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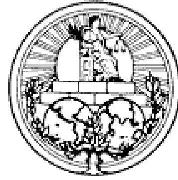

THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

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 RESPONDENT

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LIST OF ABBREVIATIONS

¶	Paragraph
§	Section
Art.	Article
Annex.	Annexure
A.J.I.L.	American Journal of International Law
A.I.P.J.	Australian Intellectual Property Journal
CASE W. RES. L. REV.	Case Western Reserve Law Review
COLUM. L. REV.	Columbia Law Review
CPC	United Nations Central Product Classification
DENV. J. INT'L. L. & POL'Y	Denver Journal of International Law and Policy
Doc.	Document
EC	European Community
E.C.R.	European Court Reports
ed.	Edition
EU	European Union
F.S.R.	Fleet Street Reports
GATT	General Agreement on Tariffs and Trade
GATT B.I.S.D	General Agreement on Tariffs and Trade Basic Instrument and Selected Documents
GATS	General Agreement on Trade and Services
G.A. Res.	General Assembly Resolution
GPA	General Procurement Agreement
GAOR	General Assembly Official Records
ICESCR	International Covenant on Economic, Social and Cultural Rights

I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
Int’l	International
J.I.E.L.	Journal of International Economic Law
Ltd.	Limited
L.N.T.S.	League of Nations Treaty Series
L.Q.R.	Law Quarterly 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
O.J.E.U.	Official Journal of European Union
Pt.	Part
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
Re.	Response
Rep.	Report
Ser.	Series
Sess.	Session
Supp.	Supplement
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series

U.S.	United States
U.K.P.C.	United Kingdom Privy Council
v.	Versus
VCLT	Vienna Convention on Law of Treaties
Vol.	Volume
WIPO	World Intellectual Property Organisation
W. RES. L. REV.	Western Reserve Law Review
WTO	World Trade Organisation

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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. Once a colonial power, Bellomach has lost much of its political influence since it relinquished its overseas territories thirty years ago. It is a now a middle-income country and is proud of its combination of economic liberalism and socially progressive programming. Bellomach is a dualistic state. Arpenia is a developing nation still predominantly engaged in manufacturing of primary products with Bellomach being one of the main exports markets.

SIX-NATIONALS RULE

The Republic of Arpenia has attracted attention as the home to several internationally-known super-athletes, especially the football players. Over the past five years, the competition has become fiercer as foreign players come to Arpenia hoping for a spot in the three major league football teams. Arpenia has embarked on a program, called Youth Employment of Arpenia Initiative (YEA Initiative) to foster the disadvantaged youth of the country. One of its components envisages the rule passed by the Federal Football Board (FFB) with an aim of encouraging national loyalties. The rule is 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. According to the qualification rule, the six players must either be citizens of Arpenia or must 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*).

Football fans from both, Arpenia and Bellomach protest against this rule, although Bellomach’s National Football Commission has called the rule “worth considering” if Arpenia is going to persist in enforcing it.

COURT LANGUAGE

The YEA Initiative also includes a study undertaken by the federal judiciary on the role of language disadvantages in the court system, based on which the federal judiciary of Arpenia made a recommendation to the state courts to ensure that measures are taken to enable access to courts. Pursuant to this recommendation, 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 as

accompanied by the two main tribal languages. Several of the large law firms in the state raised a protest, but the court remained firm.

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.

REFITTING CONTRACT

Bellomach following 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 being the Refitting Contract, the purpose of which is to re-fit the public buildings with ramps and elevators, valuing at B$ 2million, was granted by means of a public offer for bids. For refitting the buildings, it was specified that constructions are to be undertaken according to the "highest safety standards" and subject to the approval of both the federal and responsible local commission for building safety. "Virtual Eye" devices were also to be installed in all the public libraries to help blind people read non-Braille books.

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. The contract was given to Helping Limbs (HL), a local nongovernmental, non-profit organization that helps train workers with disabilities. The estimated total to be paid is B$ 32,000. The payment for the Braille and Audio Contract is to be put into a separate bank account maintained by HL to help fund the foundation's other beneficial programs. (Such programs include physical therapy, employment counselling for both, the workers and employers, employer-oriented workshops, and assisted vacation opportunities for the disabled workers).The Arpenian company, Sight and Sound (S&S) was not requested for a bid in this case. An Arpenian newspaper reported that S&S's president responded to a question of her opinion on the Bellomach project with the words, "Well, we could have done a better job, but not for the price offered".

The government of Bellomach issued a mandatory waiver of copyright for any of the information provided in the buildings in Braille and on audio, although not for the

information in regular text form. Although most of the texts would be composed by the staff of the Bellomach Department of the Interior, the prominent poet Ra Ephrama, who was born in Bellomach to Bellomachian parents, was hired by the Bellomach government 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 a part of the contract.

Bellomach has been accused of unfair procurement behaviour as well as of illegally denying intellectual property protection.

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 NOT INTERNATIONALLY RESPONSIBLE FOR ISSUING THE MANDATORY WAIVER AS IT DOES NOT VIOLATE ITS OBLIGATION UNDER THE RURITANIA FREE TRADE AGREEMENT (RFTA)

A. ARPENIA LACKS THE STANDING TO INVOKE BELLOMACH'S RESPONSIBILITY FOR ISSUING THE MANDATORY WAIVER

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2. Arpenia is prohibited from taking any discriminatory measure violating national treatment obligation under RFTA
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1. It affects the trade in legal service
2. It constitutes unjustifiable discrimination violating the WTO's fundamental principle of liberalised trade

B. THE RULE ON COURT LANGUAGE IS A QUALIFICATION THAT VIOLATES ARTICLE VI OF THE GATS

C. THE RULE OF COURT LANGUAGE IS NOT JUSTIFIED BY THE GENERAL EXCEPTIONS TO THE GATS

1. The Court language rule is not justified by Article XIV (a) of the GATS
2. It is not justified by the chapeau of Article XIV of the GATS

SUMMARY OF ARGUMENTS

Argument I.

Bellomach is not internationally responsible for issuing the mandatory waiver as it does not violate its obligation under the Ruritania Free Trade Agreement (RFTA). Bellomach is not internationally responsible for two reasons.

Firstly, Arpenia lacks the standing to invoke Bellomach's responsibility for issuing the mandatory waiver, as Ra Ephrama is a national of Bellomach and assuming but not accepting even if he is a dual national, international law prohibits a state from affording diplomatic protection to one of its nationals against a State whose nationality such person also possesses. *Arguendo*, Arpenia's claims are inadmissible because effective local remedies have not been exhausted.

Secondly, the mandatory waiver does not amount to illegal denial of intellectual property protection as the waiver is only a welfare measure which is recognized under international law and Ra Ephrama is not even entitled to intellectual property protection as he is in a contract of service with the Government of Bellomach. *Arguendo*, even if he is entitled to intellectual property protection, it falls under the exceptions, which provides for a three test step, all of which are satisfied in the present case.

Argument II.

Bellomach's act of procuring the services under the two contracts does not amount to unfair procurement behaviour for two reasons.

Firstly, the act of procurement under the two contracts does not violate Bellomach's obligations under RFTA, as RFTA encompasses all WTO rules and principles including the WTO Agreement on Government Procurement (GPA) and the two contracts are in consonance with the provisions of GPA. Art VI of the GPA obligates the procuring entities to lay down the characteristics of goods and services to be procured, thereby justifying the technical specifications mentioned in the Refitting Contract and also requires that the tendering procedure, whatever may be its form must be non-discriminatory, which is met by the Braille and Audio Contract.

Secondly, the procurement of services under the two contracts is also justified under public international law and the exception clause of the GPA which recognize a sovereign state's right to undertake measures to promote its essential obligations and in furtherance of welfare of the disabled persons.

Argument III.

The imposition of Six Nationals Rule by the Federal Football Board of Arpenia is unjustifiable for three reasons.

Firstly, Arpenia's commitments in its GATS Schedule of Specific Commitments extend to the sub-sector of sporting services and therefore, Arpenia is prohibited from taking measures violating national treatment and market access standards.

Secondly, the rule violates the free trade obligation under RFTA as RFTA in addition to GATS prohibits Arpenia from maintaining any discriminatory measure inconsistent with the national treatment obligation and as the Six Nationals Rule is a quantitative discriminatory measure against foreign footballers, it violates RFTA. Further, it also constitutes a quantitative restriction in the form of a numerical quota on the number of foreign service suppliers prohibited under Article XVI of the GATS.

Thirdly, the rule violates Arpenia's obligations under ICESCR because footballers within Arpenia's jurisdiction are being deprived from their right to work as the rule discriminates on the basis of nationality.

Argument IV.

The Rule on Court language by Arpenia is in violation of its obligation under GATS and RFTA. The Rule violates the provisions of GATS and RFTA for three reasons.

Firstly, the Rule nullifies Arpenia's undertaken specific commitments in the sector of legal services as language requirement has not been scheduled as a national treatment restriction and thus, it cannot be maintained.

Secondly, the language requirement is a qualification which constitutes unnecessary barrier to trade as it imposes an additional burden on foreign lawyers and thus, violates Article VI of the GATS.

Thirdly, the court language rule cannot be secured under the exception clause of GATS because it does not meet the necessity test as Arpenia had the option of an alternative measure which was less trade restrictive. Furthermore, it constitutes a disguised restriction in trade, thus failing the *chapeau* test as well.

ARGUMENTS ADVANCED

I. BELLOMACH IS NOT INTERNATIONALLY RESPONSIBLE FOR ISSUING THE MANDATORY WAIVER AS IT DOES NOT VIOLATE ITS OBLIGATION UNDER THE RURITANIA FREE TRADE AGREEMENT (RFTA)

A. ARPENIA LACKS THE STANDING TO INVOKE BELLOMACH'S RESPONSIBILITY FOR ISSUING THE MANDATORY WAIVER

Arpenia lacks the standing to invoke Bellomach's responsibility for issuing the mandatory waiver as Ra Ephrama is a national of Bellomach and hence Arpenia does not have any right to exercise diplomatic protection. Furthermore Arpenia has not exhausted the effective local remedies, which is a pre-requisite for making any international claim admissible.

1. Arpenia does not have the right to exercise diplomatic protection on behalf of Ra Ephrama, who is a national of Bellomach

Diplomatic protection is an invocation by a State for an injury caused to a national with a view of implementing state responsibility.[1] The general rule of international law is that it is nationality which gives rise to a right of diplomatic protection, which is determined by the municipal laws of states.[2] The two most commonly accepted principles of determining nationality are the principle of *jus soli* (right of the soil) and *jus sanguinis* (right of blood). *Jus soli* is the principle whereby nationality is dependent on the place of birth whereas *jus sanguinis* is the principle whereby the nationality of a child is dependent on the nationality of their parents.[3] In the instant case, as Ra Ephrama is born in Bellomach to Bellomachian parents[4], he is a national of Bellomach.

[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]; 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) [hereinafter Draft Articles on State Responsibility].

[2] Draft Articles on Diplomatic Protection, *supra* note 1, art. 4; Nationality Decrees in Tunis and Morocco Case (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, ¶ 24 (Feb. 7); Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, Apr. 13, 1930, 179 L.N.T.S 4137 [hereinafter Hague Convention]; European Convention on Nationality, art. 3, Nov. 6, 1997, 2135 U.N.T.S. 213.

[3] OXFORD DICTIONARY OF LAW 142 (5th ed. 2003) [hereinafter OXFORD DICTIONARY OF LAW].

[4] Compromis, ¶ 8.

Assuming but not accepting that Ra Ephrama is dual national, international law prohibits a state from affording diplomatic protection to one of its nationals against a State whose nationality such person also possesses,[5] a view which is also supported by arbitral awards.[6] Therefore, even if Ra Ephrama is considered to have dual nationality, Arpenia still does not have the right to exercise diplomatic protection against Bellomach.

2. *Arguendo*, Arpenia's claims are inadmissible because effective local remedies have not been exhausted

A State is responsible for injury to foreign nationals only when they have exhausted the effective local remedies available to them[7]. Under customary international law,[8] all local remedies must be pursued within the state allegedly responsible before an international claim is admissible.[9] Therefore foreign nationals must utilize such measures as are available in the local law to achieve a satisfactory vindication of their rights before their state of nationality can successfully maintain a claim in international law, which was not done in the present case, as no recourse was taken under the legal system of Bellomach before making an international claim.

The need to exhaust all local remedies available under the municipal law, to make an international claim admissible is also reflected in the *Ambatielos Arbitration* case,[10] the *Interhandel* case,[11] and the *Panevezys Railways* case.[12] Therefore, Arpenia lacks the standing to invoke Bellomach's responsibility for issuing the mandatory waiver.

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[5] Hague Convention, *supra* note 2, art. 4; Draft Articles on Diplomatic Protection, *supra* note 1, art. 6.
[6] Executors of RSCA Alexander v. The U.S. (United States-British Claims Comm'n), 3 J.B. Moore, History and Digest of the International Arbitration to which the United States has been a Party 2529 (Washington, D.C., U.S. Government Printing Office, 1898); Coralie Davis Honey, on behalf of the Estate of the late Richard Honey (Gr. Brit) v. United Mexican States, 5 R.I.A.A. 133 (1931); Z. R. Rode, *Dual Nationals and the Doctrine of Dominant Nationality*, 53 A.J.I.L. 139, 140-41 (1959); Frederick Adams and Charles Thomas Blackmore (Gr. Brit.) v. United Mexican States, 5 R.I.A.A. 216, 217 (1931).
[7] Draft Articles on State Responsibility, *supra* note 1, art. 22.
[8] 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).
[9] Draft Articles on Diplomatic Protection, *supra* note 1, art. 14 (1); Draft Articles on State Responsibility, *supra* note 1, art. 44 (b).
[10] The Ambatielos Claim (Greece v. U.K.), 12 R.I.A.A. 83 (1956).
[11] Case Concerning the Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21).
[12] Panevezys-Saldutiskis Railways (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76 (Jun. 30).

B. THE MANDATORY WAIVER DOES NOT AMOUNT TO ILLEGAL DENIAL OF INTELLECTUAL PROPERTY PROTECTION

The mandatory waiver issued by the Government of Bellomach on the Braille and audio texts does not amount to illegal denial of copyright protection as it is only a welfare measure aimed at ensuring better accessibility by the disabled persons in Bellomach. Moreover Ra Ephrama is not even entitled to intellectual property protection as he is in a contract of service and the vesting of copyright if any would be with the Government of Bellomach. *Arguendo*, even if he is entitled to intellectual property protection, it falls under the exceptions as recognized under the Berne Convention.

1. The mandatory waiver issued by Bellomach is justified as it is a welfare measure recognized under international law

The states of Arpenia and Bellomach entered into RFTA which encompasses all WTO rules including those of intellectual property.[13] However the protection and enforcement of intellectual property must be in such a manner that it is conducive to social welfare[14] and the mandatory waiver is a welfare measure as it is aimed at ensuring better accessibility by the disabled persons in Bellomach. Further, the World Programme for Action concerning Disabled Persons states that "*the ultimate responsibility for dealing with the consequences of disability rests with the Government*"[15] and that disability policies must ensure the access of persons with disabilities to all community services[16] and states must adopt all legislative measures for the implementation of the rights of the disabled,[17] therefore justifying the mandatory waiver issued by the Government of Bellomach.

States are also required to ensure that persons with disabilities have the opportunity to take part in cultural life and enjoy the benefits of scientific progress,[18] and useful measures in this

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[13] Compromis, ¶ 10.

[14] GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 56 (E. Elgar ed. 2008).

[15] World Programme of Action Concerning Disabled Persons, ¶ 3, G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc A/37/51 at 186–87 (Dec. 3, 1982) [hereinafter World Programme of Action Concerning Disabled Persons]; MARIANNE SCHULZE, UNDERSTANDING THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 44 (3d ed. 2010) [hereinafter SCHULZE].

[16] World Programme of Action concerning Disabled Persons, *supra* note 15, ¶ 25.

[17] Convention on the Rights of Persons with Disabilities, art. 4, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter Convention on Disabilities].

[18] Convention on Disabilities, *supra* note 17, art. 30; Universal Declaration of Human Rights, art. 27 (2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, art. 15 (1) (c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of all Forms of Racial Discrimination, art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13;

regard include *inter alia* papers written in simple language and adapted television and theatre for the deaf persons.[19] Drawing an analogy of the above, it would also include translations of the introductory descriptions into audio and Braille, thereby justifying the act of Bellomach. Further, to facilitate participation of people in cultural life, states should *inter alia*, recognize their rights to access monuments and places of cultural importance.[20] The mandatory waiver, in the instant case aims at accessibility by the disabled people, because if copyright is allowed, by virtue of its inherent property characteristics, the owner will have an exclusive title[21] which could hinder the disabled people from accessing the landmarks for which the introductory descriptions were written.[22]

Furthermore, intellectual property is a social product and has a social function.[23] Therefore although under the ICESCR, the authors have a right to benefit from their scientific, literary and artistic productions,[24] it cannot be isolated from the other rights recognized in the Covenant[25]. States parties are therefore obliged to strike an adequate balance between the conflicting rights and in doing so, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.[26] Applying this to the instant case, the private right of authors to benefit from their scientific, literary and artistic productions is a right guaranteed under the ICESCR, but the same covenant also gives importance to accessibility and welfare measures, thereby justifying the mandatory waiver which is a welfare measure.

2. Ra Ephrama is not entitled to intellectual property protection

Ra Ephrama is in a contract of service with the Government of Bellomach.[27] A contract of service is defined as a contract by which a person agrees to undertake certain duties under the

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Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

[19] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Rule 10, G.A. Res 48/96, U.N. Doc. A/47/415 (Dec. 20, 1993) [hereinafter Standard Rule].

[20] SCHULZE, *supra* note 15, at 167.

[21] J WALDRON, THE RIGHT TO PRIVATE PROPERTY 33 (Clarendon Press ed. 1988).

[22] Compromis, ¶ 8.

[23] Comm. on Economic, Social and Cultural Rights, Human Rights and Intellectual Property, ¶ 4, Rep. on its 27th Sess., Nov. 12-30, 2001, U.N. Doc. E/C.12/2001/15 (Dec. 1, 2001) [hereinafter Report of Comm. on Economic, Social and Cultural Rights, Human Rights and Intellectual Property].

[24] ICESCR, *supra* note 18, art. 15 (1) (c).

[25] ICESCR, *supra* note 18, art. 5.

[26] Report of Comm. on Economic, Social and Cultural Rights, Human Rights and Intellectual Property, *supra* note 23, ¶ 17.

[27] Compromis, Revised Clarification, ¶ 10.

direction and control of the employer in return for a specified wage or salary. [28] It has been held in the case of *Robin Ray* v. *Classic FM*[29], that while interpreting a contract, a court cannot introduce terms to make it fairer or more reasonable as the court has no power to improve upon the instrument which it is called upon to construe, and therefore in the present case, when it is stated that the contract is a contract of service, by the definition of contract of service, the employee is under the direction and control of the owner and hence the vesting of copyright, if any would be with the Government of Bellomach.

Further, it has also been provided that if a literary, musical, artistic or dramatic work is made by an employee in the course of his employment, the employer will be the first owner of any copyright in the work subject to an agreement to the contrary.[30] Similarly under the US laws a work is said to be for hire, only when it is created by an employee within the scope of his employment and in such cases the employer is considered as the author and the copyright vests in him.[31] In the instant case, since the poet was hired by the Bellomach government to write seven out of ten of the introductory descriptions of the landmarks[32], the Government of Bellomach is entitled to the copyright ownership.

3. *Arguendo*, even if he is entitled to intellectual property protection, it falls under the exceptions as recognized under the Berne Convention

International conventions on intellectual property protection recognize certain exceptions to copyright protection which were first applied under the Berne Convention[33] and have now been extended into the TRIPS agreement,[34] the WIPO Performances and Phonograms Treaty, the European Union Copyright Directive[35] and the WIPO Copyright Treaty 1996 which clearly recognizes non commercial uses for the benefits of visually impaired or hearing

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[28] OXFORD DICTIONARY OF LAW, *supra* note 3, at 62.
[29] Robin Ray v. Classic FM, (1998) F.S.R. 622,643-644; Belize v. Belize Telecom Ltd., (2009) U.K.P.C. 10.
[30] LIONEL BENTLEY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 123 (Oxford Univ. Press, 3d ed. 2008); Copyright and Designs Law: Rep. of the Comm. to Consider the Law on Copyright and Designs, ¶ 571 (1976); Market Investigations Ltd. v. Ministry of Social Security, (1968) 2 Q.B. 173; Stevenson Jordan v. Macdonald & Evans, (1951) 69 R.P.C. 10.
[31] U.S. Copyright Act, 17 U.S.C. § 101(b) (1) (1976); Community for Creative Non – Violence v. Reid, (1989) 490 U.S. 730; Urheberrechtsgesetz (UrhG) (German Copyright Law) (1965) art. 43.
[32] Compromis, ¶ 8.
[33] Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sep. 9, 1886, 1161 U.N.T.S. 30.
[34] Agreement on Trade Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].
[35] *Id.*, art. 30; WIPO Copyright Treaty, art. 10, Dec. 20, 1996, 36 I.L.M. 65.

impaired people as an exception to copyright protection. These conventions follow a three step test, the most important version of which is laid down in Art. 13 of TRIPS.[36]

The first test is that it must be limited to certain special cases. It is a widely accepted norm of human rights law to recognize persons with disabilities as a special class who must be protected through special designed laws, policies and programmes.[37] The phrase ‘certain special cases mean that a limitation or an exception in national legislation should be clearly defined and should be narrow in its scope and reach. In the instant case the legislation to make all public buildings sight and hearing impaired friendly was passed by Bellomach, pursuant to its signing of the Convention on the Rights of Persons with Disabilities[38], which states that laws protecting intellectual property rights should not constitute an unreasonable or discriminatory barrier to accessibility, as persons with disabilities have a right to access cultural materials.[39] In the instant case, the descriptions were being written for the landmarks in Bellomach,[40] and therefore the mandatory waiver was a legitimate exception to copyright protection as its only aim was to ensure accessibility to cultural materials. Moreover the mandatory waiver was issued only for the information provided in the buildings in Braille and on audio,[41] thereby narrowing its scope and reach. Further, state practice has permitted copyright exception for the visually impaired people[42] especially the ones in Braille and special formats[43] and other accessible formats for the visually impaired.[44] Therefore the first test has been satisfied by the mandatory waiver.

The second test is that it must not conflict with the normal exploitation of work which means that the right holders should not be deprived of extracting economic value from the right to work that they normally enjoy. However it has been argued that this step cannot be

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[36] TRIPS, *supra* note 34, art. 13: Members shall confine their limitations and exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of work and do not unreasonably prejudice the legitimate interest of the right holder.
[37] Convention on the Rights of the Child, *supra* note 18, art. 23; The African Charter on Human and Peoples' Rights, art. 18 (4), June 27, 1981, 1520 U.N.T.S. 217; The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 18, Nov. 17, 1988; European Union’s 2000 Charter of Fundamental Rights, art. 26, Dec. 7, 2000, 2000 O.J.E.U. (C 364) 1.
[38] Compromis, ¶ 6.
[39] Convention on Disabilities, *supra* note 17, art. 30 (3).
[40] Compromis, ¶ 8.
[41] Compromis, ¶ 8.
[42] World Intellectual Property Organization, *Report on Study of Copyright Limitations and Exceptions for the Visually Impaired*, ¶ 17, U.N. Doc. SCCR/15/7 (Feb. 20, 2007).
[43] *Id.*, ¶ 38, table 3: Armenia, Azerbaijan, Belarus, Bulgaria, Brazil, Canada, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Nicaragua, Paraguay, Peru, Portugal, Spain, Russian Federation, Uzbekistan, USA.
[44] *Id.* at ¶ 39, table 4: Dominican Republic, El Salvador, Gabon, Japan, Republic of Korea, Macau, Malaysia, Nigeria, Norway, Panama, Singapore.

interpreted from a solely economic perspective, as this would prejudice public interest which forms an essential part of TRIPS.[45] The second stage must consider 'non-economic normative factors' which would create a balance between the right holder's interests and the needs of society and culture[46]. Non economic normative factors include determining whether the use in question is such that the copyright owner should control it or whether there is a countervailing interest that would justify this not being so. Applying this to the present case, since the mandatory waiver is for the welfare of the hearing and visually impaired people, as against any private interests, there is a countervailing interest which justifies the government's interference, as the ultimate responsibility for dealing with the consequences of disability rests with the government.[47] Therefore the second test has also been satisfied.

The third test is that it must not unreasonably prejudice the legitimate interest of the right holder, but when there is a conflicting interest such as the one present in the instant case, TRIPS recognizes that copyright is limited inherently by the public interest, and that exceptions and limitations must exist,[48] thereby falling within the ambit of exceptions as recognized by international intellectual property law.

II. BELLOMACH'S ACT OF PROCURING THE SERVICES UNDER THE TWO CONTRACTS DOES NOT AMOUNT TO UNFAIR PROCUREMENT BEHAVIOUR

A. THE ACT OF PROCUREMENT UNDER THE TWO CONTRACTS DOES NOT VIOLATE BELLOMACH'S OBLIGATIONS UNDER RFTA

The RFTA encompasses all WTO rules and principles[49] including the WTO Agreement on Government Procurement (GPA). The provisions of the GPA only apply with respect to procurement of goods and services by the entities that are listed in the three Annexes if (a) the value of the procurement exceeds certain specified thresholds; *and* (b) the goods or services that are involved are not exempted from the coverage of the Agreement. GPA is

[45] TRIPS, *supra* note 34, art. 9.1; S. Ricketson, *U.S. Accession to the Berne Convention: An Outsider's Appreciation*, 12 INTELLECTUAL PROPERTY JOURNAL 87, 109 (1994); ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 205 (Cambridge Univ. Press 2005).

[46] World Intellectual Property Organization, *Report on Copyright and Related Right*, ¶ 11, U.N. Doc. SCCR/12/4 (Mar. 1, 2005); S. Ricketson, *The Three Step Test, Deemed Quantities, Libraries and Closed Exceptions- A Study of the Three step Test in Article 9(2) of the Berne Convention, Article 13 of TRIPS Agreement and Article 10 of WIPO Copyright Treaty,* 9 A.I.P.J. 87 (2002) [hereinafter Ricketson].

[47] World Programme of Action Concerning Disabled Persons, *supra* note 15; SCHULZE, *supra* note 15, at 44.

[48] TRIPS, *supra* note 34; Ricketson, *supra* note 46.

[49] Compromis, ¶ 10.

applicable in the instant case, as both the Refitting Contract and the Braille and Audio Contract is being procured by the Government of Bellomach, a central government entity,[50] and 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 GPA Schedule of specific commitments.[54]

1. The technical specifications mentioned in the Refitting Contract do not violate the provisions of the GPA

Article VI of the GPA entitled 'Technical Specifications' obligates the procuring entity to lay down the characteristics of the products or services to be procured. In principle, technical specifications must be based on performance rather than any design or descriptive criteria and on international standards where existing. But, this requirement is qualified by the words "where appropriate",[55] which makes the choice of specifications, entirely the responsibility of the procuring entities.[56] In the instant case, since Bellomach is the procuring entity they are under an obligation to lay down the characteristics of the products and services, and in making the choice of specifications, they have a right to exercise their discretion.

The only limit to their discretion is that it must not create "unnecessary obstacles to international trade".[57] In other words, technical specification relating to design or descriptive criteria are only discouraged and are not *per se* prohibited, the only rider being that they should not be adopted with the effect of creating unnecessary obstacles to international trade,[58] which is avoided in the instant case, as the Refitting Contract was subject to an open tender as against limiting competition.

It is also pertinent to note that Bellomach made the Refitting Contract to re-fit the public buildings with ramps and elevators with an objective of enabling access to persons with physical handicaps, subsequent to its signing of the UN Convention on the Rights of Persons

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[50] Agreement on Government Procurement, 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] Petros C. Mavroidis & Bernard. M. Hoekman, *The WTO's Agreement on Government Procurement: expanding disciplines, declining membership*?, 2 PUB. PROC. L. REV. 63, 70 (1995) [hereinafter Mavroidis & Hoekman].
[56] *Id*. at 71.
[57] GPA, *supra* note 50, art. VI: 1.
[58] KHI V. THAI, INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 308 (Evan M. Berman ed. 2009).

with Disabilities,[59] which recognizes the importance of the disabled people to have accessibility to the physical, social, economic and cultural environment which would enable them to fully enjoy all human rights and fundamental freedoms.[60] It puts an obligation on the State Parties to take appropriate measures to ensure that persons of disability have the access to buildings and other facilities which are open or provided to the public.[61] The Convention[62] along with the "Standard Rules on the Equalization of Opportunities for Persons with Disabilities" [hereinafter the Standard Rules],[63] requires State Parties to develop, promulgate and monitor the implementation of minimum standards and guidelines to ensure accessibility and meet the need of the persons with disability.

Furthermore, the only design requirements explicitly set out in the tender were (a) each installation should "match the local aesthetics in terms of building style and neighbourhood tastes"; and (b) "Virtual Eye" devices were to be installed in all the public libraries to help blind people read non-Braille books, which are necessary in order to achieve the desired objective of the legislation/contract and keeping in tune with our international obligations under RFTA. The objective of fitting ramps and elevators in a public library is not useful until and unless a visually impaired person can access the books and 'Virtual Eye' ensures such accessibility. The other specification mentioned in the Refitting Contract was that the constructions were to be undertaken according to the highest safety standards[64] which only ensured better responsibility and diligence on the part of the Government of Bellomach.

2. The grant of the Braille and Audio contract to Helping Limbs (HL) is not inconsistent with the GPA provisions

The Braille and Audio contract was not subject to an open tender,[65] in the absence of which, a procuring entity may use a limited tendering procedure or a selective tendering procedure, both of which restrict participation to qualified suppliers.[66] However the essential requirement under both these procedures is that it should not be used in a manner which would constitute a means of discrimination among suppliers of other Parties or as a protection

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[59] Compromis, ¶ 6.
[60] Convention on Disabilities, *supra* note 17, preamble, ¶ 22.
[61] Convention on Disabilities, *supra* note 17, art. 9 (1).
[62] Convention on Disabilities, *supra* note 17, art. 9 (2) (a).
[63] Standard Rules, *supra* note 19, Rule 5.
[64] Compromis, ¶ 6.
[65] Compromis, ¶ 7.
[66] GPA, *supra* note 50, arts. VII 3(b) - 3(c).

to domestic producers or suppliers,[67] because an open and a non-discriminatory government procurement regime allows for competition between potential suppliers, and hence ensures that best value for money is obtained.[68] In the instant case, HL was granted the abovementioned contract due to its qualifications and competence and there was no discrimination or bias towards HL. HL was clearly the more cost effective option as the dissatisfaction for the price offered is clear from the statement of the president of S&S[69]. Moreover, HL is an NGO working for the benefit of workers with disabilities and the consideration arising out of the contract was again being used for beneficial purposes, thereby fulfilling the objectives of both the legislation and as well as the procurement.

Further, the Convention on Disabilities also requires governments to take cost effective measure to ensure accessibility of resources by the disabled people[70] and the Standard Rules highlight the significance of consulting people who are generally involved with the disabled people in developing measures to make information services accessible. Therefore, granting the Audio and Braille Contract to Helping Limbs is justified as the HL management and training staff are generally graduates of the world-famous Institute on Disability Studies.[71]

B. ARGUENDO, THE PROCUREMENT OF SERVICES UNDER THE TWO CONTRACTS IS JUSTIFIED UNDER PUBLIC INTERNATIONAL LAW AND THE EXCEPTION CLAUSE OF THE GPA

It has been held in the U.S.-Gasoline case that the WTO law cannot be read in "*clinical isolation from public international law*",[72] and all exception clauses under WTO agreements recognize "the importance of a sovereign nation's ability to act with a view of promoting the purposes on the list of its exceptions, even when such action otherwise conflicts with various

[67] Mavroidis & Hoekman, *supra* note 55, at 69; Gerard de Graaf & Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 THE INT'L LAWYER 435, 439 (1995).
[68] United Nations Conference on Trade and Development, Dispute Settlement in International Trade, Investment and Intellectual Property*:* Government Procurement, ¶ 1.1, (Dec. 1, 2003) http://www.unctad.org/en/docs/edmmisc232add27_en.pdf; Martin Dischendorfer, *The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO*, 9 PUB. PROC. L. REV. 1, 5 (2000).
[69] Compromis, ¶ 9.
[70] Convention on Disabilities, *supra* note 17, art. 9.
[71] Compromis, ¶ 8.
[72] Appellate Body Report, *United States--Standards for Reformulated and Conventional Gasoline*, 20-21, WT/DS2/AB/R (May 20, 1996) [hereinafter U.S. – Gasoline].

obligations relating to international trade."[73] Therefore the general exception clauses provide a mechanism by which important State interests and obligations that are otherwise not compatible with WTO agreements, to find an expression. In the present case, since both the contracts are for the benefit of the disabled people it forms a general exception clause as recognised under public international law and international trade law.

GPA Article XXIII also contains exceptions for measures necessary to protect *inter alia* public morals, order or safety or relating to the products or services of handicapped persons, which could be used as a governmental policy.[74]

Government procurement is often used to promote secondary policies of a social, environmental, or political nature.[75] The GPA does not specifically provide for 'secondary concerns'[76] other than those regarding the handicapped persons.[77] In addition to the GPA, even the General Assembly's Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities provides for exceptional measures relating to the products or services of the handicapped persons.[78] Therefore measures under public international law and international trade law which aim at the welfare of the disabled are justified, and since both the procurements are for welfare measures for the disabled persons, Bellomach is not responsible for violating any international law obligations.

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[73] *Id.* at 4; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 206 (2d ed. 1997).

[74] SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 360 (Nobert Horn & Richard M. Buxbaum eds., 2003); Sue Arrowsmith, *Public Procurement as a Tool of Policy and the Impact of Market Liberalisation*, 111 L. Q. R. 235 (1995); McCrudden, *International Economic Law and the Pursuit of Human Rights: a Framework for Discussion of the Legality of "Selective Purchasing" Laws under the WTO Procurement Agreement*, 2 J.I.E.L. 3 (1999); Priess & Pitschas, *Secondary Criteria and Their Compatibility with EC and WTO Procurement - The Case of the German Scientology Declaration*, 9 PUB. PROC. L. REV. 171 (2000); Spennermann, *The WTO Agreement on Government Procurement - a Means of Furtherance of Human Rights*, 4 Z.E.R.S. 43 (2001).

[75] McCrudden, *Public Procurement and Equal Opportunities in the EC: a study of 'contract compliance' in the Member States of the European Community and under European Community Law* (1995); Arrowsmith, Meyer & Trybus, *Non-commercial Factors in Public Procurement*, unpublished report for the United Kingdom Office of Government Commerce (2000); JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 543 (3d ed. 1998).

[76] Sue Arrowsmith, *Government Contracts and Public Law*, 10 J. L.S. 231, 233 (1990).

[77] Paul J. Carrier, *Sovereignty under the Agreement on Government Procurement*, 6 MINN. J. GLOBAL TRADE 67, 82 (1977).

[78] Office of The United Nations High Commissioner for Human Rights, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, 19 (2005) http://www.ohchr.org/Documents/Publications/WTOen.pdf.

III. THE IMPOSITION OF SIX NATIONALS RULE BY THE FEDERAL FOOTBALL BOARD OF ARPENIA IS UNJUSTIFIABLE

A. ARPENIA HAS UNDERTAKEN COMMITMENTS IN ITS GATS SCHEDULE OF SPECIFIC COMMITMENT WITH REGARD TO THE SPORTING SERVICES

The WTO 'Service Sectoral Classification List' [hereinafter SSCL] listed 'Sporting and other recreational services' as a sub sector of "(10) Recreational, Cultural and Sporting Services".[79] This corresponds to entry number 965 in the United Nations Central Product Classification [hereinafter CPC].[80] However, CPC entry no. 96 is subdivided into various other categories, including 'Sports and recreational sports services'.[81] In general the classification of sectors and sub-sectors should be based on the SSCL; however, members are allowed to use their own sub-sectoral classification or definitions as well.[82] In the instant case, Arpenia has made commitments in the sub – sector of Entertainment, Recreational and Others even though sporting services is not explicitly mentioned.

Further, the meaning of the provision of any WTO agreement is to be clarified "in accordance with customary rules of interpretation of public international law."[83] Article 31 and 32 of the Vienna Convention on the Law of Treaties [hereinafter VCLT][84] represents the 'customary rules of interpretation of public international law'.[85] Article 31.1 of the VCLT provides for a treaty to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[86]

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[79] Council for Trade in Services, *Note by the WTO Secretariat: Service Sectoral Classification List*, MTN.GTS/W/120 (July 10, 1991).
[80] UN Statistical Committee, Central Product Classification, Statistical Papers Series No. 77, ver. 2.0, (Dec. 31, 2008) [hereinafter CPC].
[81] *Id.,* Entry no. 965.
[82] Council for Trade in Service, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, ¶¶ 23-24, S/L/92 (Mar. 28, 2001).
[83] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
[84] Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].
[85] U.S. – Gasoline, *supra* note 72, at 17; Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 6, 41 (Feb. 3); Case Concerning the Aerial Incident of July 27th, 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 I.C.J. 127, 188; Robert Howse*, Adjudicative Legitimacy And Treaty Interpretation In International Trade Law: The Early Years Of WTO Jurisprudence, in* THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 57-58 (Joseph H. H. Weiler ed. 2000); Campbell McLachlan, *The Principle of Systematic Integration and Article 31 (3) (c) of the Vienna Convention*, 54 I.C.L.Q 279, 291 (2005).
[86] VCLT, *supra* note 84, art. 31.1.

Accordingly, the ordinary meaning of the word 'recreation' includes sport and recreation facilities.[87] Also, the sub – sector of sporting service is never found in isolation either in the CPC or in the SSCL it is always accompanied with the sub-sector of recreational service. Therefore, the phrase 'recreational and other' will cover the sub – sector of sporting services as well.

Further, the WTO Appellate Body in the *US- Gambling* Case has defined "sporting" as being connected to—in the sense of "related to," "suitable for," "engaged in" or "disposed to"—sports activities.[88] Taking the same meaning, the services in sporting will include services of athletes as they are directly engaged in sport activities. The CPC explains the service activities covered under the subclass of services of athletes as 'services provided by individual own-account sportsmen and athletes'.[89] Moreover, the sub – sector of sporting services also includes Services of sports clubs, which includes organization and management of sports events by sports clubs offering the opportunity for sports, *inter alia* football clubs, swimming clubs and winter sports clubs.[90] Hence, the Scheduled Commitments extend to the Sporting Services.

In the instant case, Arpenia has three major football leagues and there is lot of influx of foreign players coming to Arpenia in order to find a spot in these league competitions. Therefore any measure by Arpenia affecting the said service will attract the commitments made in its GATS Schedule.

B. THE RULE VIOLATES THE FREE TRADE OBLIGATION UNDER RFTA

Arpenia's has violated both its market access and national treatment obligations under the GATS, in addition to RFTA as it is a quantitative discriminatory measure.

1. The Rule affects the trade in sporting services

A 'Measure' means a measure by a Member in the form of a law, regulation, rule, procedure, decision or administrative action, but can also take any other form.[91] A 'measure by a Member' within the meaning of Article I: 1 can therefore be a national parliamentary law as

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[87] OXFORD ENGLISH DICTIONARY 713 (2010).
[88] Appellate Body Report, *United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 165, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S. – Gambling Appellate Body Report].
[89] CPC, *supra* note 80, Entry no. 96610, Explanatory Note, 389.
[90] CPC, *supra* note 80, Entry no. 96512, Explanatory Note, 388.
[91] General Agreement on Trade in Services, art. XXVIII (a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

well as municipal decrees or rules adopted by professional bodies.[92] The rule has been passed by the Federal Football Board of Arpenia in the present case and thus, qualifies as a measure by Arpenia.

The WTO Appellate Body clarified in *EC – Bananas III* that the ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. Further, for a measure to affect trade in services, the measure is not required to regulate or govern the trade in, i.e. the supply of, services. A measure is covered by the GATS if it affects trade in services, even though the measure may regulate other matters. A measure affects trade in services when the measure bears upon 'the conditions of competition in supply of a service'.[93]

In the instant case, the Rule is not a 'purely sporting'[94] rule as it would have a significant economic effect on the 'presence of natural persons' in the Sporting Services. This Rule modifies conditions of competition in favour of Arpenian nationals as it restricts the business activities of players from Bellomach who wish to compete in Arpenia. If a given player is prevented from signing a contract in Arpenia, he is left with few options. As a result, players from Bellomach who wish to compete abroad are all but shut out of what would otherwise be a viable market for their athletic prowess. Thus, the Rule affects the trade in sporting services and RFTA rules and commitments would apply to it.

2. Arpenia is prohibited from taking any discriminatory measure violating national treatment obligation under RFTA

Art. 27(1) of RFTA states that RFTA shall be interpreted in accordance with the rules of treaty interpretation under public international law.[95] Article 31 of VCLT goes on to say that 'any relevant rules of international law applicable in relations between the parties' shall also be taken into account.[96] In the instant case, the 'relevant rule of international law applicable in relations between the parties' is GATS and therefore, RFTA should be interpreted in the light of provisions of GATS.

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[92] *Id.*, art. I: 3(a).
[93] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Banana*, ¶ 220, WS/DS27/AB/R (Sep. 25, 1997) [hereinafter EC – Banana III].
[94] Case T-313/02, Meca-Medina and Majcen v. Comm'n, 2004 E.C.R. II-3291, ¶ 27.
[95] Compromis, Annexure 1.
[96] VCLT, *supra* note 84, art. 31.3 (c).

Article V of GATS entitled 'Economic Integration', regulates all free trade agreements between or among Member States, pursuant to which, an economic integration agreement must have 'substantial sectoral coverage' of the trade in services.[97] Further, it should also provide for the 'absence or elimination of substantially all discrimination.'[98]

The requirement of the absence or elimination of 'substantially all' discrimination, is provided in the sense of national treatment,[99] through (a) elimination of existing discriminatory measures, and/or (b) prohibition of new or more discriminatory measures. Therefore, the terms of RFTA must provide for elimination of discrimination as per the national treatment standards under GATS.

Moreover, the GATS, followed by regional and bilateral agreements, imposes some limits on the use of domestic regulation as veiled discrimination.[100] The free trade agreements also have an important lock-in effect on domestic reform as change of policy violates the free trade obligation.[101] One of the most important aspects of free trade agreements is that they encourage developing countries to liberalize their own trade and regulatory barriers in order to attract foreign investment.[102] In the instant case, RFTA was entered into with the objective of promoting free trade between the two countries keeping in mind their long historical trade relations.

Thus, the RFTA seeks to eliminate barriers on trade in services to facilitate trade between the parties and Arpenia is prohibited from taking any new measures or make any new domestic regulations discriminating between domestic and foreign service suppliers.

As the ECJ held in *Bosman Case*:

> "*the fact that [a rule] concern not the employment of such Players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that*

[97] GATS, *supra* note 91, art. V: 1.
[98] *Id.*; CHIRSTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 113 (Cambridge Univ. Press ed. 2000) [hereinafter ARUP].
[99] GATS, *supra* note 91, art. XVII.
[100] Rachel Denae Thrasher & Kevin P. Gallagher, *21st Century Trade Agreements: Implications for Development Sovereignty*, 38 DENV. J. INT'L L. & POL'Y 313, 334 (2010).
[101] Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of The World Trading System? in* FREE TRADE AGREEMENTS : US STRATEGIES AND PRORITIES 13 (2004).
[102] *Id.* at 10.

> *participation obviously also restricts the chances of employment of the player concerned.*"[103]

Quite simply, in the instant case, the rule closes an entire market to a large number of players from all around the world and constitutes *de facto* discrimination between a domestic service supplier and a Foreign Service supplier.

The Rule will restrict Leagues from signing foreign players. The size of a league's squad is limited *inter alia* by its financial resources and the need to keep players engaged by giving them adequate game time. The introduction of the Rule would therefore necessarily require leagues to priorities the recruitment of eligible players at the expense of non-eligible players. Thus, it violates the National treatment obligation under the RFTA.

3. The Rule is a quantitative restriction violating Article XVI of the GATS

Market access is the "entry ticket," a condition *sine qua non,* to the free trade in services.[104] There can be no international trade without access to the domestic market of other countries. Rules on market access are, therefore, at the core of WTO law. The substantial reduction of tariff and non-tariff barriers to market access is, tighter with the elimination of discrimination, the key instrument of the WTO to achieve its overall objectives.

When a Member makes a market access commitment, it binds the level of market access specified in the GATS Schedule[105] and agrees not to impose any market access barrier that would restrict access to the market beyond the level specified.[106] It is pertinent to note here that the market access commitment under the GATS schedule of Arpenia in the Sector of Entertainment, Recreational and other Services is unbound with respect to mode 4 of supply (presence of natural persons) in the sector specific as well as horizontally which in effect means that Arpenia can maintain measures inconsistent with the requirement of Article XVI.

However, both the countries in the present case have concluded RFTA in order to promote trade between them and therefore, access to the market of each other is an essential requirement, which can be fulfilled only by substantial reduction of market access barriers. As the RFTA adopts all WTO rules and commitments as FTA rules and commitments, both

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[103] Case C-415/93, Union Royale Belge Sociétés de Football Association and others v. Bosman, 1995 E.C.R. I-4921, ¶ 120.
[104] Mary E Footer, *GATT and the Multilateral Regulation of Banking Services,* 27 THE INT'L LAWYER 343, 353 (1993).
[105] GATS, *supra* note 91, art. XVI: 1.
[106] GATS, *supra* note 91, art. XVI: 2.

the States in all the sectors, where market-access commitments have been undertaken should not maintain any measure listed in Article XVI: 2 as 'market access barrier'.

Article XVI: 2 (a) to (f) of the GATS provides for an exhaustive list of such discriminatory and non-discriminatory measures. This list includes limitations on the number of service suppliers in the form of numerical quotas. The Rule in the present case, qualifies as a quota under the above mentioned provision as it is a quantitative limitation on the number on Foreign Service supplier.

C. ARGUENDO, THE RULE VIOLATES THE OBLIGATION OF ARPENIA UNDER ICESCR

The right to work is a fundamental right, recognized in several international legal instruments.[107] The right to work, as guaranteed under the ICESCR, affirms the obligation of States parties to assure individuals their right to freely choose or accept work, including the right not to be deprived of work unfairly.[108]

Violations of the obligation to respect the right to work include laws, policies and actions that contravene the standards laid down in article 6 of the Covenant. The labour market must be open to everyone under the jurisdiction of States parties.[109] In particular, any discrimination in access to the labour market or to means and entitlements for obtaining employment on the grounds of *inter alia* national or social origin and birth which aims at impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.[110]

As already stated the Rule in the present cases restricts the market access for the players from Bellomach, who come within Arpenia's jurisdiction and discriminates on the basis of nationality, thus violating their right to work.

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[107] ICESCR, *supra* note 18, art. 6; UDHR, *supra* note 18, art. 23 (1); International Covenant on Civil and Political Rights, art. 8(3), Dec. 16, 1966, 999 U.N.T.S. 171; Declaration on Social Progress and Development, art. 6, G.A. Res. 2542 (XXIV), U.N. Doc. A/7630 (Dec. 11, 1969); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, 660 U.N.T.S. 195, 212; Convention on the Elimination of All Forms of Discrimination against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, *supra* note 18, art. 32; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 11, 25, 26, 40, 52, New York, Dec. 18, 1990, *entered into force* July 1, 2003, 2220 U.N.T.S. 93.

[108] ICESCR, *supra* note 18, art. 6.

[109] Comm. on Economic, Social and Cultural Rights, *Right to Work,* 4, General Comment No. 18, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005) [hereinafter General Comment No. 18].

[110] ICESCR, *supra* note 18, art. 2.

It is also pertinent to note here that the failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements constitutes a violation of their obligation to respect the right to work.[111] Therefore, the defence by Arpenia that its market access commitments are 'unbound' with respect to the 'presence of natural persons' in its GATS schedule in the sector of sporting services is inconsistent with its international obligations.

IV. THE IMPOSITION OF RULE ON COURT LANGUAGE BY ARPENIA IS IN VIOLATION OF ITS OBLIGATIONS UNDER GATS AND RFTA

A. THE COURT LANGUAGE RULE NULLIFIES THE SPECIFIC COMMITMENTS UNDER GATS SCHEDULE AND VIOLATES THE TERMS OF RFTA

It is important to ensure that benefits arising from existing commitments are not significantly curtailed by ineffective or inconsistent regulation.[112] The Rule on Court language is a discriminatory measure affecting the trade in legal service and therefore, it renders the undertaken commitments ineffective.

1. It affects the trade in legal service

In each of those countries where the regional entities are competent to enact legislation relevant for the exercise of the legal profession,[113] it must abide by the GATS obligations imposed on the WTO Members. In the instant case the High Court of Larront, the largest state in Arpenia passed the rule on court language and even though the rule is binding only in the state of Larront and not in the whole territory of Aprenia, it must abide by the GATS obligations imposed on Arpenia. The language rule also, affects the trade in legal services because it gives an upper hand to the local lawyers over foreign lawyers as they are already well versed with the tribal languages.

[111] General Comment No. 18, *supra* note 109, at 10.
[112] Council for Trade in Service, *Note by the Secretariat: Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶ 8, S/C/W/96 (Mar. 1, 1999).
[113] Richard L. Abel, *Transnational Law Practice,* 44 CASE W. RES. L. REV. 737 (1994).

2. It constitutes unjustifiable discrimination violating the WTO's fundamental principle of liberalised trade

National treatment is relevant where market access has been granted. The national treatment norm puts pressure on regulations that discriminate in favour of local lawyers.[114] It provides that foreign service suppliers are entitled to conduct business under conditions of competition not less favourable than those accorded to domestic service suppliers,[115] for which the test is to determine the effect the measure has on their opportunity to compete with locals.[116] Apart from conventional restrictions, national treatment restrictions include *inter alia* language requirements and the requirement for foreign lawyers to take active part in the local business. All these measures have to be scheduled as national treatment restrictions as they constitute either *de jure* or *de facto* discrimination against foreign service suppliers.[117]

As mentioned earlier, the RFTA also puts an obligation of national treatment on both the countries. It prohibits them from adopting new measures inconsistent with the national treatment requirement. In the instant case, language requirement has not been scheduled as a national treatment restriction in the 'National treatment' column. Therefore a measure putting such a restriction nullifies the GATS commitment. Such a qualification may apply to both foreigners as well as to the locals and might not *prima facie* discriminate but it imposes additional burden on foreigners.[118]

Furthermore, mode 4 of supply is based on the principle of reciprocity, which means that access is made available to the nationals of other countries on a condition that the host country's nationals are granted access to that country's market in return.[119] As Bellomach has not put any restriction on the lawyers from Arpenia, it is the obligation of Arpenia to do the same, which Arpenia has violated.

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[114] GATS, *supra* note 91, art. XVII.
[115] GATS, *supra* note 91, art. XVII (3).
[116] EC – Banana III, *supra* note 93, ¶ 234.
[117] Council for Trade in Service, *Background Note by the Secretariat*: *Legal Services*, ¶ 63, S/C/W/43 (July 6, 1998).
[118] ARUP, *supra* note 98, at 159.
[119] *Id.*

B. THE RULE ON COURT LANGUAGE IS A QUALIFICATION THAT VIOLATES ARTICLE VI OF THE GATS

The sixth section of Article VI requires that Member nations do not place unnecessary burden on the recognition of professional qualifications: "*In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.*"[120] Qualification requirements, "*often represent an insurmountable barrier to trade in legal services, especially for the practice of host country law*."[121] Qualification should be based on an objective criteria, the ultimate question being whether the lawyer can provide adequate service to the client. Providing adequate service should include a basic understanding of the legal system and competence in the particular area of law to be advised.[122]

In the instant case, Arpenia was a colony of Bellomach and many of Bellomach's civil laws remain in place in Arpenia. Since, the basic legal system of both the countries is very similar, lawyers from Bellomach are familiar with the legal system of Arpenia to a great extent and this language requirement is an additional burden limiting their competence. Therefore, it is an unnecessary barrier on the foreign suppliers in the name of domestic regulation.

C. THE RULE OF COURT LANGUAGE IS NOT JUSTIFIED BY THE GENERAL EXCEPTIONS TO THE GATS

A member asserting the defence 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"[123] showing that there is a sufficient nexus between the measure and the interest protected. Secondly, the challenged measure must satisfy the requirements of the *chapeau*, in order to successfully defend a measure as an exception under GATS. [124]

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[120] GATS, *supra* note 91, art. VI: (6).
[121] Council for Trade in Service, *Background Note by the Secretariat*: *Legal Services*, ¶ 41, S/C/W/43 (July 6, 1998).
[122] *Id.*, ¶ 35.
[123] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.449, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S – Gambling Panel Report].
[124] U.S. – Gasoline, *supra* note 72, at 21; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

1. The Court language rule is not justified by Article XIV (a) of the GATS

The present court language rule does not fall within Article XVI (a) '*necessary to protect public morals or to maintain public order*'. The Court Language rule has been enforced to ensure access to courts but the rule does not serve the purpose. On the other hand it makes the market of legal services more restrictive and a restrictive market is worse for the public at large because costs for legal services increase when services are more difficult to obtain.[125]

Moreover, in WTO jurisprudence, the necessity of a measure under the general exceptions clause is determined in terms of whether a reasonably available, WTO-consistent alternative, exists that is less trade-restrictive.[126] In the instant case, Arpenia had such an alternative measure. The objective of the present Court language rule could have been met by making the tribal language optional in court with other State or federal languages. This option would have been consistent with both the WTO obligation as well the RFTA obligation of Arpenia and would not have posed an unnecessary barrier on trade in legal services.

2. It is not justified by the *chapeau* of Article XIV of the GATS

The essence of the *chapeau* of Article XIV requirements is that a measure must not be applied in a manner that it would constitute a "disguised restriction on trade in services."[127] The *chapeau* is significant as it serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded to other Members by the substantive rules of GATS.[128]

As established above, the Court language rule nullifies the Market access commitment and it also violates the national treatment standard by imposing unnecessary barrier for foreign lawyers. Therefore, it is a 'disguised restriction on trade in services' and can't be secured under the exception clause of GATS.

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[125] 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, 954 (1995); Kelly C. Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1807 (1983).
[126] Report of the Panel, *United States--Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989); U.S – Gambling Panel Report, *supra* note 123 , ¶¶ 6.448, 6.461; EC-Bananas III, *supra* note 93, ¶ 231.
[127] GATS, *supra* note 91, art. XIV.
[128] U.S. – Gambling Appellate Body Report, *supra* note 88, ¶ 339.

FINAL SUBMISSION/PRAYER

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

1. Bellomach is not internationally responsible for issuing the mandatory waiver as it does not violate its obligation under the Ruritania Free Trade Agreement (RFTA).
2. Bellomach's act of procuring the services under the two contracts does not amount to unfair procurement behaviour.
3. The imposition of Six Nationals Rule by the Federal Football Board of Arpenia is unjustifiable.
4. The imposition of rule on court language by Arpenia is in violation of its obligations under GATS and RFTA.

Respectfully submitted,

X ____________________________

Agent(s) on behalf of the Respondent