GNLU INTERNATIONAL MOOT COURT COMPETITION

2011-12

BENCH MEMORANDUM

The Case Concerning Ruritania Free Trade Agreement

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1. INTRODUCTION

The GIMC 2012 case is a difficult one. Difficult to analyze and argue as well as difficult to write. It is, however, one that ties together classic trade law issues with international law questions in several newer areas. As such, it exposes the participants to a number of intellectual frameworks that are probably unfamiliar to them. Maybe they will be encouraged to pursue one or the other in the future.

Having been asked to integrate sports law into the problem, I asked a colleague of mine who specializes in the field for a current issue. The 6+5 Rule for football, in which six of the eleven players beginning the game must fulfill the qualifications for the national team, was one that combined sports law with international economic principles of non-discrimination and free movement of workers. While it is not yet a firm rule in international football, it has already become a focus of concern among the European teams, who argue that it violates the rules of liberalized movement of goods and services. Sports law values, on the other hand, would support the more honest use of players.

Intertwined with the affirmative action context of the 6+5 rule is the problem with Larront's official court language requirement. Again, the idea for this came from my fellow judges at last year's Moot Court. I have taken the idea and added a human rights touch to it by connecting it to indigenous rights. This way, the students will have the opportunity to look into the newest developments in this area of international law, which is bound to become increasingly important in the coming years. It is then tied in to the rules on trade in services with market access and/or discrimination arguments possible. The fact that a State court issued the rule adds a federalism issue that I expect to be irrelevant to the arguments, but might provide for an interesting defense by creative teams.

Finally, I took an issue relating to an area of human rights that is only now getting much public attention: the rights of persons with disabilities. Here again, there is an issue being discussed currently in Geneva that links disabilities rights with international economic law: the extent of copyright protection on braille texts. A large majority of persons with disabilities live in poverty. A complex circle of cause and effect, the situation of the poor handicapped individual is made worse by the restrictions on access to reading materials (whether for enjoyment or for education).

As a result, disabilities interests are pushing for changes to WIPO conventions (and thus TRIPs protections) to allow for such texts to be relieved of mandatory protection. While I expect only the best teams to look into the question of whether changes at to WIPO conventions will automatically result in changes in TRIPs obligations, all the students will be able to try to consider how human rights and trade rules can or should interact.

The rest of the problem is traditional trade law: mainly government procurement this time. The WTO Agreement on Government Procurement (GPA) has a mixture of general provisions and individual schedules and is, additionally, a plurilateral agreement – applying only to some of the WTO Members. The students will need to consider not only what the obligations are and to whom they apply, but also will need to think about the issue of valuation in order to determine if the public tenders reach the quantitative threshold to come under the GPA.

I hope you enjoy the GIMC 2012!

- Krista Nadakavukaren (Professor, University of Basel) (Problem Drafter)

2. ENTITES & INDIVIDUALS INVOLVED

- **The Republic of Arpenia ("RA")** is a middle income country situated in the continent of Ruritania. It was formerly colonized by the State of Bellomach (**"SB"**).
- **The State of Bellomach ("SB")** is a middle income country functioning as a parliamentary monarchy, situated in the continent of Ruritania.
- **Sight and Sound ("S&S")** is a company based in RA which manufactures "Virtual Eye" (**"VE"**).
- **Virtual Eye ("VE")** is a device which enables the blind to read non-Braille books.
- **Helping Limbs ("HL")** is a local non-governmental, non-profit organization that helps train disabled workers.
- **Ra Ephrama ("RE")** is a poet of Bellomachian birth & origin, permanently residing in Arpenia.
- **Federal Football Board (Arpenia)** is the main governing body regulating football in RA.

3. SUMMARY OF FACTS

- The Republic of Arpenia (RA) and the State of Bellomach (SB) are parties to the Ruritania Free Trade Agreement (RFTA).
- RA, a former colony of SB, is a middle income country enjoying a period of peace & prosperity following a decade of civil war. Its economy is predominantly based on manufacturing of primary products with SB being one of its main export markets. In the last decade, it began to promote R & D in various high-technology fields & has also become the home to internationally known super-athletes.
- The youth of RA have begun to invest great sums of money in training in order to make it to one of RA's three major league football teams. For those who make it, salary is extraordinarily high – up to one hundred times the salary of the average RA citizen – as well as being tax free. Competition over the past five years has become fiercer as foreign players have begun to vie for a spot in the team.
- One of the biggest companies in RA is Sight and Sound (S&S) which manufactures a device named "Virtual Eye". The device enables the blind to read non Braille books. 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 SB which is one of the biggest markets for S&S. *Virtual Eye* was patented on 1st January 2001 in RA; it is an innovation of S&S, a particular product, not a common name.
- Due to the slow-down in the economy of RA, the recently elected government of RA has embarked on a program to foster the disadvantaged youth of the country. The program is titled Youth Employment of Arpenia (YEA) Initiative.
- SB, a middle income country functioning as a parliamentary monarchy, is proud of its combination of economic liberalism and socially progressive programming. Following the signing of UN Convention on Disabilities, the parliament of SB passed a legislation to make all public buildings wheelchair accessible and sight- and hearing-impaired

friendly. To do so, two contracts were made, namely, Refitting Contract, & Audio & Braille Contract.

- The Refitting Contract, was granted by means of a public offer for bids to re-fit the public buildings with ramps and elevators to permit access to the physically handicapped; the contract also required VE devices to be installed in all public libraries to help the blind read non-Braille books.
- The Audio & Braille Contract, provided for improvements in the information available on public property to persons with sigh- and hearing- impairments. The contract was not subjected to public bids rather it was given to HL.
- The government of SB issued a mandatory waiver of copyright for information provided in Braille and on audio, although not for the information in the regular text form.
- The prominent Bellomachian poet Ra Ephrama, a permanent resident of RA, was contracted by the Bellomachian government to write seven out of ten introductory descriptions.
- Both RA & SB are members of the Government Procurement Agreement.
- Neither RA nor SB are parties to the Berne Convention.
- RA is a party to Vienna Convention on Law of Treaties but SB isn't.
- RA and SB are Parties to the WTO as well as United Nations. RA has ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. SB has ratified the International Covenant on Civil and Political Rights, and has signed but not ratified the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of Persons with Disabilities.

4. ISSUES

INTELLECTUAL PROPERTY PROTECTION

- The first issue pertains to the mandatory waiver of copyright. The question is whether such a waiver has denied RA intellectual property protection & whether such an act by SB is in consonance with GATS.

PROCUREMENT

- The second issue pertains to the process adopted for granting the Refitting Contract, & Audio & Braille Contract.

SIX NATIONALS RULE

- The third issue is dependent on the fact whether the '6+5' rule is discriminatory and whether it violates the provisions of GATS.

COURT LANGUAGE

- The fourth issue pertains to language adopted by the courts for the benefit of the youth of RA. It is to be determined whether the act falls within the exception provided under Art. XIV of GATS.

5. ARGUMENTS

I. INTELLECTUAL PROPERTY PROTECTION

A. Copyright of the poet

The Government of Bellomach issued a mandatory waiver of Copyright against the poet Ra Ephrama‘s works when translated to Braille and Audio forms. He had written introductory statements on some landmark buildings in the country.

Article 9 of TRIPS effectively incorporates by reference all of the Berne Convention's substantive provisions except as those provisions may concern the moral rights of attribution or integrity. Article 9(1) of the Berne Convention provides, *“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”*

Arguments on behalf of Arpenia

Participants arguing on behalf of the Arpenia should not waste too much time on establishing Ra Ephrama‘s exclusive right over his works. Instead they should show that mandatory waiver is not a valid limitation or exception to the poet’s exclusive right on account of its non-satisfaction of the requirements under Article 13 of the TRIPS Agreement.

Arguments on behalf of Bellomach

Bellomach should concede that the poet Ra Ephrama retains the exclusive right of authorising the reproduction. They should defend the copyright waiver by the Bellomachian government as a valid limitation/exception of the author‘s rights under Article 13 of the TRIPS Agreement and Article 9(2) of the Berne Convention.

B. Patent Rights of Sight & Sound

Article 28(1) of TRIPS states:

"A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process."

Problem does not specify whether "*Virtual Eye*" has been patented in the State of Bellomach.

Arguments on behalf of Arpenia

Art. 28 (1) of TRIPS prevents third parties from making, using, offering for sale, selling or importing a product which is a subject matter of the patent, without the patent holder's consent. The argument can be furthered by application of Arts. 30 and 31 of TRIPS. The provisions require the Government or the third party using such a patented product to seek authorisation from the patent holder before using the same.

Arguments on behalf of Bellomach

The Respondent may contend that the product is not patented in the State of Bellomach. There has been no violation of the patent as non-commercial use is contemplated as an exception to a patent holder's rights under Art. 31(b) of TRIPS.

Article 31 of TRIPS

Other Use Without Authorization of the Right Holder
Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

*...**(b)** such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. 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.*

II. THE PROCUREMENT DONE BY THE GOVERNMENT OF BELLOMACH

The preamble to the GPA recognises that "*Measures regarding GP should not be done in such a way so as to afford protection to domestic suppliers or to discriminate among foreign suppliers."*

Article XV of GPA: Limited Tendering

"1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:

...(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists...

...(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract..."

Article XXIII of GPA: Exceptions to the Agreement

"1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour."

Arguments on behalf of Arpenia

Applicants can argue that the limited tender of the *Braille and Audio* contract was not in pursuance of any legitimate grounds specified under Article XV of the GPA. Also, none of the exceptions under Article XXIII are applicable to the procurement sought by the Bellomachese government as they would constitute arbitrary and unjustifiable discrimination against other potential suppliers.

Arguments on behalf of Bellomach

Participants arguing on behalf of the Respondents should show that the Bellomachese government can rely on Limited Tendering procedure laid down under Article XV(1)(b) of GPA.

Further, procurements were in pursuance of Bellomach's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Consequently, the procurements were necessary to protect products or services relating to handicapped persons and exempted from adherence to the GPA under Article XXIII(2).

III. SIX NATIONALS RULE

The '6+5' rule was proposed by FIFA in 2008. The rule says that a national soccer team can only have five foreign players in a team. It is, however, only applicable to domestic league play. There was some concern that this new rule could be in violation with EU law as players could be or are considered to be workers and they are not allowed to be subject to restrictions in other EU countries.[1]On behalf of FIFA, the Institute for European Affairs analyzed in an expert opinion of 2008 the Compatibility of the 6+5 Rule with

[1] See,e.g.,http://soccerdelirium.com/2008/05/31/fifa-65-rule-to-limit-foreign-players-in-european-soccer-rosters/; http://www.fifa.com/mm/document/affederation/federation/01/03/27/09/inea_media_release_e.pdf [last visited on January 20, 2012].

European Community Law and came to the conclusion that the rule can be implemented in line with European law.[2]

Arguments on behalf of Arpenia

The rule prescribed by the Federal Football Board of Arpenia to encourage national loyalties is reasonable, as the requirement is that at least six players should be Arpenian nationals in the lineup. This is being done in order to cater to the disadvantaged youth who have been affected due to the slow-down in the economy. Moreover it falls under the category of 'presence of natural persons' within the modes of supply and as the specific commitment under that is 'unbound', that enables RA to make any limitation at all.

Arguments on behalf of Bellomach

The act falls within the definition of 'measure' provided under Art. XXVIII of GATS. The rule is violative of the National Treatment principle laid down under Art. XVII of GATS. It is discriminatory in nature as it tilts the weight of competition in favor of domestic service suppliers.

IV. CLAIM REGARDING RULE PASSED BY THE HIGH COURT OF LARRONT

- To prove whether the rule of submitting all documents to the High Court of Larront in one of the two main tribal languages of the State is justified, the following legal background has to be taken into consideration.

a) Whether there is any provision in GATS which allows this rule?
b) Whether this rule is in violation of the specific commitments undertaken by Arpenia?
c) Whether this rule violates the provisions of GATS relating to Market Access and National Treatment and the exceptions to these provisions?

[2] See at http://inea-online.com/download/regel/lang_eng.pdf; the summary of the expert opinion is accessible at http://inea-online.com/download/regel/gutachten_eng.pdf[last visited on January 20, 2012].

d) What are the other treaties and conventions which Arpenia has ratified and the obligations of Arpenia accruing under them?

- Mode 3 of supply (commercial presence) which covers the operation of branches of foreign law firms in Arpenia and Mode 4 (presence of natural persons) which covers individual lawyers are to be considered here as they constitute the different manners in which Bellomach lawyers may operate within Arpenia. Arpenia's commitments state that the permissible limitations on market access for Mode 3 and 4 are "same as local suppliers" and "based on the principle of reciprocity" respectively. Arpenia is unbound with respect to limitations on National Treatment for mode 4 of supply i.e. Presence of Natural Persons and therefore it is free to impose any restrictions on foreign Legal Service suppliers and give more preferential treatment to the domestic legal suppliers. On the other hand Bellomach is also unbound with respect to Mode 3 and Mode 4 of Legal Service Supply Limitations on Market access and National Treatment.
- The relevant rules governing Market access and National Treatment are mentioned in *Article XVI* and *Article XVII* of GATS. The extent to which a nation can pursue its national policy through domestic regulations has been mentioned under *Article VI* of GATS. *Article XIV* of GATS deal with general exceptions. The rule regarding submission of all documents to the High Court of Larront in one of the tribal languages is in pursuance to the national policy of Arpenia which aims at increasing the youth employment and removing linguistic barriers in accessing the courts.

Arguments on behalf of Arpenia

- It can be argued by Arpenia that for the third mode of supply it has a limited commitment in the GATS schedule providing that Market access is conditional to foreign suppliers being treated under the same rules as local suppliers and with respect to National Treatment there is a full commitment. Finally, for the fourth mode of supply it is stated that limitations on Market access would be based on the principle of reciprocity. Therefore, for Bellomachian Legal Consultants Arpenia would remain unbound. Hence,

on interpretation of the specific commitments schedule Arpenia has right to impose any kind of limitations at least for Mode 3 and Mode 4 of supply.

- Arpenia can argue that the High court rule does not violate *Article XVI (Market Access)* of GATS as all that the impugned measure does is to introduce a language requirement for rendering services and not to put any sort of quantitative restrictions on foreign services and/or service providers of the sort under *Article XIV: 2*, which is an exhaustive list of prohibited actions considered as being in violation of Market Access. This means that even if the said restriction violates another commitment under the WTO system, if it does not violate *Article XVI: 2,* it is not in violation of Market access commitments.[3]

- Arpenia can further argue that the High court rule does not violate *Article XVII (National Treatment)* of GATS the measure does not distinguish between services and service suppliers on the basis of their origin. The measure has a similar effect on the foreign services and service suppliers as it has on domestic services and service suppliers. The rule is uniform for foreign as well as domestic legal service suppliers. It should be noted that even Arpenian Law firms have protested to this rule. Thus, there is no favorable treatment towards local suppliers.

- The interpretative footnote 10 to *Article XVII* provides that the members are not required to compensate for any inherent competitive disadvantages which results from the foreign character of service supplier. Hence, language being an inherent character of the service to be provided, i.e. Legal Services in the present matter, is covered by footnote 10. The test of Causation may be used for this argument.[4]

- *In Arguendo,* Instead of Arguing separately on Market access and National Treatment, Arpenia can also bring the High court rule under the ambit of General Exceptions of GATS. *Article XIV* of GATS provide a list of interests, that have been recognised by all the Members as justifying deviation from the general rules of the GATS as well as from

[3] *U.S.-Gambling,* WT/DS285/ R, Paragraph 6.298
[4] Panel Report, Canada- Certain Measures Affecting the Automotive Industry (Canada-Autos), Paragraph 10.253,WT/DS139/R, WT/DS142/R (June 19, 2000)

any Specific Commitments made. *Article XIV (a)* provides exceptions to any measures necessary to protect public morals or to maintain public order.

Article XIV states that: - *General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) Necessary to protect public morals or to maintain public order

Arpenia can rely upon this General Exception and bring the rule under its ambit by arguing that it has been enacted with a view to ensure certain basic human rights to the tribal community who suffer from a language barrier that prevents their access to Courts. The necessity test may be used in order to bring any measure under General Exceptions.

- To satisfactorily deem an impugned measure to be covered by the General Exceptions of the GATS it must fulfill two tests of the chapeau of *Article XIV*. This basically requires that the impugned measures must not arbitrarily/unjustifiably discriminate between countries where like conditions prevail and the impugned measures must not be disguised restrictions. [5] For this, more importance should be given upon the application of the measure and its effect rather than its specific provisions.

- *In Arguendo*, Arpenia can also argue that the High court rule is a Domestic regulation under *Article VI* of GATS. It can argue that the rule is a qualitative requirement and hence it should be covered under *Article VI: 5* the GATS. It can be contended that the requirement of knowing the tribal language is a qualification or technical standard requirement.

[5] Panel Report, *United States-Import Prohibition of certain Shrimp and Shrimp Products*, Paragraph 6.580, WT/DS58/R (May 15, 1998); Appellate Body Report, *US-Gambling*, WT/DS285/AB/R (Apr. 7, 2005), Paragraph 184; Appellate Body Report, *US-Gasoline*, WT/DS2/AB/R (May 20, 1996) Paragraph 25

- Arpenia can further argue that Preamble to the GATS recognizes the right of Members to regulate the supply of services. Developing countries particularly need to exercise this right in order to meet national policy objective.

- Arpenia has ratified The ICCPR and ICESCR.
  The relevant provisions of ICCPR over here are-
  a) Article 2(1) - The right to legal recourse when their rights have been violated without any distinction.
  b) Article 2(2) - all parties to the ICCPR shall adopt laws or take any other necessary measures to uphold the rights mentioned in the ICCPR.
  c) Article 27- Right of minorities to use their native language.

Arpenia can further rely upon other provisions of United Nations Charter, ICCPR, ICESCR, United Nations Declaration of Human Rights and United Nations declaration on rights of indigenous people[6] and argue that the High court rule is in furtherance of these obligations accrued under the aforementioned treaties. To further elaborate on this point, the applicant teams can also use interpretation rules in case of conflict between treaties under General Principles of Public International Law to resolve the conflicting obligations arising between the aforementioned treaties and GATS.

Arguments on behalf of Bellomach

- Respondent will first have to establish before the court that the High court rule of submission of documents in Tribal Language amounts to a "measure" under the provisions of GATS. For this, *Articles I: 3, XXVIII (a) and XXVIII (c) of GATS* can be used. In order to prove Market access or National Treatment violation it is essential to first bring the High court rule within the scope of "Measures" under GATS.

- Bellomach can argue that the High court rule cannot get immunity under *Article VI of GATS* which deals with Domestic Regulations. The respondent can contend that the rules

[6] United Nations' General Assembly Resolution 61/295

are cumbersome and excessive and therefore the requirements of *Article VI (4) (b)* are not fulfilled. To prove that the Rule is cumbersome the respondent can argue that other alternatives to this rule are available which would not adversely affect the Service supply. Also, the relevant fact over here is that the Law firms in Arpenia is also opposing to this rule.

- Bellomach can argue that the Rule cannot be brought within the General Exceptions of *Article XIV of GATS* by constructing the provision on light of footnote number 5 to the article which states that "*the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."* It can be contended that the measure undertaken by the High Court of Larront in order to eliminate the disadvantages the tribal youth faces in rising out of their traditional low paying jobs is a trade restrictive measure which affects the supply of service by Foreign Service suppliers. It can further be contended that the necessity test is not satisfied over here. To establish this, the respondent should suggest other less WTO inconsistent and reasonable measures/alternatives which the High court of Larront can take.[7]

- Bellomach can also argue that the chapeau requirements have not been fulfilled by arguing that the measure is a disguised Trade restriction or lack of good faith as Arpenia failed to come out with a more WTO consistent alternative.

- Bellomach can argue that the measure is in violation of National treatment provision of *Article XVII* of GATS. It can be argued by Bellomach that the measure amounts to de-facto discrimination. It is discriminatory against the foreign suppliers.[8]

- Bellomach can further contend that the footnote 10 to *article XVII* i.e. Inherent disadvantages cannot be used over here as language and many of the civil laws of Bellomach are still present in Arpenia. With respect to legal services, in particular, foreign character of service supplier becomes irrelevant as the laws in both Arpenia and

[7] *Korea-Various Measures on Beef*, WT/DS161/AB/R, Paragraph 161, *U.S.-Gambling*, WT/DS285/ R
[8] Test used in *E.C.-Banana III*, WT/DS27/R & WT/DS27/AB/R

Bellomach are similar. Hence, footnote 10 is not applicable as the measure does not result in inherent competitive disadvantage, but is striving to achieve protectionism which is against the spirit of R.F.T.A.

- Bellomach can argue that the measure is in violation by establishing that it falls within the ambit of limitations given in *Article XVI: 2*. It can be contended by Bellomach that rule on court language is a measure restricting market access under *Article XVI: 2 (a)* because it effectively closes the market in legal services for foreign law firms and lawyers. Even though this measure is not a numerical quota, it has the characteristics of a number since the number of foreign law firms and lawyers who would be able to operate in Arpenia, is affected.

- Bellomach can also argue that *Article VI and Article XVI, XVII are mutually exclusive.* This view has been supported by various scholars. If an overlap is allowed, the disciplines for domestic regulation would fail to safeguard the effectiveness of market access and national treatment commitments. Therefore, based on the mutual exclusiveness between *Article VI on one hand and Articles XVI and XVII* on the other, it is submitted that the measure is not a domestic regulation under *Article VI of GATS.*