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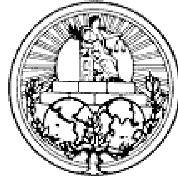

THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING RURITANIA FREE TRADE AGREEMENT

[2012 General List No. . . .]

THE REPUBLIC OF ARPENIA
(CLAIMANT)

V.

THE STATE OF BELLOMACH
(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS iv
INDEX OF AUTHORITIES vi
STATEMENT OF JURISDICTION xiii
STATEMENT OF FACTS xiv
ISSUES RAISED xvii
SUMMARY OF ARGUMENTS xix
ARGUMENTS ADVANCED 1

I. BELLOMACH IS INTERNATIONALLY RESPONSIBLE FOR ISSUING THE MANDATORY WAIVER AS IT VIOLATES ITS OBLIGATION UNDER THE RURITANIA FREE TRADE AGREEMENT (RFTA) 1

A. ARPENIA'S CLAIMS ON BEHALF OF RA EPHRAMA ARE ADMISSIBLE 1

1. Arpenia has the right to exercise diplomatic protection because of effective nationality 1
2. The exhaustion of local remedies rule is not applicable 2

B. THE MANDATORY WAIVER AMOUNTS TO ILLEGAL DENIAL OF INTELLECTUAL PROPERTY PROTECTION 3

1. The waiver violates the World Trade Organization (WTO) rules of RFTA 4
   a. It is against the principles of The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 4
   b. It is against the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention) 5
2. The waiver is in violation of human rights obligations 6

II. BELLOMACH'S ACT OF PROCURING THE SERVICES UNDER THE TWO CONTRACTS AMOUNTS TO UNFAIR PROCUREMENT BEHAVIOUR 7

A. THE PROCUREMENT OF THE SERVICES UNDER THE BRAILLE AND AUDIO CONTRACT VIOLATES THE PRINCIPLE OF DUE PROCESS 7

B. THE PROCUREMENT OF THE SERVICES UNDER THE TWO CONTRACTS IS IN VIOLATION OF BELLOMACH'S OBLIGATIONS UNDER THE RFTA 8

1. The technical specifications mentioned in the Refitting Contract are in violation of the WTO Agreement on Government Procurement (GPA) 8
2. The grant of the Braille and Audio Contract to Helping Limbs is in violation of the GPA and the WTO rules 9

a. The tendering procedure is inconsistent with the GPA... *9*

b. The procurement objective of the Braille and Audio contract is a market barrier *10*

c. The granting of the Braille and Audio Contract to Helping Limbs is against the principle of transparency.. *11*

III. THE SIX NATIONALS RULE [HEREINAFTER 'THE RULE'] DOES NOT VIOLATE ANY INTERNATIONAL OBLIGATION.. 12

A. THE RULE DOES NOT VIOLATE THE GATS COMMITMENTS AND OBLIGATIONS 12

1. Arpenia has not made any commitments in the Sector of Sporting Services in its GATS schedule of Specific Commitment... 12

2. *Arguendo*, the Rule does not violate the undertaken commitments in GATS Schedule 14

B. THE RULE DOES NOT BREACH THE RURITANIA FREE TRADE AGREEMENT 14

IV. THE IMPOSITION OF RULE ON COURT LANGUAGE BY ARPENIA DOES NOT VIOLATE ITS OBLIGATIONS UNDER THE GATS AND THE RFTA...... 16

A. IT DOES NOT VIOLATE THE SPECIFIC COMMITMENTS UNDER THE GATS SCHEDULE UNDERTAKEN BY ARPENIA 16

1. It does not violate the undertaken Market access commitments............................. 16

2. It does not violate the national treatment obligation under Article XVII of the GATS and the RFTA 17

B. IT CONSTITUTES A DOMESTIC REGULATION PERMITTED WITHIN THE SCOPE OF ARTICLE VI OF THE GATS 18

1. It does not nullify the commitments under the GATS schedule 18

2. It constitutes a qualification and not an unnecessary barrier 18

V. *ARGUENDO*, THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE SECURED UNDER THE EXCEPTION CLAUSE OF GATS 20

A. THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE JUSTIFIED UNDER ARTICLE XIV (A) OF THE GATS 20

B. BOTH THE RULES ARE JUSTIFIED BY THE *CHAPEAU* OF ARTICLE XIV OF THE GATS 22

FINAL SUBMISSION/PRAYER.. 24

LIST OF ABBREVIATIONS

¶	Paragraph
A.C.	Appeals Cases
All E.R.	All England Report
Am. J. Int'l L.	American Journal of International Law
art. /arts.	Article/ Articles
B.C. INT'L & COMP. L. REV.	Boston International and Comparative Law Review
CASE W.RES. L. REV.	Case Western Reserve Law Review
COLUM. L. REV.	Columbia Law Review
COMP. L. REV.	Comparative Law Review
DICK. J. INT'L L.	Dickinson Journal of International Law
Doc.	Document
E.C.J.	European Court of Justice
E.J.I.L.	European Journal of International Law
ed.	Edition
G.A. Res.	General Assembly Resolution
GAOR	General Assembly Official Records
GEO. J. INT’L L.	Georgetown Journal of International Law
HOUS. J. INT'L L.	Houston Journal of International Law
I.C.J.	International Court of Justice
I.C.L.Q.	The International and Comparative Law Quarterly
I.L.M.	International Legal Materials
J. INT’L ECON L.	Journal of International Economic Law
LA. L. REV.	Louisiana Law Review
MICH. J. INT'L L.	Michigan Journal of International Law
MINN. J. GLOBAL TRADE	Minnesota Journal of Global Trade

NAFTA	North American Free Trade Agreement
no.	Number
P.C.I.J.	Permanent Court of International Justice
PUB. PROC. L. REV.	Public Procurement Law Review
Q.B.	Queen’s Bench
R.I.A.A.	Reports of International Arbitral Awards
R.P.C.	Reports of Patent, Design and Trade Mark Case
S. Ct	Supreme Court Reporter
Ser.	Series
Sess.	Session
Supp.	Supplement
TEX. INT’L L. J.	Texas International Law Journal
THE INT'L LAWYER	The International Lawyer
U.N.T.S.	United Nations Treaty Series
U.S.T.	United States Code
UKPC	United Kingdom Privy Council
Vol.	Volume
WORLD T. R.	World Trade Report
Y.B.I.L.C.	Yearbook of the International Law Commission

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STATEMENT OF JURISDICTION

The Republic of Arpenia (Claimant) and the State of Bellomach (Respondent) have submitted their differences concerning the interpretation of The Ruritania Free Trade Agreement (RFTA) to the International Court of Justice pursuant to the Special Agreement (Compromis) jointly notified to the Court on 1 August 2011, and as clarified on 20 November 2011 (Clarifications) and amended on 6 December 2011 (Amendments). The Court's jurisdiction is invoked under Article 36(1) read with Article 40(1) of the Statute of the International Court of Justice, 1950. The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

The dispute concerns the interpretation of the Ruritania Free Trade Agreement (RFTA) concluded between the Republic of Arpenia and the State of Bellomach. The Republic of Arpenia is a former colony of the State of Bellomach, however, at present both these states enjoy dualistic status. Arpenia is a developing nation, still predominantly engaged in manufacturing of primary products with Bellomach being one of the main exports markets. Bellomach is a middle income country which is proud of its combination of economic liberalism and socially progressive programming.

VIRTUAL EYE

"Virtual Eye" is a device that helps blind people to read non Braille books. It is manufactured by Sight and Sound (S&S), one of the biggest companies in Arpenia. Virtual Eye was patented on January 1, 2001 in Arpenia. It is an innovation of S&S, a particular product and not a common name. The company has been granted many patents in this area and is considered a world leader in this field. The company exports these devices all over the world including Bellomach which is one of the biggest markets for S&S.

Bellomach, pursuant to its signing of the UN Convention on the Rights of Persons with Disabilities (CRPD), passed a legislation to make all public buildings wheelchair accessible and sight- and hearing-impaired friendly. To this effect, they made two contracts. The first contract was the Refitting Contract, with an objective to re-fit the public buildings with ramps and elevators, valuing B$ 2million. It was granted by means of a public offer for bids. The only design requirements explicitly set out in the tender were: that each installation should "match the local aesthetics in terms of building style and neighbourhood tastes"; and that "Virtual Eye" device were to be installed in all the public libraries.

BRAILLE AND AUDIO CONTRACT

Pursuant to the legislation passed by the Government of Bellomach the Braille and Audio Contract was made, the purpose of which was to improve the information available on public property for persons with sight- and hearing impairments. This contract, however, was not subject to an open tender. The Arpenian company, Sight and Sound (S&S) has installed disabilities assistance installations for private businesses in Bellomach as well as in Arpenia, but were not requested for a bid in this case. It was rather given to Helping Limbs (HL), a

local NGO, by the Government of Bellomach. The HL management and training staff are generally graduates of the world-famous Institute on Disability Studies, located in the Bellomach capital and owned by a private financier. The estimated total to be paid is B$ 32,000.

The Government of Bellomach issued a mandatory waiver of copyright for any information provided in the buildings in Braille and on audio, although not for the information in regular text form. Although most of the texts would be composed by the staff of the Bellomach Department of the Interior, the prominent poet Ra Ephrama, who is a permanent resident of Arpenia, was to write seven out of ten of the introductory descriptions of the landmarks. HL was to transpose such descriptions (as well as others) into Braille and audio forms as part of the contract.

Arpenia accuses Bellomach of unfair procurement behavior as well as of illegally denying intellectual property protection.

SIX-NATIONALS RULE

As a result of the rising fame of football players in the last decade, the youth of Arpenia has invested great sums of money in training to make the cuts for one of Arpenia's three major league football teams. The investment pays off for those who are good enough: the salaries of major league players are extraordinarily high – up to one hundred times the salary of the average Arpenian citizen – as well as being tax-free.

Due to a slow-down in the economy and to foster the disadvantaged youth of the country, Arpenia has embarked on a program called Youth Employment of Arpenia Initiative (YEA Initiative) that includes a rule passed by the Federal Football Board (FFB), that to play in the national league competitions, at least six of the players on the field at any point in the game must be players that fulfil the qualifications for the national team. The qualification requires that the six players must either be citizens or have resided in Arpenia for at least ten of the past fifteen years to qualify as "Arpenian" for national league games (FFB's Rule 48*bis*). The 10 years stay means an overall 10 years stay and not continuous.

Bellomach's National Football Commission has called the rule "worth considering" if Arpenia is going to persist in enforcing it.

COURT LANGUAGE

Another component of the YEA Initiative was a study undertaken by the federal judiciary on the role of language disadvantages in the court system. Therefore, in an attempt to eliminate the disadvantages the tribal youth face in rising out of their traditional low-paying jobs, the High Court of Larront, the largest state in Arpenia, 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.

Bellomach's legal community, however, have protested vigorously to Arpenia's rules on court language. The National Attorneys Association of Bellomach called it "unwarranted nationalism", and demanded that the issue be pursued legally.

Both countries exchanged formal diplomatic protests, but to no avail. After six months of subsequent consultations, the negotiators of Arpenia and Bellomach could not come to an agreement, so they decided to invoke the provisions of their Ruritania Free Trade Agreement and proceed to the International Court of Justice.

ISSUES RAISED

I. BELLOMACH IS INTERNATIONALLY RESPONSIBLE FOR ISSUING THE MANDATORY WAIVER AS IT VIOLATES ITS OBLIGATION UNDER THE RURITANIA FREE TRADE AGREEMENT (RFTA)

A. ARPENIA'S CLAIMS ON BEHALF OF RA EPHRAMA ARE ADMISSIBLE

1. Arpenia has the right to exercise diplomatic protection because of effective nationality
2. The exhaustion of local remedies rule is not applicable

B. THE MANDATORY WAIVER AMOUNTS TO ILLEGAL DENIAL OF INTELLECTUAL PROPERTY PROTECTION

1. The waiver violates the World Trade Organization (WTO) rules of RFTA
   a. *It is against the principles of The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*
   b. *It is against the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention)*
2. The waiver is in violation of human rights obligations

II. BELLOMACH'S ACT OF PROCURING THE SERVICES UNDER THE TWO CONTRACTS AMOUNTS TO UNFAIR PROCUREMENT BEHAVIOUR

A. THE PROCUREMENT OF THE SERVICE UNDER THE BRAILLE AND AUDIO CONTRACT VIOLATES THE PRINCIPLE OF DUE PROCESS

B. THE PROCUREMENT OF THE SERVICES UNDER THE TWO CONTRACTS IS IN VIOLATION OF BELLOMACH'S OBLIGATIONS UNDER THE RFTA

1. The technical specifications mentioned in the Refitting Contract are in violation of the WTO Agreement on Government Procurement (GPA)
2. The grant of the Braille and Audio Contract to Helping Limbs is in violation of the GPA and the WTO rules
   a. *The tendering procedure is inconsistent with the GPA*
   b. *The procurement objective of the Braille and Audio contract is a market barrier*
   c. *The granting of the Braille and Audio Contract to Helping Limbs is against the principle of transparency*

III. THE SIX NATIONALS RULE [HEREINAFTER 'THE RULE'] DOES NOT VIOLATE ANY INTERNATIONAL OBLIGATION

A. THE RULE DOES NOT VIOLATE THE GATS COMMITMENTS AND OBLIGATIONS

1. Arpenia has not made any commitments in the Sector of Sporting Services in its GATS schedule of Specific Commitment
2. Arguendo, the Rule does not violate the undertaken commitments in GATS Schedule

B. THE RULE DOES NOT BREACH THE RURITANIA FREE TRADE AGREEMENT

IV. THE IMPOSITION OF RULE ON COURT LANGUAGE BY ARPENIA DOES NOT VIOLATE ITS OBLIGATIONS UNDER THE GATS AND THE RFTA

A. IT DOES NOT VIOLATE THE SPECIFIC COMMITMENTS UNDER THE GATS SCHEDULE UNDERTAKEN BY ARPENIA

1. It is does not violate the undertaken Market access commitments
2. It does not violate the national treatment obligation under Article XVII of the GATS and the RFTA

B. IT CONSTITUTES A DOMESTIC REGULATION PERMITTED WITHIN THE SCOPE OF ARTICLE VI OF THE GATS

1. It does not nullify the commitments under the GATS schedule
2. It constitutes a qualification and not an unnecessary barrier

V. *ARGUENDO*, THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE SECURED UNDER THE EXCEPTION CLAUSE OF GATS

A. THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE JUSTIFIED UNDER ARTICLE XIV (A) OF THE GATS

B. BOTH THE RULES ARE JUSTIFIED BY THE *CHAPEAU* OF ARTICLE XIV OF THE GATS

SUMMARY OF ARGUMENTS

Argument I.

Bellomach is internationally responsible for issuing the mandatory waiver as it violates its obligation under the Ruritania Free Trade Agreement (RFTA). Bellomach's responsibility can be invoked for three reasons.

Firstly, Arpenia's claims on behalf of Ra Ephrama are admissible, as Arpenia has the right to exercise diplomatic protection on account of effective nationality. Further, the rule requiring exhaustion of local remedies is not applicable as the claimant state has directly been injured by the wrongful acts of Bellomach.

Secondly, the mandatory waiver issued by the Government of Bellomach violates the rules of RFTA, as it contravenes the minimum level of intellectual property protection guaranteed under The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

Thirdly, the mandatory waiver also violates the human rights of authors, in that it violates the minimum standards required for protection against anti-competitive measures.

Argument II.

Bellomach's act of procuring the services under the Refitting Contract and the Braille and Audio Contract amounts to unfair procurement behaviour for two reasons.

Firstly, the procurement of the service under the Braille and Audio Contract violates the principle of due process, which requires government decisions to be fair, legitimate and not arbitrary. The lack of transparency in granting the above mentioned contract to Helping Limbs shows a bias towards a national supplier.

Secondly, it violates Bellomach's obligations under RFTA because the technical specifications mentioned in the Refitting Contract are in violation of Article VI of the WTO Agreement on Government Procurement (GPA). Further, it forms a market barrier, lacks transparency and is inconsistent with the tendering procedure of the GPA.

Argument III.

The Six Nationals Rule is not in violation of Arpenia's international obligation under the GATS and RFTA for two reasons.

Firstly, the rule does not violate the GATS Schedule as Arpenia has not enlisted the sub-sector of either sporting services or services of athletes in its Schedule. Therefore, it does not undertake any commitments. *Arguendo*, Arpenia's commitment for the relevant sector and the relevant mode of supply are unbound, thereby permiting Arpenia to maintain measures inconsistent with the market access and national treatment obligation.

Secondly, the rule does not violate the national treatment standards under RFTA as it does not discriminate in favour of the local footballers.

Argument IV.

The imposition of the Rule on Court Language by Arpenia does not violate its international obligations for two reasons.

Firstly, the imposed Rule is consistent with the Specific commitments under Arpenia's GATS schedule as it is a qualitative restriction, thereby not falling into the category of market access restrictions. Also, the Rule does not violate the national treatment obligation as it is not a discriminatory measure.

Secondly, the Rule constitutes a domestic regulation permitted under the scope of Article VI of the GATS as neither has it nullified the commitments undertaken by Arpenia in its GATS schedule nor is it an unnecessary barrier to trade. Rather, it constitutes a qualification necessary to ensure that the disadvantaged tribal youth of Arpenia gains access to courts.

Argument V.

Arguendo, the Six Nationals Rule and the Rule on Court Language are secured under the exception clause of GATS for two reasons.

Firstly, even if the Rules violate Arpenia's obligation under GATS, it is justified under Article XIV of the GATS as the rules further the policy objective of job creation for the disadvantaged youth of Arpenia, in addition to it being necessary to maintain public order.

<u>Secondly</u>, both the rules also fulfil the requirement of the *Chapeau* of Article XIV of GATS, as they do not constitute a disguised restriction on international trade.

ARGUMENTS ADVANCED

I. BELLOMACH IS INTERNATIONALLY RESPONSIBLE FOR ISSUING THE MANDATORY WAIVER AS IT VIOLATES ITS OBLIGATION UNDER THE RURITANIA FREE TRADE AGREEMENT (RFTA)

A. ARPENIA'S CLAIMS ON BEHALF OF RA EPHRAMA ARE ADMISSIBLE

Arpenia's claims on behalf of Ra Ephrama are admissible because Arpenia has the right to exercise diplomatic protection and the exhaustion of local remedies rule is not applicable.

1. Arpenia has the right to exercise diplomatic protection because of effective nationality

Diplomatic protection is an invocation by a State for an injury caused to a national with a view of implementing state responsibility.[1] It is a general rule of international law that it is nationality which gives rise to a right of diplomatic protection. The rule of effective nationality was laid down in the *Nottebohm* case[2] which defined it as an effective link between the State and the national who has been injured. It held that:

> "*According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties along with a close connection with the population of the State conferring nationality than with that of any other State.*"

Ra Ephrama has been a permanent resident of Arpenia, and hence there is a more genuine connection of existence, interests and sentiments, along with a closer connection with the population of Arpenia, as compared to Bellomach.

Arguendo, even if Ra Ephrama is a dual national, international law permits the exercise of diplomatic protection by one state of nationality against another state of nationality, provided the Claimant state establishes that its nationality is predominant both at the time of injury as well as at the date of official presentation of the claim.[3] The word predominance conveys the

[1] Draft Articles on Diplomatic Protection, art.1 (1), G.A. Res. 61/35, Annex, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (Dec. 4, 2006) [hereinafter Draft Articles on Diplomatic Protection].
[2] Nottebohm (Liech.v. Guat.), 1955 I.C.J. 4, ¶ 23 (Apr. 6).
[3] Draft Articles on Diplomatic Protection, *supra* note 1, art. 7; Canevaro Claim (It. v. Peru), 11 R.I.A.A. 397 (1912); Hein case of 26 April and 10 May 1922 (Anglo-Ger. Mixed Arb. Trib.), 1 Annual Digest of Public International Law Cases 148, 216 (1922); Blumenthal case (Fr.-Ger. Mixed Arb. Trib.), 3 Recueil des Décisions

element of relativity and indicates that an individual has stronger ties with one state rather than the other. Also the factors which determine predominance includes *inter alia*, habitual residence, participation in social and public life etc.[4] In the instant case, Arpenia is the predominant state as Ra Ephrama is a permanent resident and hence has stronger ties with Arpenia in comparison to Bellomach.

It has also been held that the principle which excludes diplomatic protection in the case of dual nationality must yield before the principle of effective nationality, whenever such nationality is that of the claiming State and there is an existence of predominant ties.[5] Further, when there is a conflict of nationality in case of dual nationals, the nationality recognized must either be the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.[6] As Ra Ephrama is habitually a resident of Arpenia and has closer ties with Arpenia than with Bellomach, Arpenia is his state of nationality.

2. The exhaustion of local remedies rule is not applicable

Under customary international law, all local remedies must be pursued within the state allegedly responsible before an international claim is admissible.[7] However this rule does not apply in cases where the Claimant state is directly injured by the wrongful act of another state, as here the state has a distinct reason of its own for bringing an international claim.[8]

A State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself.[9] It has also been held by the Permanent Court of

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des Trib. Mixtes 616 (1924); Pinson case (Fr.-Mex. Mixed Cl. Comm'n), 4 Annual Digest of Public International Law Cases 297-301 (1927).

[4] Special Rapporteur on Diplomatic Protection, *First Rep. on Diplomatic Protection,* Int'l Law Comm'n, ¶ 153, U.N. Doc. A/CN.4/506 (Mar. 7, 2006) (by John R. Dugard).

[5] Merge claim (It.-U.S. Conciliation Comm'n), 14 R.I.A.A. 236, 247 (1955).

[6] Hague Convention on Certain Questions Relating to Conflict of Nationality Laws, art. 5, Apr. 13, 1930, 179 L.N.T.S 4137.

[7] Draft Articles on Diplomatic Protection, *supra* note 1, art. 14 (1); Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 44 (a), G.A. Res. 56/83, Annex, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Vol. 1) (Dec. 12, 2001); Case concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15, ¶ 50 (Jul. 20); Claim of Finnish ship owners against Great Britain in respect of the use of certain Finnish vessels during the war (Fin. v. U.K.), 2 R.I.A.A. 1479, 1502 (1934).

[8] Draft Articles on Diplomatic Protection, *supra* note 1, art. 14 (3).

[9] EMER DE VATTEL, THE LAW OF NATIONS OR, PRINCIPLES OF NATURE LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE AND SOVERIGNS 53 (Béla Kapossy & Richard Whitmore eds., 2008).

International Justice[10] that by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right. Therefore Arpenia by taking up the case of Ra Ephrama is in turn asserting its own right.

Even if the claim is a mixed one, in the sense that it contains elements of both injury to the state as well as injury to the nationals of the state, the International Court of Justice in the *Hostages* case,[11] *Arrest Warrant of 11 August 2000* case,[12] and in the *Avena* case,[13] has treated them as a direct violation of international law, since in all these cases along with there being a direct injury to the state, there was also an injury to a national. The court while coming to this conclusion held it as a direct injury, because of the "interdependence of the rights of the State and individual rights." Therefore, assuming but not accepting that Arpenia's claim is not a direct one, it is still admissible pursuant to the abovementioned cases.

B. THE MANDATORY WAIVER AMOUNTS TO ILLEGAL DENIAL OF INTELLECTUAL PROPERTY PROTECTION

The mandatory waiver amounts to illegal denial of intellectual property protection as it violates the terms of RFTA which includes all WTO rules *inter alia* rules of the Agreement on Trade Related Aspects of Intellectual Property Rights [hereinafter TRIPS] and the Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention]. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is recognised as a human right obligation, which has also been breached by the mandatory waiver.

[10] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, ¶ 12 (Aug. 30); Panevezys-Saldutiskis Railways (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, ¶ 16 (Jun. 30).
[11] Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Ir.), 1979 I.C.J. 23, ¶¶ 90-92 (Dec. 24).
[12] Case concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 8, ¶ 80 (Feb. 14).
[13] Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 40 (May 18).

1. The waiver violates the World Trade Organization (WTO) rules of RFTA

a. It is against the principles of The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members.[14] Protection under TRIPS has been defined as to include *inter alia* matters affecting the availability, enforcement and use of intellectual property rights.[15] In the instant case the mandatory waiver on the Braille and Audio texts affects the availability of copyright protection, hence denying the minimum level of protection guaranteed under TRIPS.

Intellectual property recognizes certain exceptions to copyright protection which were first applied under the Berne Convention[16] and have now been extended into the TRIPS agreement.[17] These exceptions lay down a three step test to determine the legitimacy of an exception to copyright protection, all of which must be satisfied cumulatively.

The first test is that the exceptions must be limited only to certain special cases which mean that a limitation or an exception should be clearly defined in national legislation. In the instant case, the legislation passed by the Bellomach parliament to make public buildings wheelchair accessible and sight and hearing friendly[18] does not make any mention of the mandatory waiver. Further as was held in the case of *Robin Ray v. Classic FM*[19], while interpreting a contract, a court cannot introduce terms to make it fairer or more reasonable. Thus, the mandatory waiver does not satisfy the first test.

The second and the third test states require that the exceptions must not conflict with the normal exploitation of the work and it must not unreasonably prejudice the legitimate interests of the author. Since copyright protection has been denied to Ra Ephrama, he has been deprived of property rights such as the right to determine what will be done with the

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[14] GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 32-33 (E. Elgar ed. 2008); UNDERSTANDING THE WTO 2008, WORLD TRADE ORGANIZATION 41 (4th ed. 2008).

[15] Agreement on Trade Related Aspects of Intellectual Property Rights, arts. 3-4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

[16] Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sep. 9, 1886, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

[17] TRIPS, *supra* note 15, art. 13.

[18] Compromis, ¶ 8.

[19] Robin Ray v. Classic FM, (1998) F.S.R. 622,643-644; Belize v. Belize Telecom Ltd., (2009) U.K.P.C. 10.

object,[20] or the exclusive right to reproduce, adapt or distribute,[21] thus prejudicing the legitimate interest of the author. Hence, the second and the third test too have also not been satisfied, thereby being inconsistent with the exception clause.

b. It is against the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention)

All WTO members are required to comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto,[22] since RFTA encompasses all WTO rules and principles[23] and violating the provisions of the Berne Convention mentioned hereinabove would constitute a violation under RFTA.

The Berne Convention recognizes that copyright in a work should be owned by the author as a reward to his skill, labour and capital in producing the work.[24] It also recognizes the author's economic rights[25] which are manifested through the right of reproduction, adaptation, cinematic production, translation and other types of alterations to the work.[26] However, the mandatory waiver is against the economic rights of an author as he has been denied the right of translation.

The Berne Convention also recognises the moral rights and the right to integrity. These rights include the right to be identified as an author and to protect the work from mutilation or distortion,[27] and the prerogative of objecting to any modification of the work that authors consider derogatory or prejudicial. States are also required to provide for adequate legislation and regulation to protect the moral and the material interest of the author[28], and the mandatory waiver is against this.

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[20] J. WALDRON, THE RIGHT TO PRIVATE PROPERTY 42 (Clarendon Press ed. 1988).
[21] D.S. Cioliono, *Why Copyrights are Not Community Property*, 42 LA. L. REV. 127, 133 (1999).
[22] TRIPS, *supra* note 15, art. 9.1; Panel Report, *United States – Section 110 (5) of U.S. Copyright Act*, WT/DS/160 (Jun.15, 2000).
[23] Compromis, ¶ 10.
[24] Berne Convention, *supra* note 16, art. 1; Copyright and Designs Law: Rep. of the Comm. to Consider the Law on Copyright and Designs, ¶ 538 (1976) [hereinafter Copyright and Designs Law Committee Report].
[25] Berne Convention, *supra* note 16, art, 9 (1).
[26] Copyright and Designs Law Committee Report, *supra* note 24; TRIPS, *supra* note 15, arts. 12, 14(1), 8(1); Redwood Music Limited v. Chappell & Co Ltd, (1982) R.P.C. 109.
[27] Berne Convention, *supra* note 16, art. 6; Comm'n on Human Rights, Working Group on the Declaration on Human Rights, Rep. on its 2nd Sess., Dec. 2 – 17, 1947, ¶ 16, U.N. Doc. E/CN.4/57 (Dec. 10, 1947); JAYSHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 208 (Oxford ed. 2001).
[28] Comm. on Economic, Social and Cultural Rights, *General Comment No. 17*, ¶ 18(a), U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter General Comment No. 17].

2. The waiver is in violation of human rights obligations

Human rights are regarded as the first responsibility of Governments.[29] The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production, of which he or she is the author, is a human right.[30] Human rights, sets out the minimum standards required for protection against anti-competitive measures in the same way as TRIPS provides the minimum standards for intellectual property.[31] Further, in order not to render this provision devoid of any meaning, the protection afforded needs to be effective.[32] The mandatory waiver amounts to violation of human rights, because the right to benefit from any literary or artistic production, *in toto,* copyright protection has been denied to him.

One of the tests adopted by British courts to determine whether a work is entitled to copyright protection is that of the *de minimis* test, which demands that such work must show 'skill, judgment and labour'.[33] In the United States, the creator of the work is entitled to have his effort and expenses protected through the doctrine of '*the sweat of the brow'*.[34] The French Statute declares that all 'works of the mind, whatever their kind, form of expression, merit or purpose' will be protected.[35] Further, under the French code, an employee who creates a work during the employment retains copyright in his work.[36] The German law is even stricter whereby the author of the work is always the creator of a work.[37] Therefore, in most jurisdictions, the ownership of copyrights usually vests in the author of the work.[38] In the instant case the mandatory waiver denies this right recognised by civilized nations.

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[29] World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, art. 1, U.N. Doc. A/CONF.157/23 (July 12, 1993).
[30] International Covenant on Economic, Social and Cultural Rights, art. 15 (1) (c), Dec. 16, 1966, 993 U.N.T.S. 3; Universal Declaration of Human Rights, art. 27 (2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); American Declaration of the Rights and Duties of Man, art. 13 (2), 43 AM. J. INT'L L. SUPP. 133 (1949) (May 2, 1948); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 14 (1) (c), Nov. 17, 1988; Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1 Nov. 4, 1952.
[31] High Commissioner on Human Rights, *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*: Comm'n on Human Rights, ¶ 8, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001).
[32] General Comment No. 17, *supra* note 28, ¶ 10.
[33] Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., (1964) 1 All E.R. 465.
[34] Feist Publications Inc v. Rural Telephone Service Co., (1991) 111 S. Ct 1282.
[35] Loi relative au code de la propriété intellectuelle (French Intellectual Property Code), arts. L.112-1, L.112-2, L.112-3, July 1, 1992.
[36] *Id.*, arts. L.111-1, L.113-1.
[37] Urheberrechtsgesetz (UrhG) (German Copyright Law), art. 7, Sep. 9, 1965.
[38] GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 84 (E. Elgar ed. 2008).

II. BELLOMACH'S ACT OF PROCURING THE SERVICES UNDER THE TWO CONTRACTS AMOUNTS TO UNFAIR PROCUREMENT BEHAVIOUR

A. THE PROCUREMENT OF THE SERVICES UNDER THE BRAILLE AND AUDIO CONTRACT VIOLATES THE PRINCIPLE OF DUE PROCESS

The principle of due process requires government decisions to be fair and reasonable, furthering a legitimate governmental objective,[39] as against an arbitrary government decision.[40] It is concerned with how the decision is made rather than its substance, thereby precluding a decision maker from acting in circumstances in which a fair minded observer would have a reasonable apprehension of bias.[41]

Due process as an obligation is imposed in a number of human rights treaties[42] and as a standard in a number of bilateral trade treaties.[43] One of the most common standards included in such treaties is 'fair and equitable treatment', which requires that state acts, in all circumstances and instances must be in such a way that the foreigner is always treated in a fair and equitable manner.[44] An extensive range of WTO provisions also imposes due process requirements on Members in the conduct of their domestic proceedings,[45] which establishes certain minimum standards for transparency and procedural fairness in the administration of trade laws[46]. Further, WTO tribunals also use the principle of due process for effective

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[39] BLACK'S LAW DICTIONARY 516-17 (4th ed. 1968).

[40] KERMIT H. HALL, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 236 (2d ed. 1992); AUSTRALIAN LEGAL DICTIONARY 929, 1129 (4th ed. 1997).

[41] Chief Constable of North Wales Police v. Evans, (1982) 3 All E.R. 141; Re Poyser and Mills Arbitration, (1964) 2 Eng. Rep. 467, 468 (Q.B.); Earl of Iveagh v. Minister of Housing and Local Government, (1962) 2 Eng. Rep. 147, 160 (Q.B.); Westminster City Council v. Great Portland Street Estates plc, (1985) A.C. 661.

[42] Geneva Convention relative to the Treatment of Prisoners of War, arts. 104, 99, 105, Aug. 12, 1949, 75 U.N.T.S. 135; International Covenant on Civil and Political Rights, arts. 14,15, Dec. 16, 1966, 999 U.N.T.S. 171; The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; The American Convention on Human Rights, art. 8.1, Nov. 21, 1969, 1144 U.N.T.S. 143.

[43] Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments On Investment Protection, in* RECUEIL DES COURS: COLLECTED SOURCES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 251, 324 (Academie De Droit International De La Haye ed. 1997).

[44] Christopher Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVEST. TRADE 357 (2005).

[45] General Agreement on Trade in Services, art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]; General Agreement on Tariffs and Trade, art. X, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT]; TRIPS, *supra* note 15, art. 41 – 42.

[46] GATT, *supra* note 45, art. X: 3(a); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 183, WT/DS58/AB/R (Oct. 12, 1998); RAJ BHALLA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 452-53 (Sweet & Maxwell eds., 2005).

resolution of trade disputes,[47] which states that the rules of due process takes precedence over the interest of other stakeholders such as NGO's and corporations.

In the instant case the manner in which the Braille and Audio Contract was given to Helping Limbs goes against the principle of due process, as there were no reasons mentioned for the same and it shows a bias towards national suppliers. Further, Sight and Sound [hereinafter S&S], an Arpenian company, were not even requested for a bid[48], and the same was given to Helping Limbs, a local NGO supplier without there being any transparency or procedural fairness.

B. THE PROCUREMENT OF THE SERVICES UNDER THE TWO CONTRACTS IS IN VIOLATION OF BELLOMACH'S OBLIGATIONS UNDER THE RFTA

The RFTA encompasses the WTO Agreement on Government Procurement [hereinafter GPA] all WTO rules and principles are RFTA rules and principles.[49] The provisions of the GPA only apply with respect to the procurement of goods and services by the entities that are listed in the three annexes if (a) the value of the procurement exceeds the certain specified threshold; and (b) the goods or services that are involved are not exempted from the coverage of the agreement. The GPA is applicable in the instant case, as (1) the Refitting Contract and the Braille and Audio Contract is being procured by the Government of Bellomach, a central government entity,[50] and (2) the value of the contract is B$ 2 million[51] and B$ 32,000[52] respectively, thereby meeting the minimum threshold requirement,[53] as specified in the Bellomach's GPA Schedule of specific commitments.[54]

1. The technical specifications mentioned in the Refitting Contract are in violation of the WTO Agreement on Government Procurement (GPA)

The technical specifications of the Refitting Contract[55], must meet certain requirements under the GPA. Firstly it is required that technical specifications must be in terms of performance

[47] Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations*, ¶ 166, WT/DS/108/AB/RW2 (Feb. 13, 2006).
[48] Compromis, ¶ 9.
[49] Compromis, ¶ 10.
[50] Agreement on Government Procurement, Annexure 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 33 I.L.M. 154 [hereinafter GPA]; Compromis, Annexure 5.
[51] Compromis,¶ 6.
[52] Compromis,¶ 7.
[53] GPA, *supra* note 50, art. 1.
[54] Compromis, Annexure 5.
[55] GPA, *supra* note 50, art. VI.

rather than a design criteria.[56] Secondly the specifications must be based on international standards.[57] Thirdly there must be no reference to a particular trademark, patent, design or type and even if it is, words such as "or equivalent" must be used.[58] In the instant case, the tender for the Refitting Contract explicitly states a design requirement,[59] stating that the installations must in accordance with local aesthetics in terms of building style and neighbourhood tastes.[60] The Refitting Contract also makes a direct reference to "Virtual Eye",[61] a patented innovation of S&S, an Arpenian company without the use of words such as "or equivalent". Thus none of the above requirements have been satisfied.

2. The grant of the Braille and Audio Contract to Helping Limbs is in violation of the GPA and the WTO rules

The granting of the Braille and Audio Contract to Helping Limbs, to the exclusion of S&S is inconsistent with the GPA, as it forms a market barrier and goes against the principle of transparency, thereby constituting a *de facto* discrimination.

a. The tendering procedure is inconsistent with the GPA

As per the provisions of GPA, when a procuring entity uses a method of procuring other than open tendering, they shall maintain a record of procurement proceedings along with a statement of reasons and circumstances upon which it relied to justify the use of that method.[62] Since the Braille and Audio contract was not subject to an open tender,[63] Bellomach should have maintained a record of procurement proceedings along with a statement of reasons and circumstances upon which it relied to justify the use of that method, which it failed to do.

Further, in the absence of an open tender, a procuring entity may use a limited tendering procedure or a selective tendering procedure.[64] However the main objective of the GPA is to

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[56] GPA, *supra* note 50, art. VI: 2 (a).
[57] GPA, *supra* note 50, art. VI: 2 (b).
[58] GPA, *supra* note 50, art. VI: 3; UNCITRAL Model Law on Public Procurement, art. 10(4), G.A. Res. 2205 (XXI), Annex, U. N. GAOR, 66th Sess., Supp. No. 17, U.N. Doc. A/66/17 (Jul. 1, 2011) [hereinafter UNCITRAL Model Law].
[59] Compromis, ¶ 6.
[60] *Id.*
[61] *Id.*
[62] UNCITRAL Model Law, *supra* note 58, arts. 25, 28 (3).
[63] Compromis, ¶ 7.
[64] GPA, *supra* note 50, arts. VII: 3(b) - 3(c).

subject government procurement to international competition[65] and limited tendering is a non competitive procedure,[66] as only few potential suppliers are contacted by the procuring entity individually,[67] thereby avoiding maximum possible competition. In the instant case, if the procurement of the Braille and Audio Contract is through limited tendering, it excludes competition and is a protection veil to domestic suppliers, which is prohibited under GPA.[68]

Selective tendering procedure, on the other hand, is one where participation is restricted only to certain invited suppliers,[69] but where entities are required to maintain lists of qualified suppliers along with the eligibility criteria that have to be fulfilled by the applicants.[70] No such lists or eligibility criteria have been mentioned in the instant case. Further, limitation on participation must be clearly established by procurement regulation or under any other law of the procuring state. [71] In the instant case, the legislation passed by Bellomach did not contain any eligibility or participation criteria, thereby establishing that the tendering procedure was inconsistent with the GPA.

b. The procurement objective of the Braille and Audio contract is a market barrier

A procurement objective which is of a non-economic purpose and which provide domestic industry with a competitive advantage serve as barriers to nation's procurement market,[72] and goes against the GPA objective of subjecting government procurement to international competition.[73] In the instant case, the procurement of the Braille and Audio contract was for a non-economic purpose, the purpose being the welfare of the disabled people and hence it constitutes a market barrier.

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[65] BERNARD. M. HOEKMAN & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANISATION'S AGREEMENT ON GOVERNMENT PROCUREMENT 4 (The World Bank ed. 1995); GPA, *supra* note 50, arts. VII (2), X(1), XV (1); UNCITRAL Model Law, *supra* note 58, preamble ¶ (c), arts. 12, 24, 25(4) (a), 28, 31.
[66] Petros C. Mavroidis & Bernard. M. Hoekman, *The WTO's Agreement on Government Procurement: expanding disciplines, declining membership*?, 2 PUB. PROC. L. REV. 63, 72 (1995) [hereinafter Mavroidis & Hoekman].
[67] GPA, *supra* note 50, art, VII: 3 (c).
[68] GPA, *supra* note 50, art. XV: (1).
[69] GPA, *supra* note 50, arts. VII: 3(b), X.
[70] Mavroidis & Hoekman, *supra* note 66, at 74.
[71] UNCITRAL Model Law, *supra* note 58, art. 8(2).
[72] SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 13-19 (Nobert Horn & Richard M. Buxbaum eds., 2003) [hereinafter ARROWSMITH]; Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529 (2007).
[73] Mavroidis & Hoekman, *supra* note 66, at 69.

Non-economic objectives are typically used to identify favoured contractors which can create substantial barriers and may discriminate in favour of domestic industry.[74] Further, when these objectives are integrated into a procurement procedure, they almost inevitably increase the contracting officials' discretion, thereby diminishing transparency and increasing corruption,[75] and hence going against established principles of government procurement.

c. The granting of the Braille and Audio Contract to Helping Limbs is against the principle of transparency

The principles of transparency along with non-discrimination are the two most important principles governing government procurement;[76] which also finds a mention in the preamble to the GPA, thereby constituting an important source for treaty interpretation.[77] A transparent procurement process is defined as one which is characterized by the existence of clear rules and clear means to verify that those rules are followed.[78] An important parameter of transparency is that the rules which are to be applied in conducting procurements should be made clearly known to the effected parties.[79] In the instant case the rules applicable in procuring the Braille and Audio Contract lacked transparency because first there were no clear rules establishing the preference of Helping Limbs over other bidders and secondly even if any of the rules existed, it was not clearly known the reason for S&S not being requested for a bid.

Further, governments using procurement for economic and social policies have a greater need to ensure transparency.[80] Since the procurement of the abovementioned contract was for a social policy, that of furthering the interests and welfare of the disabled people, there was a greater need to ensure transparency which was denied.

Transparency forms a part of almost all bilateral and regional free trade agreements notified to the WTO because lack of transparency constitutes a de facto discrimination against foreign

[74] ARROWSMITH, *supra* note 72, at 15.
[75] *Id.* at 327; Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103, 109 (2002).
[76] UNCITRAL Model Law, *supra* note 58, preamble ¶ (d), art. 28 (2); GPA, *supra* note 50, preamble ¶ 2.
[77] Vienna Convention on the Law of Treaties, art. 31 (2), May 23, 1969, 1155 U.N.T.S. 331.
[78] WESTRING & JADOUN, PUBLIC PROCUREMENT: MANUAL FOR CENTRAL AND EASTERN EUROPE 6 (Joseph S & Harry P. Hatry eds., 1996).
[79] Sue Arrowsmith, *Towards a Multilateral Agreement on transparency in Government Procurement*, 47(4) I.C.L.Q., 793, ¶ 10 (1998).
[80] *Id.*, ¶ 7.

suppliers.[81] It is an important procurement related commitment. With an aim of avoiding *de facto* discrimination, a number of GPA provisions aim at ensuring transparency such as the need for publicity for procurement procedure[82] and even if the participation of suppliers/contractors is limited to those on qualification lists, the existence of lists and relevant details are required to be published.[83] In the instant case the procurement of the Braille and Audio contract lacked transparency as there was no invitation for S&S to participate in the bid and there was also no mention of any qualification list which excluded S&S from participating, hence constituting a *de facto* discrimination.

III. THE SIX NATIONALS RULE [HEREINAFTER 'THE RULE'] DOES NOT VIOLATE ANY INTERNATIONAL OBLIGATION

A. THE RULE DOES NOT VIOLATE THE GATS COMMITMENTS AND OBLIGATIONS

The sub – sector of 'Sporting Services' and 'Services of Athletes' have not been inscribed in Arpenia's GATS Schedule of Specific Commitments [hereinafter the GATS Schedule] and hence the above mentioned sub – sectors remain uncommitted. Moreover, the Rule is also in consonance with Arpenia's undertaken commitments under the GATS Schedule.

1. Arpenia has not made any commitments in the Sector of Sporting Services in its GATS schedule of Specific Commitment

The GATS Schedule is a legal record of the specific commitments of each WTO member and is annexed to GATS. It is thus considered to be an integral part of GATS and binding on all WTO members.[84] A member does not grant national treatment or market access to foreign services or service suppliers in a particular sector unless it specifically enters a commitment to do so in its GATS schedule.[85] In other words, market access and national treatment commitments apply only to the sectors or sub-sectors inscribed in the schedule.[86] Therefore, Arpenia's obligations with respect to national treatment and market access are restricted only to the subsector explicitly enlisted in its GATS schedule.

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[81] Simon J. Evenett & Bernard Hoeckman, *The WTO and Government Procurement*, 19(3) E.J.I.L. 617 (2008).
[82] GPA, *supra* note 50, art. IX.
[83] GPA, *supra* note 50, art. IX: (9).
[84] GATS, *supra* note 45, art. XX.
[85] Council for Trade in Service, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, ¶ 3, S/L/92 (Mar. 28, 2001) [hereinafter Scheduling Guidelines].
[86] *Id.*, ¶ 25.

GATS defines the term "sector" of a service to mean, "*with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule*" or "*otherwise, the whole of that service sector, including all of its subsectors.*"[87]

In the instant case, Arpenia's GATS Schedule only includes the subsector of 'Entertainment, Recreational and Others' and the words 'sporting service' have been omitted from the 'sector list' column.[88] As the sector of sporting services has not been specified in the GATS Schedule, it does not fall within the definition of the term 'sector' of a service and thus, Arpenia does not maintain any commitments in the sector of sporting services.

Further, the phrase 'Recreational and others' cannot be construed to include the sporting services as the legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled.[89] The Guidelines for the Scheduling of Specific Commitments under GATS makes it clear that the members must include only the sectors in respect to which commitments are to be undertaken and as the sporting sector is not being inscribed, it remains uncommitted.

The WTO 'Service Sectoral Classification List' listed 'Sporting and other recreational services' as a sub sector of "(10) Recreational, Cultural and Sporting Services".[90] This corresponds to entry number 965 in the United Nations Central Product Classification [hereinafter CPC].[91] However, CPC entry no. 96 is subdivided into various other categories, including 'Sports and recreational sports services'[92] and 'Services of athletes and related support services'.[93] The CPC entry no. 966 'Services of athletes and related support services' includes the sub class of 'services of athletes' which is explained as services provided by individual own-account sportsmen and athletes.[94]

The footballers from Bellomach in the instant case are covered under the 'services of athletes' as per the above mentioned definition and therefore, even if the 'sports services' are

[87] GATS, *supra* note 45, art. XXVIII (e).
[88] Compromis, Annexure 2.
[89] Scheduling Guidelines, *supra* note 85, ¶ 23.
[90] Council for Trade in Services, *Note by the WTO Secretariat: Service Sectoral Classification List*, MTN.GTS/W/120 (July 10, 1991).
[91] UN Statistical Committee, Central Product Classification, Statistical Papers Series No. 77, ver. 2.0, (Dec. 31, 2008.
[92] *Id.*, Entry no. 965.
[93] *Id.*, Entry no. 966.
[94] *Id.*, Entry no. 96610, Explanatory notes, 389.

included within the sector of 'Entertainment, Recreational and Others', it still does not include the sub-sector of 'services of athletes'[95]

2. *Arguendo*, the Rule does not violate the undertaken commitments in GATS Schedule

The present case of foreign footballers coming to Arpenia in order to play in National Leagues is covered under the Mode 4 of supply[96], entitled as 'presence of natural person'. Presence of natural person has been defined as *'Service delivered within the territory of the Member, with supplier present as a natural person'*.[97]

In the instant case, Arpenia's commitment in the subsector of the 'Entertainment, Recreational and Others' is 'unbound' in both the 'market access' column as well as the 'national treatment' column, with respect to the supply through presence of natural person.[98] This in effect means that Arpenia remains free in the 'given sector' and the 'given mode of supply' to introduce or maintain measures inconsistent with 'market access' or 'national treatment'.[99]

Therefore, even if any rule with respect to the foreign footballers playing in National League Competitions, is maintained by Arpenia, which is *prima facie* inconsistent with the national treatment and market access, it will not constitute a breach of its obligation under GATS.

B. THE RULE DOES NOT BREACH THE RURITANIA FREE TRADE AGREEMENT

The Rule does not constitute *de facto* discrimination against the footballers from Bellomach and is therefore, consistent with the national treatment obligation under RFTA. Moreover, as the rule aims to achieve a public policy objective, it is justified under Article XIV of GATS.

Article V of GATS entitled 'Economic Integration', regulates all Free trade agreement between or among member states. Pursuant to this, an economic integration agreement must provide for the 'absence or elimination of substantially all discrimination'.[100] This

[95] *Id.*, Entry no. 9661.
[96] GATS, *supra* note 45, art. 1 (2) (d).
[97] Scheduling Guidelines, *supra* note 85, ¶ 26; GATS, *supra* note 45, art. 1 (2) (d).
[98] Compromis, Annexure 2.
[99] Scheduling Guidelines, *supra* note 85, ¶ 46.
[100] GATS, *supra* note 45, art. V: 1(b); CHIRSTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 113 (Cambridge Univ. Press ed. 2000) [hereinafter ARUP].

requirement is provided in the sense of national treatment,[101] between the parties, through (a) elimination of existing discriminatory measures, and/or (b) prohibition of new or more discriminatory measures. The RFTA being an economic integration agreement prohibits its members from introducing discriminatory measures. However, the scope of permissible discriminatory measures includes exceptions permitted under Article XI, XII, XIV and XVI *bis* of the GATS.

In the instant case, RFTA adopts all WTO rules and commitments as FTA rules and commitments.[102] The national treatment obligation under the RFTA is the same as under the GATS. Article XVII of the GATS, entitled 'National Treatment', demands that Foreign Service suppliers be accorded no less favourable treatment than that accorded to local counterparts. A member may grant national treatment by providing formally identical treatment or formally different treatment,[103] as long as it does not modify the conditions of competition in favour of domestic service suppliers.

In the instant case, Arpenia's Federal Football Board [hereinafter FFB] with an aim of encouraging national loyalties, passed a rule that to play in national league competitions, at least six of the players on the field at any point in the game must be players that fulfill the qualifications for the national team, *i.e.* that the player must either be citizens or have resided in Arpenia for at least ten of the past fifteen years to qualify as "Arpenian" for national league games.[104]

This Rule does not represent discrimination as it applies only to the playing XI and clubs remain free to recruit players who are ineligible for the national team. Further, the Rule restricts neither the signing nor the work of footballers as they can still be employed by the Leagues. Also, the Rule does not discriminate between foreign and local footballers as it gives an equal opportunity to the foreign footballers to participate in national league games for those who have stayed in Arpenia for 10 years. Therefore, the Rule does not modify the conditions of competition against the footballers from Bellomach and accordingly it is not a discriminatory measure violating national treatment obligation.

[101] GATS, *supra* note 45, art. XVII.
[102] Compromis, ¶ 10.
[103] GATS, *supra* note 45, art. XVII: 2.
[104] Compromis, ¶ 3.

IV. THE IMPOSITION OF RULE ON COURT LANGUAGE BY ARPENIA DOES NOT VIOLATE ITS OBLIGATIONS UNDER THE GATS AND THE RFTA

A. IT DOES NOT VIOLATE THE SPECIFIC COMMITMENTS UNDER THE GATS SCHEDULE UNDERTAKEN BY ARPENIA

The rule on court language is neither a market access restriction nor a discriminatory measure and therefore, it does not violate Arpenia's commitments under the GATS schedule.

1. It does not violate the undertaken Market access commitments

The market access restrictions specified in Article XVI of GATS are only for service sectors explicitly listed in a Member's schedule in the 'market access' column. Market access restrictions are, in principle, prohibited unless they are explicitly listed in the Member's schedule. The measures prohibited by Article XVI range from quantitative restrictions[105] to quantitative-type limitations.[106] Domestic regulations falling outside the scope of any of the six categories of measures prohibited under Article XVI: 2 may be imposed or maintained without violating Article XVI: 1, even if such regulations have the effect of limiting the supply of the service.[107]

In the instant case the High Court of Larront, which is the largest state in Arpenia 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. This rule is neither a quantitative restriction nor a quantitative – type limitation. Also, it does not have the effect of such restrictions. Therefore, the present rule does not fall within the category of market access barriers as enumerated in Article XVI: 2.

Further, the qualitative restrictions are not covered by Article XVI as it only covers quantitative restrictions and quantitative-type limitations.[108] However, the rule on court language, irrespective of their purported regulatory purpose or intent, does not put a maximum limitation on Legal Services in Arpenia. Rather, it imposes minimum requirements as to how legal services must be supplied and qualifies as a qualitative restriction. Therefore,

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[105] GATS, *supra* note 45, art. XVI: 2 (a)-(d).
[106] GATS, *supra* note 45, art. XVI: 2(e).
[107] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.256-6.257, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S. – Gambling Panel Report].
[108] *Id.*, ¶ 6.327.

it does not impose any 'market access barrier' that would restrict access to the market beyond the level specified in the GATS Schedule.

2. It does not violate the national treatment obligation under Article XVII of the GATS and the RFTA

Article XVII of the GATS, which is entitled 'National Treatment' highlights that a country may not discriminate between its own service providers and the service providers of other countries, except as noted on the country's GATS Schedule.[109] As asserted earlier, the RFTA also puts a national treatment obligation pursuant to Article V of the GATS, in the essence of prohibiting discrimination against foreign lawyers.[110]

The first type of supply of service in the GATS occurs when the supplier or lawyer stays in his or her home country and supplies services to a client abroad. The second type occurs when a client receives legal advice in the lawyer's country. The last two types deal with physical presence in a foreign country.[111] While these definitions include lawyers practicing in foreign jurisdictions, only those nations that have made specific commitments on legal services are bound to accept it under the GATS provisions.[112]

In the instant case, on the first three types of supply in the Legal Services Sector, Arpenia has made full commitments meaning that the foreign lawyers will be granted treatment no less favourable then that accorded to its own legal personnel whereas the commitments on the fourth mode of supply are unbound, which means, Arpenia can introduce measure inconsistent with Article XVII.

Further, a Member may meet the requirement of national treatment by according to Foreign Service suppliers, either formally identical treatment or formally different treatment to that it accords to its own like service suppliers. In the instant case, the rule on court language accords identical treatment to both foreign as well as domestic lawyers. Also, the rule does not modify the conditions of competition in favour of domestic lawyers because the lawyers from Bellomach are on the same footing as the lawyers from Arpenia with respect to the tribal languages. Therefore, the rule meets the requirement of national treatment obligation.

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[109] GATS, *supra* note 45, art. XVII: 1.
[110] GATS, *supra* note 45, art. V: (1) (b).
[111] Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269, 282 (1994).
[112] *Id.* at 283.

B. IT CONSTITUTES A DOMESTIC REGULATION PERMITTED WITHIN THE SCOPE OF ARTICLE VI OF THE GATS

Article VI:5 only prohibits licensing, qualification, and technical requirements that nullify specific commitments made by the WTO Member concerned under Articles XVI-XVIII by means of unnecessary barriers to trade.[113] In the instant case none of above mentioned prohibitions have been imposed through the Rule on court language.

1. It does not nullify the commitments under the GATS schedule

Domestic regulations assume that products or services can have market access. It does not *per se* prohibit them but rather regulates them.[114] As a result, domestic regulation, in principle, violates trade rules only when it discriminates against imports[115] or when it is more trade restrictive than necessary to meet its stated legitimate objective.[116]

As mentioned above, the Court language rule is a domestic regulation that *prima facie* applies to both foreign as well as domestic providers. It is imposed in relation to the quality of the service supplied and hence, does not discriminate against the foreign supplier. Also, the Court language rule does not affects the market access of foreign lawyers. Thus, it does not nullify the commitments under the GATS Schedule.

2. It constitutes a qualification and not an unnecessary barrier

Member nations have the right to regulate their service sectors, provided the manner in which the markets are regulated is reasonable.[117] GATS provides that measures taken by the Members relating to qualification requirements, technical standards and licensing requirements [hereinafter QTL requirements] shall aim to ensure that such requirements are a) based on an objective and transparent criteria, such as competence and the ability to supply

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[113] GATS, *supra* note 45, art. VI: 4.
[114] Joost Pauwelyn, *Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4(2) WORLD T. R. 131, 140 (2005) [hereinafter Pauwelyn].
[115] GATS, *supra* note 45, art. XVII.
[116] The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, art.5.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493; Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 U.N.T.S 120; GATS, *supra* note 45, art. VI: 4, 5; Council for Trade in Service, *Note by the Secretariat: Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶ 3, S/C/W/96 (Mar. 1, 1999) [hereinafter Council for Trade in Service, *Note by the Secretariat: Article VI:4 of the GATS*].
[117] Mary E. Footer, *The International Regulation of Trade in Services Following Completion of the Uruguay Round*, 29 THE INT'L LAWYER 453, 467 (1995).

the service; and b) not more burdensome than necessary to ensure the quality of the service.[118]

Although the GATS itself does not define the meaning of QTL requirements under Article VI, the WTO Secretariat clarified that they regulate quality rather than quantity. Qualification requirements, "*normally relate to matters such as education, examination requirements, practical training, experience or language requirements*",[119] ensuring the quality of the service provider.[120]

A distinction must be drawn between those restrictions which are aimed at protecting the public against incompetence and those which are solely intended to protect domestic lawyers from international competition.[121] Full knowledge of the local language is a justified restriction, as it is necessary to ensure minimum competence of the profession.[122] Such a restriction imposed by the host country is legitimate because it allows nations to maintain relatively strict control over legal service providers, assure a certain level of competency, and preserve the integrity of their laws and court systems.[123]

The court language rule in the instant case regulate how legal services must be performed, namely by submitting all documents and pleadings to the court in one of the two tribal languages along with the federal languages. The rule is made to fulfil domestic policy objectives that are, *prima facie* not protectionist. It only eliminate the language disadvantage for tribal youth of Arpenia and does not put any unnecessary burden on the service supplier as the local language requirement is a justified qualification.

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[118] GATS, *supra* note 45, art.VI.
[119] Council for Trade in Service, *Note by the Secretariat: The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade and on Import Licensing Procedures to Article VI: 4 of the GATS*, ¶ 4, S/WPPS/W/9 (Sep. 11, 1996); Council for Trade in Service, *Note by the Secretariat: Article VI:4 of the GATS*, *supra* note 116, ¶ 4.
[120] Pauwelyn, *supra* note 114, at 144.
[121] Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA,* 5 MINN. J. GLOBAL TRADE 159, 163-64 (1996) [hereinafter Flores]; Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services,* 19 HOUS. J. INT'L L. 95, 97-98 (1996) [hereinafter Barker]; Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services,* 16 MICH. J. INT'L L. 941, 951 (1995) [hereinafter Chapman & Tauber].
[122] Richard L. Abel, *Transnational Law Practice,* 44 CASE W. RES. L. REV. 737, 753 (1994); Barker, *supra* note 121, at 139; Annie Eun-ah Lee, Comment, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT,* 13 B.C. INT'L & COMP. L. REV. 91, 122 (1990).
[123] Kelly C. Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1770 (1983); Flores, *supra* note 121, at 163-64; Chapman & Tauber, *supra* note 121, at 951-953.

V. *ARGUENDO*, THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE SECURED UNDER THE EXCEPTION CLAUSE OF GATS

The overriding nature of Article XIV operates as an absolute defense for measures that might otherwise be in violation of Member's commitments and obligations under GATS.[124] A member asserting the defense under Article XIV must satisfy a two-tier test. Firstly, the member must demonstrate that the challenged measure meets the requirements of the "necessity test."[125] Secondly, the challenged measure must satisfy the requirements of the *chapeau*, in order to successfully defend a measure as an exception under GATS.[126]

A. THE SIX NATIONALS RULE AND THE RULE ON COURT LANGUAGE ARE JUSTIFIED UNDER ARTICLE XIV (A) OF THE GATS

The WTO Panel in *U.S.-Gambling*[127] acknowledged that, the architecture of GATS explicitly recognizes the sovereign right of a member to regulate services, and provides flexibility for members to regulate in order to pursue their public policy objectives.[128] The balance between the specific obligations, which focus on eliminating restrictive regulations to liberalize trade in services and the sovereign powers of individual members to protect vital domestic interests, is achieved by providing broad public policy exceptions.[129] The GATS exceptions clause regulates the circumstances in which national interests may override the provisions of GATS.[130]

The first clause exempts measures 'Necessary to Protect Fundamental Policy Interests of a Member' that is necessary to protect public morals or maintain public order.[131] In *U.S.-Gambling*, the Panel upheld that:

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[124] Appellate Body Report, *United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 98, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S. – Gambling Appellate Body Report]; U.S. – Gambling Panel Report, *supra* note 107, ¶ 6.450; GATS, *supra* note 45, art. XIV; Scheduling Guidelines, *supra* note 85, ¶ 20; William J. Drake & Kalypso Nicolaïdis, *Global Electronic Commerce and GATS: The Millennium Round and Beyond*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 241, 256 (Pierre Sauvé & Robert Stern eds., 2000).
[125] U.S. – Gambling Panel Report, *supra* note 107, ¶ 6.449.
[126] *Id.*, ¶ 6.449.
[127] *Id.*, ¶ 6.316.
[128] *Id.*, ¶ 6.314; GATS, *supra* note 45, preamble ¶ 4, arts. VI, XIV.
[129] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 599 (Cambridge Univ. Press ed. 2005).
[130] GATS, *supra* note 45, art. XIV; Scheduling Guidelines, *supra* note 85, ¶ 20; Kalypso Nicolaïdis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 241, 256 (Pierre Sauvé & Robert Stern eds., 2000).
[131] GATS, *supra* note 45, art. XIV (a).

> "*'public morals' denotes the 'standards of right and wrong conduct maintained by or on behalf of a community or nation', while 'public order' referrers to the 'the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality'.*"[132]

According to the *travaux préparatoires* of public order, the concept stems from that of '*ordre public'* in French laws.[133] *Ordre public* is now a well-established concept in many civil law jurisdictions as well as in EU law, and is also present in many international treaties.[134] In these contexts, "public order" has been interpreted as referring to the basic and fundamental values of a domestic legal system, encompassing values that are moral, economic or political. 'Public Order' is not a value in itself, but it is a legal doctrine whereby existing, fundamental values of a legal system will prevail over specific laws that come into contact with them.[135]

The Six Nationals Rule in the instant case has been passed by the FFB pursuant to the Youth Employment of Arpenia Initiative. This initiative has been taken by the Government of Arpenia to foster the disadvantaged youth of the country due to a slowdown in the economy. The measures for the empowerment of the disadvantaged youth reflect the basic moral and social value of the legal system and, are necessary to maintain public order in the society.

Furthermore, Article XIV also shields domestic regulations necessary to achieve certain policy objectives even if the regulation is otherwise inconsistent with the members' obligations under GATS[136] As established before, the rule on court language is a domestic regulation under Article VI of the GATS and therefore, it puts the burden of proof on the complainant to demonstrate that the measure is not necessary for its stated objective.[137]

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[132] U.S. – Gambling Panel Report, *supra* note 107, ¶ 6.317; Office of The United Nations High Commissioner for Human Rights, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, 6 (2005) http://www.ohchr.org/Documents/Publications/WTOen.pdf.

[133] Christopher McCrudden, *International economic law and the pursuit of human rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government Procurement Agreement,* 2 J. INT'L ECON. L. 3, 40 (1999); Timothy G. Ackermann, *Disorderly loopholes: TRIPS patent protection, GATT and the ECJ*, 32 T. INT'L L. J. 489, 495 (1997).

[134] Christopher McCrudden, *International economic law and the pursuit of human rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government Procurement Agreement,* 2 J. INT'L ECON. L. 3, 40 (1999).

[135] *Id.* at 41; Office of The United Nations High Commissioner for Human Rights, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, 10 (2005) http://www.ohchr.org/Documents/Publications/WTOen.pdf.

[136] GATS, *supra* note 45, art. XIV; Scheduling Guidelines, *supra* note 85, ¶ 20; William J. Drake & Kalypso Nicolaïdis, *Global Electronic Commerce and GATS: The Millennium Round and Beyond*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 241, 256 (Pierre Sauvé & Robert Stern eds., 2000).

[137] U.S. – Gambling Panel Report, *supra* note 107, ¶ 6.450.

Domestic regulation which are used to further policy objectives such as to promote the access of disadvantaged persons to the labour market or to further job creation in the disadvantaged regions,[138] may inhibit the foreigner's capacity to compete with locals, but they are necessary to ensure responsibility to local consumers, to ensure benefits to the domestic economy and to ensure the capacity of the host state to supervise. [139]

In the instant case, as stated by the Chief Justice of High Court of Larront, the rule on court language has been enforced to eliminate the language disadvantage amongst the tribal youth and to ensure their access to justice.[140] Foreign lawyers will lack the necessary understanding and competence to serve local needs properly without knowing their language, as the legal services depend on personal contact with the client and the knowledge of local customs and conditions. Thus, not having a local language qualification would in effect mean that the locals have no effective redress. Hence, the rule on court language is necessary to achieve its objectives.[141]

B. BOTH THE RULES ARE JUSTIFIED BY THE *CHAPEAU* OF ARTICLE XIV OF THE GATS

Under the requirements of the *chapeau*, the emphasis is on the application of the challenged measure,[142] as opposed to its substantive content, because the purpose of the *chapeau* is to prevent abuse of the Article XIV exceptions.[143] The *Chapeau* articulates that a measure must not be applied in a manner that constitutes (a) arbitrary discrimination between countries where like conditions prevail, (b) unjustifiable discrimination between countries where like conditions prevail, or (c) a disguised restriction on international trade.[144]

The Six Nationals Rule in the instant case meets the requirements of the *chapeau* of Article XIV as the rule is neither a discriminatory measure in violation of national treatment obligation nor is it a restrictive measure on the services of football players. Therefore, it is Arpenia's internal public policy matter and Arpenia has the sovereign right to regulate the said Sector in order to pursue its public policy objective.

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[138] Council for Trade in Service, *Note by the Secretariat: Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶ 4, S/C/W/96 (Mar. 1, 1999).
[139] ARUP, *supra* note 100, at 157.
[140] Compromis, ¶ 4.
[141] ARUP, *supra* note 100, at 150, 153.
[142] U.S. – Gambling Appellate Body Report, *supra* note 124, ¶ 339; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶¶ 20-21, WT/DS2/AB/R (May 20, 1996) [hereinafter U.S. – Gasoline].
[143] U.S. – Gambling Panel Report, *supra* note 107, ¶ 6.574; U.S. – Gasoline, *supra* note 142, at ¶ 22.
[144] GATS, *supra* note 45, art. XIV.

Further, the rule on court language is applied identically on local as well as foreign lawyers and does not leave any scope for discrimination. It is also not a restriction on trade, rather it is a qualification ensuring access to courts for the disadvantaged tribal youth of Arpenia. Therefore, this rule is a measure protected under Article XIV as an exception.

FINAL SUBMISSION/PRAYER

Wherefore for the foregoing reasons, the Republic of Arpenia respectfully requests this Hon'ble Court to adjudge and declare:

1. Bellomach is internationally responsible for issuing the mandatory waiver as it violates its obligation under the Ruritania Free Trade Agreement.
2. Bellomach's act of procuring the services under the two contracts amounts to unfair procurement behaviour.
3. The Six Nationals Rule does not violate Arpenia's international obligations.
4. The imposition of rule on court language by Arpenia does not violate its obligations under the GATS and the Ruritania Free Trade Agreement.
5. The Six Nationals Rule and the Rule on Court Language are secured under the exception clause of GATS.

Respectfully submitted,

X ____________________________

Agent(s) on behalf of the Claimant