBLIQUE D' ARPENIA

DEMANDERESSE

v.

ET LA ÉTAT D' BELLOMACH

DÉFENDEUR

The Case Concerning the Differences Between Arpenia and Bellomach Regarding the Interpretation of Ruritania Free Trade Agreement.

MEMORIAL FOR THE RESPONDANT // MÉMOIRE DE LA DÉFENDEUR

FOURTH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2012

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LIST OF ABBREVIATIONS

1. ¶ - Paragraph
2. AB/R – Appellate Body Report
3. AJSS – African Journal of Social Sciences
4. Art. – Article
5. Arts. – Articles
6. ASBL – *Association Sans But Lucratif* (French: Non-Profit Organisation)
7. CDPA – Copyright
8. Ch. – Chancery
9. Doc. – Document
10. DSR – Dispute Settlement Resolution
11. DSU – Understanding on Rules and Procedure Governing the Settlement of Disputes
12. EC – European Community
13. ECJ – European Court of Justice
14. Ed. – Edition
15. EEC – European Economic Union
16. EILR – Emory International Law Review
17. Eng. – England
18. EU – European Union
19. EWHC – High Court of England and Wales
20. FFB – Federal Football Board
21. FIFA – *Fédération Internationale de Football Association*
22. FRBSB – *Fédération Royale Belge des Sociétés de Basket-ball*
23. FTA – Free Trade Agreement
24. GATS – General Agreement on Trade in Services
25. GPA – Government Procurement Agreement
26. HL – Helping Limbs
27. ICCPR – International Convention on Civil and Political Rights
28. ICESCR – International Convention on Economic, Social and Cultural Rights
29. ICJ – International Court of Justice
30. ILM – International Legal Materials
31. Inc. – Incorporated

32. IPR – Intellectual Property Rights
33. Ltd. - Limited
34. MFN – Most-Favoured Nations
35. MTN – Multilateral Trade Negotiations
36. No. – Number
37. OECD – Organisation for Economic Co-operation and Development
38. OJ – Official Journal of the European Union
39. Ors. – Others
40. OUP – Oxford University Press
41. Pg. – Page
42. Pvt. – Private
43. R&D – Research and Development
44. r/w – read with
45. Regd. – Registered
46. RFTA – Ruritania Free Trade Agreement
47. S&S – Sight and Sound
48. SCC – Supreme Court Cases
49. TS – Treaty Source
50. TEU – Treaty on European Union.
51. TFEU – Treaty on the Functioning of the European Union.
52. TRIPS – Trade Related Aspects of Intellectual Property Rights.
53. UEFA – *Union of European Football Association*
54. UK – United Kingdom
55. UN – United Nations
56. *UNCRPD – United Nations Convention on Rights of Person with Disabilities*
57. UNTS – United Nations Treaty Source
58. UOI – Union of India
59. US – United States
60. USA – United States of America
61. VCLT – Vienna Convention on Law of Treaties
62. *WT/DS – World Trade/Dispute Settlement*
63. *WTO – World Trade Organisation*
64. YEA Initiative – Youth Employment of Arpenia Initiative

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STATEMENT OF JURISDICTION

The Republic of Arpenia and the State of Bellomach have submitted this dispute to the International Court of Justice pursuant to a Special Agreement (Compromis), dated July 15, 2011. This Court's jurisdiction is invoked under Art. 36(1) r/w Art. 40(1) of the Statute of the International Court of Justice, 1950.

STATEMENT OF FACTS

BACKGROUND OF FACTS

- The Republic of Arpenia ('Arpenia'), which was formerly a colony of the State of Bellomach ('Bellomach'), is a middle income country in the continent of Ruritania. It's economy was predominantly based on manufacture of primary goods and Bellomach was one of its main markets. Of late, Arpenia has also started promoting R&D in various fields. (¶ 1)
- Bellomach, which was once a colonial power, is a parliamentary monarchy and is also situated in Ruritania. It is now a middle income country and is proud of its combination of economic liberalism and socially progressive programming. (¶¶ 5-6)
- To promote trade between the two countries, Arpenia and Bellomach have concluded the Ruritania Free Trade Agreement ('RFTA') which has a broad scope covering trade in goods, trade in services, intellectual property rights, market access rights for investors in agriculture, and also allows for automatic approval of tourist visas for upto two months. The RFTA adopts all WTO rules and commitments as FTA rules and commitments, and provides that in case of dispute, the parties are to approach the ICJ for a resolution of their differences. (¶ 11)

THE YOUTH EMPLOYMENT OF ARPENIA INITIATIVE ('YEA INITIATIVE') AND ITS EFFECTS

- Due to a slow-down in the economy, the government of Arpenia embarked on a program to foster the disadvantaged youth of the country, called YEA Initiative. The program had three main components. Firstly, to increase employment opportunities for young people, the mandatory retirement age of all workers was reduced to 60 years with no exceptions including the public and private sectors. (¶ 3)
- Secondly, to encourage national loyalties, the Federal Football Board ('FFB') has passed a rule that in national league competitions, at least six of the players on the field at any point in the game must be either citizens or have resided in Arpenia for at least ten of the past fifteen years to qualify as "Arpenian" for national league games.

However, Bellomach's National Football Commission has called the rule "worth considering" if Arpenia is going to persist in enforcing it. (¶¶ 3, 13)

- Thirdly, in an attempt to eliminate the disadvantage of languages faced by tribal youth, the High Court of Larront, the largest state in Arpenia, passed a binding rule that all documents and pleadings, done and submitted to the court, must be made in either the state language or one of the federal languages (Arpenian and Bellomachese), and one of the two main tribal languages. However, vigorously protesting the changed rules on court language, the National Attorneys Association of Bellomach has called it "unwarranted nationalism", and has demanded it be pursued legally. (¶¶ 4, 14)

BELLOMACH'S REFITTING CONTRACT, AND BRAILLE AND AUDIO CONTRACT

- Sight and Sound ('S&S'), a big company in Arpenia, manufactures a device named as "Virtual Eye". The device helps blind people to read non Braille books. The company was granted many patents in this area and is considered a world leader in this field. These devices are exported all over the world including Bellomach, and is one of the biggest markets for S&S. (¶ 2)
- Although Bellomach has just signed and is yet to ratify the UNCRPD, its parliament passed legislation to make all public buildings wheelchair accessible and sight- and hearing-impaired friendly. To do so, they made two contracts. The first was granted by means of a public offer for bids to re-fit the public buildings with ramps and elevators to permit access to persons with physical handicaps (Refitting Contract) and tender was valued to be B$ 2million.The "Virtual Eye" devices were to be installed in all the public libraries to help blind people read non-Braille books. (¶ 6)
- The second contract was for making improvements in the information available on public property to persons with sight and hearing impairments (Braille and Audio Contract). This contract was not subject to an open tender and was given to Helping Limbs (HL), a local non-governmental, non-profit organization that helps train workers with disabilities. It provided for a payment of 15% over the costs of labour and material, and the estimated total to be paid was B$32,000. (¶¶ 6-7)

- Furthermore, the government of Bellomach issued a mandatory waiver of copyright for any of the information provided in the buildings in Braille and on audio, although not for the information in regular text form. The prominent poet Ra Ephrama, who was a Bellomachian, but now a permanent resident of Arpenia, was hired by the Bellomach government to write seven out of ten of the introductory descriptions of the landmarks and HL were to transpose such descriptions (as well as others) into Braille and audio forms as part of the contract. However, Arpenia accused Bellomach of unfair procurement behavior and of illegally denying intellectual property protection. (¶¶ 9, 15)
- Both the countries exchanged formal diplomatic protests to no avail and after six months of subsequent consultations, the negotiators of Arpenia and Bellomach could not come to an agreement. Therefore, they decided to invoke the provisions of their RFTA and proceed to the ICJ. (¶ 9)

RELEVANT INTERNATIONAL AGREEMENTS

- Arpenia and Bellomach are parties to the WTO as well as United Nations. Arpenia has ratified the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). Bellomach has ratified the ICCPR, and has signed but not ratified the ICESCR and the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'). (¶ 12)

STATEMENTS OF ISSUES

I. BELLOMACH IS JUSTIFIED IN ITS PROTEST AGAINST THE CHANGES MADE REGARDING COURT LANGUAGES IN THE STATE OF LARRONT, ARPENIA.

A. THE COURT LANGUAGE RULE IMPOSED BY HIGH COURT OF LARRONT IS NOT IN CONSONANCE WITH GATS AND SUBSEQUENTLY THE RFTA.

1. ***Arpenia has violated both the language and the intent of the RFTA by its imposition of the court language rule.***
2. ***Art. 31(1) of VCLT has attained the status of customary international law and both the countries are bound to follow it.***

B. ARPENIA HAS NOT ABIDED BY ITS SPECIFIC COMMITMENTS RELATING TO LEGAL SERVICES.

C. ENGAGING IN ANTI COMPETITIVE PRACTICE, ARPENIA HAS VIOLATED PROVISION OF GATS.

1. ***Art. XVI of GATS relating to Market Access is violated.***
2. ***Art. XVII of GATS relating to National Treatment is violated.***
3. ***Art. XXI of GATS relating to Modification of Schedules is violated.***

II. BELLOMACH'S NATIONAL FOOTBALL COMMISSION IS JUSTIFIED IN PROTESTING THE 'SIX NATIONALS' RULE MADE BY THE ARPENIA'S FEDERAL FOOTBALL BOARD.

A. ARPENIA HAS VIOLATED GATS.

1. ***Arpenia has infringed Art. XVI(2)(a) of the GATS.***
2. ***Arpenia has infringed Art. XVII of the GATS.***
3. ***Arpenia has infringed Art. V(5) of the GATS.***

B. THE SAID RULE HAS IS NOT IN CONFORMITY WITH THE INTERNATIONAL CUSTOMARY NORMS.

III. BELLOMACH HAS NOT DENIED INTELLECTUAL PROPERTY PROTECTION TO ARPENIA.

A. THE BRAILLE AND AUDIO CONTRACT IS NOT VIOLATIVE OF THE BERNE CONVENTION

1. Nationality of the author, Ra Ephrama

2. *Braille and Audio contract is within the exceptions of free use of copyright*

B. INCORPORATION OF THE PROVISIONS OF UN CRPD BY BELLOMACH.

C. THE REFITTING CONTRACT DOES NOT DENY ARPENIA THE INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO "VIRTUAL EYE.

SUMMARY OF ARGUMENTS

I. Bellomach is justified in its protest against the changes made regarding court languages in the State of Larront, Arpenia.

It is submitted that the court language rule imposed by High Court of Larront is not in consonance with GATS and subsequently the RFTA. Arpenia has violated both the language and the intent of the RFTA by its imposition of the court language rule. Since, Art. 31(1) of VCLT has attained the status of customary international law and both the countries are bound to follow it.

Arpenia has not abided by its Specific Commitments relating to Legal Services because it has adopted Anti-Competitive Practice measures. Subsequently, by engaging in anti - competitive practice, Arpenia has violated the following provision of GATS: Art. XVI of GATS relating to Market Access is violated, Art. XVII of GATS relating to National Treatment is violated and Art. XXI of GATS relating to Modification of Schedules is violated.

II. Bellomach's National Football Commission is justified in protesting the 'six nationals' rule made by the Arpenia's Federal Football Board.

It is humbly submitted that by introducing the 'six nationals' rule, and providing that at any point of the game, there should be a minimum of six Arpenians playing on the field, Arpenia has violated the national treatment rule contained in Art. XVII of the GATS. Arpenia has infringed Art. XVI (2)(a) of the GATS relating to Market Access, as it has restricted the market access of the football players from Bellomach, by imposing a quota for the local players. This is in clear violation with the provisions of GATS regarding Market Access which is contained in Art. XVI.

The said 'six nationals' rules passed by the Arpenian FFB is not in conformity with the international customary laws. Furthermore, even the *Fédération Internationale de Football Association* Congress in May, 2008, had passed a resolution, that a team can have a

maximum of 5 foreign players to reduce the influx of foreign players in local teams. But, in 2010, the same has been abandoned by FIFA, as it is in contravention with the EU laws.

III. Bellomach has not denied Arpenia Intellectual Property Protection

It is to be noted from the facts that though Ra Ephrama is a permanent resident of Arpenia, he is a national of Bellomach, born to Bellomachese parents. Though a permanent resident of Arpenia, he continues to be a national of Bellomach. It is humbly submitted that the copyright on the text composed by the poet Ra Ephrama is not waived. The copyright waiver is only in respect to the Braille and Audio transpose done by Helping Limbs and not with respect to the original text composed by Ra Ephrama.

Further, it is submitted that the contract for refitting the public buildings was a public offer. The installation of "Virtual Eye" device in the public libraries was a part of the contract and not a separate distinct contract for the procurement and installation of the device. "Virtual Eye" is available in the market of Bellomach apart from other markets world over.

Therefore, as Virtual Eye is being exported to Bellomach, the first selling rights of the device are intact with Arpenia (Sight and Sound) but it cannot claim the patent rights when the product is being further sold or utilised.

ARGUMENTS ADVANCED

I. BELLOMACH IS JUSTIFIED IN ITS PROTEST AGAINST THE CHANGES MADE REGARDING COURT LANGUAGES IN THE STATE OF LARRONT, ARPENIA.

A. THE COURT LANGUAGE RULE IMPOSED BY HIGH COURT OF LARRONT IS NOT IN CONSONANCE WITH GATS AND SUBSEQUENTLY THE RFTA.

1. *Arpenia has violated both the language and the intent of the RFTA by its imposition of the court language rule.*

It is submitted that the court language rule imposed by Arpenia via High Court of Larront has violated both the language and intent of the RFTA. Arpenia and Bellomach signed the RFTA in 2011, where both the countries have recognised "the importance of free and fair trade" for the economic development of both the countries.[1] This trade restriction undermines the RFTA's intent to strive towards economic development of both the countries. Arpenia is bound by the provisions of RFTA and is required by the VCLT to perform its trade obligations in good faith .[2]

2. *Art. 31(1) of VCLT has attained the status of customary international law and both the countries are bound to follow it.*

It is submitted that although Bellomach is not a party to VCLT, the treaty however binds both the countries. The Appellate Body on *US — Gasoline*[3] stated that the "general rule of interpretation", contained in Art. 31[4] of the VCLT had attained the status of customary or general international law. The Appellate Body added that WTO law was not to be "read in clinical isolation from public international law". As such, it forms part of the 'customary

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[1] *As per the* Preamble, Compromis submitted to the ICJ.
[2] VCLT, Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
[3] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).
[4] VCLT, *supra* note 2.

rules of interpretation of public international law' which the Appellate Body has been directed, by Art. 3(2) of the *DSU*[5], to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization*[6] . That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."[7]

Further, in connection with applying the "customary rules of interpretation of public international law", the Appellate Body in *Japan — Alcoholic Beverages II*[8] stated that Art. 31 of the VCLT provide that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'."[9] In *EC — Hormones*[10], the Appellate Body ¶phrased its statement from *India — Patents (US)*[11], by noting that the fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used.[12]

The RFTA has a broad scope which covers trade in goods, trade in services, IPR, market access, etc.[13] Thus, Arpenia has violated the provisions of GATS which in turn are mentioned in the RFTA under trade in services and therefore, Arpenia has violated the provisions of the RFTA also.

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[5] DSU, Art. 3.2, Apr. 15, 1994, 33 I.L.M. 112(1994) - "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[6] *Hereinafter* referred to as the WTO Agreement.

[7] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 17, WT/DS2/AB/R (Apr. 29, 1996) ; Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46 WT/DS50/AB/R (Dec. 19, 1997); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶¶ 10-12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996); and Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, ¶ 6.13, WT/DS99/R (Jan. 29, 1999).

[8] Panel Report*, Japan — Taxes on Alcoholic Beverages,* WT/DS8/R, WT/DS10/R, WT/DS11/R (Jul. 11, 1996).

[9] *Id.*, ¶ 11.

[10] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

[11] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997).

[12] Panel Report*, Japan — Alcoholic Beverages, supra note 9*, ¶ 181.

[13] *As per* ¶ 11, *Compromi*s.

B. ARPENIA HAS NOT ABIDED BY ITS SPECIFIC COMMITMENTS RELATING TO LEGAL SERVICES.

It is submitted that Arpenia has violated the specific commitments it has made in the GATS Schedule of Specific Commitments.[14] Arpenia has violated its sector specific commitment regarding legal services including consultancy and litigation before courts.[15] Legal services are listed as a sub-sector of (1) business services and (A) professional services. This classification system corresponds to the United Nations classification system, in which "legal services" are sub-divided into:

- legal advisory and representation services concerning criminal law;
- legal advisory and representation services in judicial procedures concerning other fields of law;
- legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.;
- legal documentation and certification services;
- other legal and advisory information; and
- arbitration and conciliation services, previously part of management consultancy services (added in the February 1997 revision).[16]

The federal judiciary of Arpenia undertook a study on the role of language disadvantages in the court system and passed it on to the state courts with a recommendation that measures be taken to ensure access to courts. In response, the High Court of Larront, the largest state in Arpenia, in an attempt to eliminate the disadvantages the tribal youth face in rising out of their traditional low-paying jobs, passed a binding rule that all documents submitted to the court and all pleadings before the court must be made in either the state language or one of the federal languages (Arpenian and Bellomachese) and one of the two main tribal languages.[17]

[14] *As per* Annexure II, *Compromis* (hereinafter GATS Schedule).
[15] *Id.*
[16] WTO Services Sectoral Classification List, MTN.GNS/W/120, *available at* www.wto.org/english/ratop e/serv_e/mtn_gns_w_120_e.doc (last visited Dec. 20, 2011).
[17] *As per* ¶ 4, *Compromis*.

Since specific commitments have an effect similar to a tariff binding, thus, they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.[18] However, Arpenia's GATS Schedule has been modified to the disadvantage of Bellomach without notifying Bellomach of the modification. Thus, this is in violation of Art. XVI, XVII and XXI of GATS.[19] These articles have been discussed in the arguments on pages 5 to 9.

Further, Art. VI of the GATS has six subsections, only one of which is generally-applicable to all WTO Member States. Art. VI, ¶. 2 is the generally-applicable provision in the Domestic Regulation provision in the GATS.[20] ¶. 2 requires each WTO Member State to maintain or institute procedures to have an objective and impartial review of any negative decisions by a country to exclude foreign service providers[21], in this case, foreign lawyers. It is therefore submitted that remedies must be available to Bellomach.

It is submitted that Arpenia is engaged in anti-competitive practice by modifying the GATS Schedule to the disadvantage of Bellomach. The dictionary meaning of the word "practices" is very general. Its meanings include "the habitual doing or carrying on of something; usual, customary, or constant action; action as distinguished from profession, theory, knowledge, etc.; conduct."[22] The word "practices", thus, indicates "actions" in general, or can mean actions that are "usual" or "customary". The dictionary meaning of the word "competitive" "is used to describe a situation in which people or organisations compete against each other."[23] The word "competition", in its relevant economic sense, is in turn defined as "a situation in which organisations compete with each other for something that not everyone can have".[24] Consistent with these meanings, the word "anti-competitive" has been defined as "tending to reduce or discourage competition.[25]

[18] WTO Service Schedule, *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, *available at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Nov. 15, 2011).
[19] *As per* GATS, Annexure 1B, Apr. 15, 1994, 1869 U.N.T.S. 183.
[20] International Bar Association, *GATS – A Handbook for International Bar Association*, *available at* http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf.
[21] *Id*.
[22] OXFORD ADVANCED LEARNER'S DICTIONARY (8TH ED. 2011).
[23] *Id.*, pg. 304.
[24] OXFORD ADVANCED LEARNER'S DICTIONARY, *supra* note 22.
[25] *Merriam Webster Dictionary*, *available at* http://www.webster.com (last visited on Nov. 21, 2011).

The range of anti-competitive practices that are prohibited varies between Members, but practices that are unlawful under the competition laws of Members having such laws include cartels or collusive horizontal agreements between firms, such as agreements to fix prices or share markets, in addition to other practices such as abuse of a dominant position and vertical market restraints.[26] The importance of ensuring that firms refrain from engaging in horizontal price fixing agreements, market or customer allocation arrangements and other forms of collusion is likewise emphasized in the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[27] Thus, Arpenia has abused its dominant position with respect to the GATS Schedule by introducing the rule of making the two tribal languages compulsory as court language and thus trying to eliminate competition.

In *Mexico – Telecommunication*, the Panel construed the phrase "anti-competitive practices" very broadly. It was said that the phrase suggests actions that lessen rivalry or competition in the market. Some of the practices it covers include pricing actions, monopolisation or abuse of dominant position in ways that affect prices or supply, horizontal coordination of suppliers, and market sharing agreements.[28]

The second important aspect of the finding relates to the relationship between national legislation and GATS obligations. According to the Panel, international commitments taken under GATS to prevent anti-competitive practices are designed to limit the regulatory powers of Members. Since these commitments are obligations owed to all WTO Members, they cannot be eroded unilaterally by a domestic law. Therefore, it is submitted that since the rule passed by the Court of Larront is anti-competitive measure.

[26] Note by the Secretariat, *Overview of Members' National Competition Legislation*, WT/WGTCP/W/128/Rev.2, (Jul. 4, 2001).
[27] United Nations Set (1980), ¶ 3 Part D, *available at* r0.unctad.org/en/subsites/cpolicy/docs/cpset/cpset.htm (last visited on Dec. 13, 2011).
[28] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004).

C. ENGAGING IN ANTI COMPETITIVE PRACTICE, ARPENIA HAS VIOLATED PROVISION OF GATS.

1. *Art. XVI of GATS relating to Market Access is violated.*

With respect to market access through the modes of supply identified in Art. I of GATS, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[29] The market access provision also requires that access to the legal services market not be provided in a manner less favourable than is set forth in the country's Schedule of Specific Commitments. Therefore, the market access provision focuses on what a WTO Member State may not do, employing a negative approach.[30]

The demand for legal services comes from business and organizations as well as from individual citizens. Less frequently, individual citizens seek legal advice in foreign and international law, although this is a field in which in recent times demand has grown due to the increase in the mobility of labour.[31] Mainly, foreign lawyers supplying legal services cross-border or by means of establishment act in the vast majority of cases as foreign legal consultants, i.e., they provide advisory legal services in international law, in the law of their home country or in the law of any third country for which they possess a qualification.[32]

Mode 3, or Commercial Presence, involves foreign lawyers who establish a permanent presence in a country, such as a branch office. This Mode is the one which is most frequently thought about when the GATS is discussed among lawyers. It will usually involve the establishment of an office in a foreign country by one of the large commercial firms. [33] GATS defines commercial presence as any type of business or professional establishment, including through:

[29] GATS, *supra* note 19, Art. XVI.
[30] WTO, *Liberalisation of Trade in Professional Services*, OECD Doc. 1995, *available at* www.wto.org*/english/tratop_e/serv_e/w43.doc (last visited on Nov. 14, 2011).*
[31] *Id.*
[32] WTO Secretariat, *supra* note 26, pg 7.
[33] *Id.*

i. the constitution, acquisition or maintenance of a juridical person, or
ii. the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service. [34]

Further, 'supply of service' is defined under the GATS as one which includes the production, distribution, marketing, sale and delivery of a service.[35]

Thus, by adding a language barrier for Bellomach will be in violation of Art. XVI of the GATS. Arpenia's GATS Schedule provides a limitation on market access in the legal services sector with respect to the 'commercial presence' mode of supply as 'under the same rules as local suppliers'.[36]

Art. XVI (2) (a) says that unless the member has specified in its Schedule, a Member shall not maintain or adopt limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.[37] Art. XXVIII (i) provides that where the service supplier is not supplying a service directly by a juridical person, but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement.[38]

Monopoly is defined as 'complete control of trade in particular goods or the supply of a particular service.'[39] Therefore, it is submitted that Arpenia has been in violation of Art. XVI of GATS by not abiding to its schedule because when making a commitment a government, therefore, binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service.[40]

[34] GATS, *supra* note 19, Art. 26.
[35] *Id.*
[36] *As per* Annexure II, *Compromis.*
[37] *Id.*
[38] GATS, *supra* note 19, Footnote of Art. XXVIII (i)
[39] OXFORD ADVANCED LEARNER'S DICTIONARY 1188 (8TH ED. 2011).
[40] WTO Service Schedules, *supra* note 18.

However, the only limitation mentioned in the Schedule is supply services under the same rules as that of local suppliers.[41] However, by making the pleadings to courts in one of the two tribal languages compulsory[42] will definitely constitute monopolisation of services since it will work to the disadvantage of foreign suppliers in legal services, specifically that of Bellomach.

2. *Art. XVII of GATS relating to National Treatment is violated.*

Art. XVII of the GATS which deals with the national treatment provision provides that if a country lists a particular sector, such as legal services, on its Schedule of Specific Commitments, then that country has agreed to provide national treatment with respect to that sector, subject to any limitations noted in the Schedule of Specific Commitments.[43] It further states that countries may meet the national treatment requirement either by according formally identical treatment or formally different treatment.[44]. The Agreement also provides that 'formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.[45]

Thus, the national treatment provision is imperative because it acts as an equal protection clause for foreign lawyers as compared to domestic lawyers. If a country has "scheduled" legal services, this article would prohibit regulators from providing foreign lawyers with treatment that is less favourable than the treatment it accords to domestic lawyers, except as specifically noted in the GATS Schedule.[46] The Panel in *EC — Bananas III* held that internal taxes or charges or other regulations 'should not be applied to imported or domestic products so as to afford protection to domestic production'.[47]

[41] *As per* Annexure II, *Compromis.*
[42] *As per* ¶ 4, *Compromis.*
[43] GATS, *supra* note 19, Art. XVII(1).
[44] GATS, *supra* note 19, Art. XVII(2).
[45] GATS, *supra* note 19, Art. XVII(3).
[46] International Bar Association, *supra* note 20., pg. 20.
[47] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 241, WT/DS27/AB/R (Sept. 9, 1997).

Although there is no limitation on national treatment in Arpenia's GATS Schedule regarding Mode 3, i.e., commercial presence sector[48], yet, Arpenia has imposed a rule which is in clear violation of the national treatment rule under Art. XVII.[49] Therefore it is submitted that Arpenia is using the YEA initiative[50] as a disguise to eliminate competition in the legal service sector in order to favour the domestic suppliers since they will have an upper hand over the Bellomachese suppliers of legal services. Increasing international economic interaction, and globalization of the legal profession and international trade in legal services, makes liberalized trade in this area important. By committing a services sector to liberalization Arpenia is legally bound by GATS to provide national treatment to all foreign services suppliers, particularly, Bellomach in the legal services sector.

3. *Art. XXI of GATS relating to Modification of Schedules is violated.*

Arpenia is not justified in implementing its rules on court language because it violates Art. XXI of GATS which deals with 'modification of Schedules'.[51]
"definition of modify from Oxford"

Therefore, Arpenia is legally bound by GATS to notify Bellomach of any modification in the Schedule. The inclusion of the rule of 'one of the tribal languages to be compulsory'[52] is a modification of the GATS Schedule because as noted above, the definition of legal services includes legal advisory and representation services.[53] Thus, Arpenia is in violation of Art. XXI of GATS.

¶ (1) (b) provides that a modifying Member has to notify its intent to modify a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal. [54] However, no such action has been communicated by Arpenia to the Council.

[48] *See* Annexure II, Facts on Record.
[49] *See* ¶ 4, Facts on Record.
[50] *See* ¶ 3, Facts on Record.
[51] GATS, *supra* note 19, Art XXI.
[52] *As per* ¶ 4, *Compromis*.
[53] WTO "Services Sectoral Classification List", *supra* note 16.
[54] *Id.*

Further, ¶ 2(a) provides that in case a Member is affected by the modification then at that member's request, the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. Also, commitments can only be withdrawn or modified after the agreement of compensatory adjustments with affected countries.[55]

Here, Bellomach is an affected member because its sector in legal services is being adversely affected due to the imposition of Arpenia's court language rule and Arpenia has violated the provisions of this Article because it has not engaged in any negotiations with Bellomach and also according to this Article, Bellomach has the right to get compensation from Arpenia for the modification of the GATS Schedule.

[55] *Id.*

II. BELLOMACH'S NATIONAL FOOTBALL COMMISSION IS JUSTIFIED IN PROTESTING THE 'SIX NATIONALS' RULE MADE BY THE ARPENIA'S FEDERAL FOOTBALL BOARD.

A. ARPENIA HAS VIOLATED GATS.

Arpenia is not justified in passing the said rule as it is in violation of the specific commitments made by it in its GATS Schedule. Hence, Arpenia has infringed the following articles of GATS.

1. *Arpenia has infringed Art. XVI(2)(a) of the GATS.*

Arpenia has infringed Art. XVI(2)(a) of the GATS, as it has restricted the market access of the football players from Bellomach, by imposing a quota for the local players. This is in clear violation with the provisions of GATS regarding Market Access which is contained in Art. XVI.

Art. XVI(2)(a)[56] of GATS provides:

"Market Access:

(2) In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;"

The above mentioned provision is violated by Arpenia as it has made sector - specific commitments to Bellomach in the field of Sporting and Recreational Activities[57] which

[56] GATS, *supra* note 19, Art. XVI(2)(a) (1994).

includes Football as it is a sport. Arpenia has introduced a reserved quota for its local players and had, hence, reduced the market access enjoyed by Bellomach.

2. *Arpenia has infringed Art. XVII of the GATS.*

By introducing the 'six nationals' rule, and providing that at any point of the game, there should be a minimum of six Arpenians playing on the field, Arpenia has violated the national treatment rule contained in Art. XVII of the GATS.

Art. XVII[58] of GATS provides:

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

ii. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

iii. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

National Treatment has been precisely defined in clause (1) of the above mentioned article. Furthermore, as per the definition accorded by the above mentioned Art. XVII, Arpenia has provided a different and preferential to its local football players as it has introduced a reserved quota-system for them. The same treatment has not been provided to the foreign players and has been given only to the local/domestic players. The rule is, therefore, discriminatory and has violated the National Treatment Rule.

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[57] *As per* Annexure II, *Compromis*.
[58] GATS, *supra* note 19, Art. XVII.

3. ***Arpenia has infringed Art. V (5) of the GATS.***

Furthermore, the 'six nationals' rule made by Arpenia is inconsistent with the specific commitments it has in its GATS Schedule regarding its limitation on national treatment and market access with regard to presence of natural persons. However, Arpenia has not provided any notice of the said modification in the rules of FFB. But according to Art. V (5) of GATS, a notification of the modifications which is inconsistent with specific commitments, has to provide to the affected Member.

Art. V (5)[59] of GATS provides:

> "If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply."

Thus, as Arpenia has not provided a notice of the modifications made, it has violated Art. V (5) of the GATS.

B. <u>THE SAID RULE HAS IS NOT IN CONFORMITY WITH THE INTERNATIONAL CUSTOMARY NORMS.</u>

The said 'six nationals' rules passed by the Arpenian FFB is not in conformity with the international customary laws. Art. 38(1)(b) of the Statute of the International Court of Justice[60] defines 'international custom' as "evidence of a general practice accepted by law." However, there is no evidence that such a rule has a generally accepted practice at the international level.

[59] GATS, *supra* note 19, Art. V(5).
[60] Statute of International Court of Justice, Art. 38, T.S. No. 993.

Furthermore, Starke's International Law[61] states that customary rules crystallise from usages and practices which have evolved from mostly three sets of circumstances:

i. Diplomatic Relations between States.
ii. Practice of International Organs.
iii. State Laws, Decisions of State Courts, and State Military or Administrative Practices.

However, in the present case, most of the international organs have had a view against the rule passed by Arpenia and have ruled against such quota-system.

In the case of *Union Royale Belge des Societes de Football Association (ASBL) & Ors v. Jean-Marc Bosman*[62], the legality of the system of transfers for football players and the existence of so-called 'quota systems', whereby only a limited number of foreign players were allowed to play in a club match was challenged in the ECJ.[63]

Consequently, the ECJ ruled against such quota-systems and also pronounced them illegal as such system with not in consonance with Art. 48[64] of the then EEC Treaty, which are now Arts. 39[65] and 45[66] of the TEU and TFEU respectively. Art. 48 of the EEC Treaty provided for freedom of movement of workers, and abolished any discrimination between workers of the Member states for employment, remuneration and other conditions based on nationality.

Hence, the ECJ ordered as follows:

i. Transfer fees for out-of-contract players were illegal where a player was moving between one E.U. nation and another. From now on only players still serving contracts with their teams could have transfer fees paid for them.
ii. Quota systems were also held to be illegal. Club sides are now able to play as many foreigners from other European Union states as they liked (although limits on players from outside the E.U. could still be imposed).[67]

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[61] I. A. Shearer, Starke's International Law, 31-37 (11th ed. 1994).
[62] Case C-415/93, 1995 ECR I-4921.
[63] G. Pearson, *The Bosman Case, EU Law and the Transfer System*, *available at* http://www.liv.ac.uk/footballindustry/bosman.htm (last visited on Dec. 26, 2011).
[64] EEC, Art. 48, 2002 O.J. (C 325) 1.
[65] TEU, Art. 39, Feb. 7, 1992, 1992 O.J. (C191) 1.
[66] TFEU, Art. 45, May 5, 2008, 2008 O.J. (C115).
[67] Pearson, *supra* note 63.

Furthermore, even the *Fédération Internationale de Football Association*[68] Congress in May, 2008, had passed a resolution, that a team can have a maximum of 5 foreign players[69], to reduce the influx of foreign players in local teams. But, in 2010, the same has been abandoned by FIFA,[70] as it is in contravention with the EU laws.

Thus, it is submitted that as the ECJ and FIFA, which are renounced international forums, are against such quota-systems and hence, such a rule is not an internationally accepted customary norms.

[68] Hereinafter referred to as FIFA.

[69] 59th FIFA Activity Report, Protect the game – The values of football were upheld again in 2008 (April 2008 – March 2009), pg. 12, *available at* http://www.fifa.com/mm/document/affederation/administration/01/53/04 51/fifa_ar08-09_e.pdf (last visited on Dec. 15, 2011).

[70] *Fifa Scraps Plans for 'Home-Grown' Player Rule*, *available at* http://news.bbc.co.uk/sport2/hi/football/ 8733164.stm (last visited on Dec. 10, 2011).

III. BELLOMACH HAS NOT DENIED INTELLECTUAL PROPERTY PROTECTION TO ARPENIA.

Bellomach and Arpenia are both members to the World Trade Organisation. Thereby they are obliged to abide by all the agreements of WTO, including TRIPS (Trade Related Intellectual Property Rights).
The members each accept all the agreements as a single package with a single signature — making it, a "single undertaking". The TRIPS Agreement is part of that package. Therefore it applies to all WTO members.[71]

The WTO agreements took effect on 1 January 1995. Developing countries were given five years until 2000 to ensure that their laws and practices conform to the TRIPS agreement.[72] Hence, the government of Bellomach and Arpenia are required as per the WTO policy to incorporate the changes in their domestic intellectual property laws to provide protection as per the standard of TRIPS.

As per the facts Bellomach and Arpenia are not members to the Berne Convention.
But according to Article 9(1) of TRIPS, "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."
Hence, Arpenia and Bellomach are bound by the Berne Convention, 1971.

A. THE BRAILLE AND AUDIO CONTRACT IS NOT VIOLATIVE OF THE BERNE CONVENTION.

As per WTO[73], intellectual property rights are defined as Ownership of ideas, including literary and artistic works (protected by copyright), inventions (protected by patents), signs for distinguishing goods of an enterprise (protected by trademarks) and other elements of industrial property.

[71] WTO – TRIPS, *Frequently Asked Questions about TRIPS in WTO*, *available at* http://www.wto.org/english /tratop_e/trips_e/tripfq_e.htm#Who'sSigned
[72] Understangding WTO – The Agreements, *Intellectual Property: Protection and Enforcement*, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.
[73] WTO – Glossary, *available at* http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

Black's Law[74] defines Copyright as follows:

> "The right to copy: specific, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural and architectural works; motion pictures and other audio-visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adopt, distribute, perform, and display the work."

Copyright is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films and computer programs.[75]

Copyright does not need any registration. Copyright and trade secrets are protected automatically according to specified conditions. They do not have to be registered, and therefore there is no need to disclose, for example, how copyrighted computer software is constructed.[76]

Literary works are not limited to works of literature, but include all works expressed in print or writing (other than dramatic or musical works).[77] The introductory descriptions written by the poet, Ra Ephrama about the public buildings and landmarks thus qualify as literary works.

The literature on the public buildings of Bellomach have to be transposed into braille an audio forms as per the braille and audio contract. Ra Ephrama has composed seven out of the ten introductory descriptions on public buildings for Bellomach government.

Ra Ephrama's work refers to literary work. As per Black's Law[78] literary works is defined as:

> "A non audiovisual work that is expressed in verbal, numerical or other symbols, such as words or musical notion and embodied in some type of physical object." Literary works are one of the eight general categories that are eligible for copyright protection.

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[74] BLACK'S LAW DICTIONARY (8TH ED. 2004).
[75] LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW (2003).
[76] Understangding WTO – The Agreements, *supra* note 72.
[77] University of London Press Ltd. v. University Tutorial Press Ltd., [1961] 2 Ch 601(Eng.).
[78] BLACK'S LAW DICTIONARY (8TH ED. 2004).

As per Art. 2[79] of the Berne Convention, the works protected under copyright include literary and artistic work in form of books, pamphlets etc.

1. *Nationality of the author, Ra Ephrama.*

It is to be noted from the facts that though Ra Ephrama is a permanent resident of Arpenia, but is a national of Bellomach as he is born in Bellomach to Bellomachian parents[80]. Though a permanent resident of Arpenia, he continues to be a national of Bellomach.

The work of writing the introductory descriptions is therefore a part of Bellomach and not the copyright works to be claimed by Arpenia. Hence, if there is any violations of the intellectual property rights granted to Ra Ephrama cannot be construed as denying intellectual property protection to Arpenia.

2. *Braille and Audio contract is within the exceptions of free use of copyright.*

Copyright on the text composed by the poet Ra Ephrama are not waived. The braille and audio contract only requires the copyright to be waived on the braille and audio form of the information. It is to be noted that the translation into braille and audio form is being done by HL, a NGO of Bellomach.

As per Art. 9(2) of Berne Convention It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

There is no unfair or unreasonable prejudice to the copyright that Ephrama holds with respect to the text composed by him. The adaption of the same into the braille and audio form does not interfere with the legitimate interest of the author as the original text form

[79] Berne Convention, Art.2(1), The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings;
[80] *As per* ¶ 8, Amendments, GIMC, 2012.

continues to enjoy the copyright protection. The adaptation for the public non - commercial purpose is covered under the TRIPS agreement.

Art. 31[81] of the TRIPS Agreement provides for other use without authorization, including that by the government in cases of urgency, national emergency and public non-commercial use.

The transposed descriptions were utilized for public and non-commercial purpose.[82] The contract is for making information regarding public buildings and landmarks accessible to the sight and hearing impaired. Also, the payment of the contract is utilised to further the aims and objectives of HL[83].

Therefore, the utilisation of the works without permission of Ra Ephrama, the author, is within exception to his copyright over the works. Hence, the adaptation of the work cannot be construed as infringement to the copyrights.

B. INCORPORATION OF THE PROVISIONS OF UN CRPD BY BELLOMACH

As stated in the facts, Bellomach has signed the UNCRPD based on which the parliament has passed a legislation. The braille and audio contract has been formulated to give effect to the legislation.[84]

Bellomach has signed the UNCRPD, and incorporated the objectives in national law.
As per Art. 30(3) of the CRPD, States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

[81] Art. 31 (b) This requirement may be waived by a Member in the case … or in cases of public non-commercial use. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

[82] *As per* ¶ 7, Amendments, GIMC, 2012 - The payment for the Braille and Audio Contract is to be put into a separate bank account maintained by HL to help fund the foundation's other beneficial programs.(Such programs include physical therapy, employment counseling for both, the workers and employers, employer-oriented workshops, and assisted vacation opportunities for the disabled workers.).

[83] *Id.*

[84] *As per* ¶ 6, Amendments, GIMC, 2012.

The copyright on the braille and audio forms of the descriptions on the public buildings and landmarks would restraint the distribution as well as availability of the material for the sight and hearing impaired persons, thus defeating the very purpose of the legislation.

C. THE REFITTING CONTRACT DOES NOT DENY ARPENIA THE INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO "VIRTUAL EYE".

The contract for refitting the public buildings was a public offer. The installation of "Virtual Eye" device in the public libraries was a part of the contract and not a separate distinct contract for the procurement and installation of the device. The objective of the contract is to refit the public buildings to make them accessible and friendly for the hearing and sight impaired people.

It is stated in the facts that Sight and Sound exports the device "Virtual Eye" of which Bellomach is one of the major importers. It has been previously installed in Bellomach for private business. From this it can be concluded that the device "Virtual Eye" is available in the market of Bellomach apart from other markets world over.

Exhaustion[85] in intellectual property protection refers to the principle that once a product has been sold on a market, the intellectual property owner no longer has any rights over it. In other words, once a product is sold on a market, the intellectual property owner no longer has rights over it – his/her rights are "exhausted".[86]

Art. 6[87] of the TRIPS agreement refers to the exhaustion. It provides that:

> "The exhaustion of intellectual property rights is being viewed as a measure to control the competitive and monopolistic practices of the patentee-manufacturers."

An IPR is typically exhausted by the "first sale" (U.S. doctrine) or "placing on the market" of the good or service embodying it. The basic idea is that once the right holder has been

[85] WTO – Glossary, *supra* note 73.
[86] EU Free Trade Agreements Manual, *Eight briefings on the European Union's approach to Free Trade Agreements*, *available at* http://policy-practice.oxfam.org.uk/publications/eu-free-trade-agreements-manual-eight-briefings-on-the-european-unions-approach-115066. (last visited on Dec. 20, 2011).
[87] For the purposes of dispute settlement under this Agreement, subject to the provisions of Arts. 3 and 4, nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

able to obtain an economic return from the first sale or placing on the market, the purchaser or transferee of the good or service is entitled to use and dispose of it without further restriction and dispose of it without further restriction. As illustration, consider a can of soda labelled with the famous "Coca-Cola" trademark. The Coca-Cola Company holds rights to that mark, and it may prevent others from first-selling the can of soda without its consent. If you buy the can of soda from an authorized first-seller, the Coca-Cola Company's right in its trademark is exhausted, and it cannot prevent you from drinking the soda, or from giving or selling the can of soda to someone else.[88]

The principle of 'exhaustion of rights' in relation to patents was established by the ECJ in *Centrafarm BV v. Sterling Drug Inc.*[89] Sterling owned patents relating to anti – infection drug, Negram, in both UK and Netherlands. Centrafarm acquired supplies of Negram which has been put on the market in UK and exported them into Netherlands, where they could be sold at higher price. In common parlance, Centrafarm was the 'parallel importer' of the drugs.

Sterling sued for patent infringement in the Neherlands. In its judgement, the ECJ held that concerning the free movement of goods was only to safeguards those rights which constitute the specific subject matter protected by the patent. However, it went on to hold that a derogation from the free movement of goods is not justified where the product has been put on the market in 'a legal manner' by the patentee or with his consent, in the member state from which it has been imported.

To decide otherwise would be to 'partition off national markets' and thereby restrict trade between member states in a situation where no such restraint is necessary to safeguard the specific subject matter of the patent.[90]

Exhaustion of right and parallel imports were examined once again by the ECJ in *Merck & Co. Inc v. Stephar BV*[91]. It is upto to the patentee to decide the conditions under which he would market his product.

[88] IPRsonline.org, *Exhaustion, available at* http://www.iprsonline.org/unctadictsd/docs/RB_Part1_Nov_1.4_update.pdf (lasr visted on Dec. 15, 2011).
[89] Case C-15/72, Centrafarm BV & Adriaan de Peijper v. Sterling Drug Inc. 1974 ECR 1183.
[90] JENNIFER DAVIS, INTELLECTUAL PROPERTY LAW (3RD ED. 2008).
[91] Case C-187/80, Merck & Co. Inc. v Stephar BV & Petrus Stephanus Exler, 1981 ECR 2063.

Key to the decisions in *Centrafarm* and *Merk v. Stephar*[92] is the matter of consent. In both the cases, the patentee had consented to the first sale of his goods in a member state.[93]

Disability assistance devices, which include "Virtual Eye" has been previously installed in Bellomach for private business.[94] This implies that patent rights over "virtual eye" have been exhausted. Sight and Sound has exhausted its patent rights by the first selling or putting in the market of Bellomach.

Hence, Arpenia cannot claim the patent protection and patent rights for Virtual Eye product in Bellomach.

[92] Case C-187/80, Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler, 1981 ECR 2063.
[93] Case C-19/84, Pharmon BV v. Hoechst AG, 1985 ECR 2281.
[94] *As per* ¶ 10, *Compromis.*

PRAYER/ CONCLUSION

Wherefore, may it please the Court in the light of the questions presented, arguments advanced, and authorities cited, to adjudge and declare that: The State of Bellomach respectfully requests this Hon'ble Court to:

- **Declare** that the rule passed by the High Court of Larront is in violation of GATS and Arpenia's Specific Commitments and provide compensatory measures to Bellomach for the same;
- **Declare** that 'six national rule' imposed by Arpenia's Federal Football Board to be void;
- **Declare** that there has been no illegal denying of IP protection to Arpenia;
- **Declare** that there is no unfair procurement on part of Bellomach;

All of which is respectfully affirmed and submitted

AGENTS FOR THE RESPONDENT,
REPUBLIC OF BELLOMACH.