FIXITANIA – CERTAIN MEASURES AFFECTING FINANCIAL SERVICES AND INFLUENCING THE EXCHANGE RATE

A WTO CASE STUDY

PRESENTADO POR:
DANIEL ORDUZ SALAZAR
NICOLÁS ESGUERRA MIRANDA
MIGUEL ANDRÉS TORRES CARO

DIRECTOR:
ALFONSO MIRANDA LONDOÑO

BOGOTÁ D.C., FEBRERO DE 2015
NOTA DE ADVERTENCIA

"La Universidad no se hace responsable por los conceptos emitidos por sus alumnos en sus trabajos de tesis. Solo velará por que no se publique nada contrario al dogma y a la moral católica y porque las tesis no contengan ataques personales contra persona alguna, antes bien se vea en ellas el anhelo de buscar la verdad y la justicia".

*   *   *

*   *   *
4. **The Fixitanian Stability Act Is Not Covered by the Exception Contained in GATT Article XV:9** .............................................................................................................................................................................. 57

**Request for Findings** ........................................................................................................................................................................... 59

**Bibliography** ....................................................................................................................................................................................... 61

A. **Conventions and Treaties** ............................................................................................................................................................... 61

B. **WTO Cases** ...................................................................................................................................................................................... 61

1. **WTO Appellate Body Reports** ....................................................................................................................................................... 61

2. **WTO Panel Reports** ................................................................................................................................................................. 62

C. **Secondary Sources** ........................................................................................................................................................................... 64
SECTION I - INTRODUCTION

A. OVERVIEW OF THE ELSA MOOT COURT COMPETITION ON WTO LAW

The ELSA Moot Court Competition on WTO Law is a mock court organized by the European Law Students’ Association, simulating a case under the dispute settlement system of the World Trade Organization (the “WTO”). The competition dates back to 2002, where it began as a regional competition for European universities. Nevertheless, soon the competition turned global, attracting more than 80 universities worldwide to participate each year.

Due to the global recognition of the competition, today the ELSA Moot Court is divided into five regional rounds, which take place in America, Asia-Pacific, Europe, Africa and the Middle East. The best teams of each regional round are selected to participate in the World-Round, which is hosted in Geneva, Switzerland, having the best two teams plead in the WTO Headquarters.

The ELSA Moot Court presents students with a hypothetical case question on WTO law, involving two fictional States. Despite being hypothetical, the cases are based on plausible situations or current matters subjects of academic debate. For example, in the 2014 case (“Fixitania – Certain Measures Affecting Financial Services”) the legal debate was focused on two measures passed by a hypothetical State (Fixitania) in times of economic crisis. With the first measure, the State guaranteed the savings made in national banks, but not the ones in foreign banks. This of course, affected the business of foreign banks in that country that did not have the same governmental back up, and therefore lost many of their
customers. This measure is similar to the ones taken by different countries in order to stabilize their national financial sector, such as recapitalizing, guaranteeing or bailing out domestic banks. In that sense, the case is meant to question the legality of such measures during the course of the global economic crisis. The second measure taken by the same state, introduced a dual exchange rate regime, with an undervalued fixed exchange applicable solely to exporters of that country. The question raised with this measure is whether this action can constitute a subsidy under the Agreement on Subsidies and Countervailing Measures. Recently, several countries have taken similar measures regarding their exchange rate policy and there is an ongoing debate regarding the legality of such measures under the WTO Agreements. China, for example, is said to have its currency pegged to the dollar, which allows its domestic exporters to compete at more favorable prices in the United States. Other examples are the case of Myanmar who recently introduced a dual exchange rate regime; or Switzerland who also fixed exchange rate schemes. In that sense, although the case given to the students is in fact hypothetical, its resemblance to current debate is undeniable, which makes the exercise even more relevant and passionate for both participants and judges.

Once the case is released, each participating team must analyze the legal issues raised according to the facts of the case, and based on a thorough research and study of WTO’s covered agreements, case-law (WTO Panel and Appellate Body Reports) and the teachings of the most highly-regarded international law experts. The teams are supposed to represent both conflicting States in the case, presenting claims as both the complainant and the respondent State in the dispute.
B. Preparation for the Competition

The ELSA Moot Court is divided in two phases. The first stage involves the drafting of a legal paper, which comprises the facts of the case and the analysis of each of the claims in the light of the covered agreements and WTO case-law. The written briefs cannot be longer than 30 pages in extension, and each team must present a written submission for each of the contending parties (complainant and respondent). These submissions are evaluated meticulously, and are subject to the most rigorous formal requirements, which may cause a team to lose points in case they are not properly taken into account. Once the case is submitted, in late September, each team counts with almost four months to prepare the legal documents and hand them in for their evaluation in January.

For this stage of the contest, the preparation consisted almost entirely in legal research. Each of the claims in the case were accurately divided between the three members of the team, and each one of the students was assigned a set of Panel and Appellate Body Reports that needed to be evaluated and studied, since they had direct influence in the resolution of the case. Alongside the case law, the research included the study of legal documents from the WTO, the IMF, and the ICG, among others, as well as numerous journals by the most renowned economists and legal analysts regarding themes such as interest rates, deposit insurance, moral hazard, and subsidies.

The research and drafting of the paper was made individually by each teammate, under strict supervision by our coaches. Nevertheless, the team met three or more times a week in order to discuss crucial aspects of the case and examine the written work of our teammates.
Section I - Introduction

The written submission was made based on the IRAC format, which is commonly used in law schools to tackle legal issues presented to students for their evaluation. The IRAC system is divided in issue, rule, application and conclusion: the “issue” involves the question that wants to be answered; the “rule” involves the measures at hand in order to solve the issue; the “application” regards the analysis of the issue in the light of the rule; and the conclusion is the answer to the question posed initially.

Once the written submission was handed in, the team had to prepare for the second stage of the competition: the oral submission. This phase involves presenting the case orally before a group of WTO experts that serve as hypothetical “judges”. The judges may interrupt the students in their oral interventions in order to question about the facts of the case, the sources of law, the legal analysis of the case and its resolution. Each team counts with a total of 30 minutes to present their case, after which, once the respondent team has concluded, there is a 5 minute intervention for each team in order to rebut and sub-rebut the arguments of the counterpart.

The oral submission is a key element of the moot court, since it evaluates the individual capabilities of each of the intervening students, which are graded based on their oratory, analysis, ability to answer questions and time management. Additionally, this stage measures the ability of the students to work together, since team work is one of the key elements that the judges must take into account.

For the oral submission, the team had a rigorous training in oratory, which took place daily. The team gathered afterschool and simulated the hearings in front of the coaches, who acted as “judges”. Once the hearings were over, the team had a feedback session and
worked on the questions that were not answered properly during the drill, repeating the hearings over and over again. This training involved learning about time management, team work, oratory, and body language. The training in oral skills lasted over five months, from the submission of the written document until the final hearing in the WTO Headquarters, which implied changing the script over and over again until it was nearly flawless.

The ELSA Moot Court Competition converges each year the best universities in the world around a legal issue on WTO law. Therefore, this competition requires the utmost preparation and ability, and the perfect combination in oral and written skills, legal analysis, team work, and research capabilities. Over a period of 10 months, team number 40 from Pontificia Universidad Javeriana, Bogotá, Colombia, prepared, studied and rehearsed the resolution of the case “Fixitania – Certain Measures Affecting Financial Services and Influencing the Exchange Rate”. Competing against 4 teams in the Latin American regional round, the University landed as runner up, earning a spot in the final oral round in Geneva. Two months of further preparation led the team to Switzerland on May 2013, and rallying against the best universities in the globe, made it to the final. The last hearing was made before a Panel of 9 experts on WTO Law, in the Main Conference Room of the WTO Headquarters, against the University of Hong Kong. In the Final, the Pontificia Universidad Javeriana pleaded as Libertania, the complainant in the case, and defeated its counterpart in a breathtaking matchup. Finally, our team was honored by receiving the winning prize from the hands of the Director General of the WTO, Mr. Pascal Lamy, and by receiving a special mention for the outstanding oral performance of one of our teammates, Mr. Nicolás Esguerra.
C. COACHING THE TEAM

BY: JUAN PABLO CAICEDO AND ALBERTO MADERO

As detailed in the previous section, the preparation for the ELSA Moot Court is an extensive and burdensome process. However, only the teams that fully understand the importance of this stage can become suitable candidates for obtaining the victory in the final oral round of the competition. The preparation stage of the competition does not simply comprise dedicating long hours for legal research, drafting of written submissions or preparing oral arguments. It also involves developing team-work skills, learning to handle emotions in moments of high pressure and understanding the honor and responsibility that is entrusted to the team as a representative of a top-tier law faculty in a worldwide legal competition. And the figure responsible for making the team fully grasp all these determinant factors is a “behind the scenes” player that, nevertheless, performs a crucial role in the preparation stage of the competition: the coaches.

From a strict academic perspective, the coaches of the team perform three main functions, which in chronological order include: i) providing an introduction to the legal system of the WTO through weekly lectures on the matter; ii) supervising the team during the drafting of the written submissions and iii) preparing the team for the oral hearings. The first task takes places during the first couple of months of the competition, before the hypothetical case is released by the organizers of the moot court. Once the case is released, the legal issues of the case are allocated among the team members and the coaches concentrate on providing the necessary legal and procedural concepts to each team member in order for them to
SECTION I - INTRODUCTION

properly solve the legal questions posed by the case. Finally, after the submission of the memorials, the coaches prepare the team members for the most demanding stage of the competition: the oral hearings before real-life WTO experts and practitioners.

Notwithstanding the above, if we analyze from a non-academic perspective the full role of the coach, we necessarily reach the conclusion that their work is by no means limited to the aforementioned tasks. The key for good coaching in a moot court competition lies on fully understanding the situation in which the students are at every precise moment. And this comprehension is only achieved when the coaches of the team have themselves been participants in the moot court before. Only previous participants have both the legal and the human expertise required to properly prepare a new team for the numerous challenges that the competition will pose. And this is the reason why the role of the coach cannot be analyzed merely from an academic perspective; because the moot court, as such, is not merely an academic exercise. It is a life and game-changing experience to which participants enter as young, naïve and un-experienced law students, and leave as structured, responsible, mature and hard-working young lawyers. There is no single experience throughout the five years of law school that prepares students in a more thorough manner for the real life - legal profession than moot courts. And in this point lies the importance of this type of experiences, beyond awards and world titles. Moot courts create lawyers, good lawyers; Lawyers proud of their profession, of their school and of their country. No exam or mid-term gives this result.

Law students that enter a moot court have never faced before the kind of pressure and demand they will experience during the moot court. Not only will their legal skills be
tested. Students will need to learn how to properly work in a team, how to respond positively and maturely to criticism, how to adapt to unforeseen scenarios and to push themselves to levels of work and sacrifice never experienced before. All these while simultaneously attending their regular obligations in their law courses. Hence, the importance of the persons entrusted with the guidance – and, to certain degree, survival – of the students throughout this process.

The coach-student relationship goes far beyond a regular professor-student relationship. Even though the role of a coach encompasses the regular functions usually performed by a law professor, it requires much more than the capacity to transmit legal knowledge. It requires the ability to understand the student as a human being and the skills to interact with him in situations in which no regular law professor is usually placed. The coach will need to learn how to read the students, to determine if they are nervous, angry, tired, and, additionally, how to properly deal with the situation. There is no textbook for this.

As it can be inferred from the previous lines, the crucial element for a successful coach-student relationship can be summarized in one word: trust. This was, without hesitation, one of the key elements of the positive outcome achieved by the team in the 2013 ELSA Moot Court Competition. There was complete and absolute trust by the students on the guidance and good-judgment of their coaches. This, by no means, suggests that team members in moot courts should assume that their coach is always right. Coaches are usually also young lawyers beginning their careers both as practitioners and pedagogues. However, only to the extent that the students have complete trust in their coaches will the coaching process be fluent and fruitful. Trust does not mean assuming that everything the coach says
is accurate per se. Trust in this context means having absolute faith that by working together, coach and students, side-by-side, any obstacle faced by the team can and will be defeated. In our case, it was this trust that gave the team the necessary strength to pick itself up after losing the final hearing of the regional round in Costa Rica and setting in mind a clear and defined goal; winning the Final Oral Round in Geneva. Coaching a winning team is easy; coaching a team that has suffered a major defeat and having their trust in guiding them to victory is something else. It is the kind of trust that doesn’t let you give up. And that is what coaching is all about.
SECTION II – THE CASE

The case that will be presented is “Fixitania – Certain Measures affecting Financial Services and Influencing the Exchange-Rate”. Libertania brings this case to the WTO, where it requests the Dispute Settlement Body to establish a panel in order to rule upon this matter. The Dispute Settlement Body of the WTO established a Panel to settle this dispute. The facts of the case that will be described took place between the global financial crisis of 2007 and 2013.

Fixitania is a developed WTO member and a member of the International Monetary Fund (“IMF”). Libertania is also a developed WTO member and also a member of the IMF. Both countries are party to the Vienna Convention on the Law of Treaties. Fixitania has made specific commitments under the General Agreement on Trade in Services (“GATS”) for financial services. Its Schedule of Specific Commitments states: Fixitania undertakes commitments on Financial Services in accordance with the provisions of the “Understanding on Commitments in Financial Services”. With regard to restrictions on national treatment in the Financial Services sector, the Fixitanian Schedule states “None”, which according to the Guidelines for Scheduling Specific Commitments under the GATS implies a full commitment on national treatment, without restrictions. Having undertaken commitments on financial services in accordance with the Understanding on Commitments in Financial Services implies that Fixitania must comply with the national treatment section of the Understanding, which requires the member to grant official funding and refinancing facilities to financial service suppliers of other members established in its territory.

Until the start of the global economic crisis of 2007, Fixitania was an extremely open, trade-oriented, and liberal economy. In particular, the financial sector of Fixitania was globally active in doing business based on Fixitania’s legislation for the banking sector and financial services, which provided, among other things, for free movement of capital and payments
Section II – The Case

with third countries, subject only to an emergency clause that allowed the Fixitanian government to introduce restrictions on the free movement of capital and payments in case the foreign currency reserves managed by the Fixitanian Central Bank (“FCB”) fell below the equivalent of 1.5 billion Special Drawing Rights (“SDRs”).

The exchange rate for the Fixitanian currency, the “Fixi”, was freely floating, and the Fixitanian Central Bank was not intervening on the exchange markets in order to influence the course of the “Fixi” against any other currency. It was the market that determined the price of the currency of Fixitania.

The Central Bank is established by Fixitanian law, is owned by the Government, and is under the direct authority of the Fixitanian Minister of Finance. The profit of the Bank that derives from its monetary policy and foreign reserve transactions is transferred to the Government on an annual basis. This will allow Libertania to argue before the Panel that the Fixitanian Central Bank is, according to WTO law, a public body. According to WTO case law, an entity will constitute a public body if the Government controls it.\(^1\) The aforementioned facts of the case allow Libertania to determine that FCB is in fact a public body. This is of great importance since in order for the action of the Bank to be subject to WTO law, it has to be demonstrated that it is a public body.

Once the global financial and economic crisis hit, Fixitanian commercial banks faced serious trouble, as they had been borrowing short term on the global financial markets (mainly in US Dollar) and had lent long term to foreign borrowers, also mainly in US Dollar. As a consequence, the Fixitanian Government in 2007 had to introduce restrictions on the free movement of capital in order to prevent the total drying up of its foreign currency reserves. Furthermore, in order to prevent a collapse of major Fixitanian banks, the Fixitanian Government passed the “Regulatory Emergency Ordinance for Financial Institutions”

\(^1\) PR, Korea – Vessels, para 7.50.
“REOFI”), according to which savings in Fixitania were guaranteed by the Fixitanian Government, but only for banks that were registered in Fixitania and had a majority of domestic shareholders. Banks that were subsidiaries of foreign banks, i.e. banks with 51% of foreign shareholders, were exempted from the guarantee. As a consequence, non-guaranteed banks lost many of their customers and business. As will be proven further by the State of Libertania, the REOFI constitutes a protectionist measure hidden under an apparent emergency regulation in order to salvage Fixitanian banks. Even though the measure was taken in a period of financial distress, the REOFI distinguishes between foreign and domestic banks exclusively on their origin in order for them to be eligible for the governmental guarantee; therefore, foreign banks with equal or greater size than domestic banks are not protected with the insurance and thus lose their business shortly after.

Deposit insurance schemes have become a common ground for most countries critically hit by the financial crisis of 2008, in order to restore the public confidence in the financial institutions, as was the case of Iceland and Cyprus. These schemes have proven to be effective and have mitigated some of the adverse effects of the financial emergency; nevertheless, the financial system is composed by all financial institutions, and all must be protected. Therefore, Libertania will prove that the exclusion of foreign banks from the guarantee is a prima facie case of a protectionist measure and not a prudential regulation, thus a violation of Fixitania’s national treatment obligations.

Due to the crisis, the gross domestic product (GDP) of Fixitania fell 15% within 1 year and unemployment climbed to a record high of 20%. In 2008, the majority of the Fixitanian population voted for a newly founded protest party in the general elections. After the elections, the new government declared, “the forces of global financial capitalism must never again endanger the Fixitanian people and prosperity”.

SECTION II – THE CASE
The Fixitanian parliament enacted the “Fixitanian Stability, Economic Growth and Social Justice Act” (“Fixitanian Stability Act” or “FSEGSJ”). Libertania also disputes this measure as contrary to the WTO obligations of Fixitania. The Fixitanian Stability Act contains numerous provisions reorganizing the financial markets and supervision of financial institutions. It also abolishes the general freedom to export capital, but upholds freedom of payments with third countries, and encourages investments in the manufacturing sector. Furthermore, the Fixitanian Stability Act introduces a dual-exchange-rate regime with a fixed exchange rate for export transactions of Fixitanian exporters. Under that system, exporters can register with the Central Bank and be granted the status of an “Exporter of National Relevance” (“ENR”). ENRs are legally entitled and obliged to exchange their foreign-currency income at an exchange rate for the Fixi, which is being fixed against the Libertado, the currency of Libertanian, F’s largest trading partner (a so-called currency peg); the applicable exchange rate is set by the Fixitanian Government, and the Fixitanian Central Bank is tasked with buying all foreign currencies offered by ENRs at the respective rate against Fixi. All other foreign exchange transactions take place on a foreign exchange market, the exchange rate being the result of supply and demand [the Free Currency Market (“FCM”)]. The Central Bank of Fixitania does not intervene in this market at any time. This is precisely what Libertania will argue to be contrary to WTO Law, more specifically that it is a subsidy prohibited by the Agreement on Subsidies and Countervailing Measures (“SCM”). Traditionally, this is not the type of measures that constitute a subsidy. There is no WTO decision that states that fixing a currency constitutes a subsidy under WTO Law. Therefore, Libertania will have to make its case based on the legal dispositions and their applicability to the case at hand. A decision ruling in favor of Libertania’s claim would set down a very interesting precedent. Despite the economic benefits that fixing a currency is
said to bring, country members of the WTO would have to take this precedent into account for future cases in which they intended to implement such measures. It is clear that the recognized autonomy in their monetary policy would be limited in some way.

Thanks to these measures along with further economic and social reforms, the Fixitanian economy recovered quickly. Investments are no longer being made in the financial services industry but in high-technology industries, including the engineering and manufacturing of hybrid cars. Furthermore, Fixitania exports large quantities of biofuels.

As a consequence of the growing exports, the prohibition to export capital, and the obligation to buy unlimited amounts of foreign currency from ENRs, the Fixitanian Central Bank accumulated foreign currency reserves worth approximately 500 billion SDRs between 2008 and 2011. The current account balance for 2011 showed an overall trade surplus of 200 billion SDRs with the rest of the world and a bilateral trade surplus against Libertania of 100 billion SDRs. This effect could be argued to be a proof of the unfair benefit gained by Fixitania solely on the basis of granting unfair competitive advantage to their exporters through the fixed exchange rate. On the other hand, it is also evidence of the effectiveness of the measure. In that sense, the Panel would have to settle a current debate: can State do anything to protect their national interests in times of crisis? Are sovereign States bound by their international obligations in detriment of the welfare and benefit of their nationals?

Over the same period of time, the exchange rate for the Fixi on the Free Currency Market increased significantly, whereas the fixed export exchange rate applicable to ENRs was held constant by the Fixitanian Government; at the end of 2011, the Fixi traded at a rate 25% higher than the fixed exchange rate applicable to ENRs. In its Staff Report, following regular consultations under Article IV of IMF Articles of Agreement in the spring of 2012, the IMF stated that Fixitania had regained its economic strength and should now move to a more
flexible and uniform exchange-rate regime in order to reduce the current trade surplus and economic imbalances. The IMF also found that the ENRs exchange rate for the Fixi set by the Fixitanian Government is “significantly undervalued”. The undervaluation of the fixed exchange rate vis a vis the exchange rate of the market will be a crucial element in the determination of this measure as a subsidy. Although fixed exchange rates are per se more beneficial, it is the undervaluation that is providing for an unfair advantage to exporters against the national industry of other countries such as Libertania. Fixed exchange rates are said to allow the recipients much more predictability and certainty that the exchange rate of the market which fluctuates depending on the supply and demand. The undervalued fixed exchange rate, additionally allows the recipient to earn more Fixis for each Libertado they exchange at that rate as compared to what they would receive in the exchange rate of the market. What could be considered in fact proof of that benefit is that in Libertania, the manufacturers of hybrid cars increasingly suffer from the competition of Fixitanian hybrid car producers, which sell their products 20% below the price of hybrid cars produced in Libertania. Economists in Libertania consider the fixed exchange rate of the Fixi against the Libertado to be at least 15% undervalued. According to the same economists, the Fixi should trade at a higher rate against the Libertado under market conditions. The Panel will therefore have to determine whether the Fixitanian exporters are receiving a subsidy that is allowing them to gain competitive advantage thereby causing Libertanian producers a serious prejudice. Moreover an interesting question that will be subject of the dispute is why only exporters are entitled to the fixed exchange rate. In fact, even if conferring a fixed exchange rate were a subsidy under the SCM Agreement, the WTO does not prohibit all types of subsidies. However, those subsidies that are granted on the sole condition of exporting are in fact prohibited. This element will therefore, also be subject of the dispute at hand.
SECTION II – THE CASE

The aforementioned IMF staff report, however, did not make an assessment whether the exchange-rate regime of Fixitania was in breach of its obligations under the IMF Articles of Agreement.

Forced by strong lobbying efforts of the Libertarian hybrid car producers and banks, the Libertarian Government adopted the position of the industry and requested consultations under the WTO dispute settlement understanding (DSU) with Fixitania.

After 2 months, the consultations ended without any substantial concessions by Fixitania. Libertania now requests the establishment of a Panel. The Panel was established at the next meeting of the WTO Dispute Settlement Body (DSB).

In its request for consultations, the Libertarian government argues that the Fixitanian REOFI and the exchange-rate regime established by the Fixitanian Stability Act breaches several provisions of the WTO agreements. In particular, Libertania argues:

- That the REOFI breaches Article XVII of the General Agreement on Trade in Services and paragraph 2 of its Annex on Financial Services.
- That the FSEGSJ breaches: (i) the Agreement on Subsidies and Countervailing Measures in conjunction with Art. VI and XVI GATT, since the dual-exchange-rate regime constitutes a prohibited export subsidy; (ii) Art. XV:4 of the GATT in conjunction with the provisions of the IMF Articles of Agreement, in particular Art. IV (1) iii) thereof, since the exchange-regime constitutes a manipulation of the exchange rate of the Fixi that frustrates the intent of the GATT 1947.

The Chairman of the WTO DSB, pursuant to the WTO-IMF Cooperation Agreement, informed the IMF of the dispute. The IMF, following the applicable procedural provisions, replied to the Chairman of the DSB and referred in its letter to the Staff Report of the 2012 Article IV consultations. The Chairman of the DSB informed the Chairman of the Panel of
the letter and made it available to the Panel, as well as the Fixitanian and Libertanian delegations. The Panel decided to consult experts in accordance with Art. 13.2 of the DSU. The uniform view of all consulted experts is that the fixed exchange rate available for ENRs is at least between 15 and 20 % undervalued as compared to (hypothetical) market conditions.
SECTION III – CASE RESOLUTION

ELSA MOOT COURT COMPETITION ON WTO LAW

2012/2013

Fixitania – Certain Measures affecting Financial Services and Influencing the Exchange-Rate

Libertania
(Complainant)

vs

Fixitania
(Respondent)

SUBMISSION OF THE COMPLAINANT
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
</tr>
<tr>
<td>ABR</td>
<td>Appellate Body Report</td>
</tr>
<tr>
<td>AFS</td>
<td>Annex on Financial Services</td>
</tr>
<tr>
<td>AoA</td>
<td>Agreement on Agriculture</td>
</tr>
<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
</tr>
<tr>
<td>DSS</td>
<td>Dispute Settlement System</td>
</tr>
<tr>
<td>ENR</td>
<td>Exporter of National Relevance</td>
</tr>
<tr>
<td>FSEGSJ</td>
<td>Fixitanian Stability, Economic Growth and Social Justice Act</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>NT</td>
<td>National Treatment</td>
</tr>
<tr>
<td>PR</td>
<td>Report of the Panel</td>
</tr>
<tr>
<td>REOFI</td>
<td>Regulatory Emergency Ordinance for Financial Institutions</td>
</tr>
<tr>
<td>SCM</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
</tr>
<tr>
<td>SDR</td>
<td>Special Drawing Rights</td>
</tr>
<tr>
<td>UCFS</td>
<td>Understanding on Commitments in Financial Services</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties of 23 May 1969</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO Agreement Marrakesh</td>
<td>Agreement Establishing the WTO</td>
</tr>
</tbody>
</table>
Statement of Facts

F and L are both WTO and IMF Members, as well as part of the VCLT. F undertook commitments on financial services in accordance with the provisions of the “Understanding on Commitments in Financial Services”. Regarding the restrictions on national treatment in the financial services sector, Fixitania’s schedule establishes: “None”.

In 2007, the Fixitanian Government introduced restrictions on the free movement of capital and enacted the REOFI. This act guarantees savings in Fixitanian banks or banks with a majority of Fixitanian shareholders, but does not guarantee savings in foreign banks or banks subsidiaries of foreign banks. This act has adversely impacted foreign banks or subsidiaries of foreign banks by making them lose the majority of their businesses and customers to domestic owned banks.

In 2008, the Fixitanian Parliament passed the FSEGSJ. The measure introduced a dual exchange rate regime with a fixed exchange rate for export transactions of ENRs and a free floating exchange rate for all other foreign transaction. ENR is a status granted to those exporters who registered with the Fixitanian Central Bank. Fixitanian exporters that have been granted with the ENR status are obliged to convert foreign currency at the fixed exchange rate. The exchange rate is fixed against the Libertado, the currency of L, which is Fixitania’s largest trading partner. Fixitanian Government sets the applicable exchange rate and the FCB must buy all foreign currencies offered by ENRs at the respective rate against the Fixi. Contrariwise to the fixed exchange rate, the free-floating exchange rate is not in any way intervened by the Fixitanian Government. The IMF stated in 2012 that the ENR exchange rate for the Fixi is significantly undervalued and also that F should move to a
more flexible and uniform exchange rate. Economists consulted have all concluded that the ENR exchange rate is at least between 15 and 20% undervalued. The undervalued exchange rate has allowed Fixitanias’s enterprises to sell their products below market prices in other Members or to increase their returns. For instance, Fixitanian hybrid cars producers were able to sell their products 20% below the price of Libertanian producers. As a consequence of Fixitania’s artificial advantage, export transactions have increased and the FCB has accumulated foreign currency reserves that are approximately 500 billion SDRs between 2008 and 2011. Also, in 2011 F had a current account surplus of 200 billion SDRs with the rest of the world from which 100 billion SDRs are a bilateral trade-surplus with L.

**Summary of Claims**

**A. REGARDING THE REOFI**

Claim 1

- The REOFI violates the National Treatment obligation of Article XVII GATS.
- The REOFI provides less favorable treatment to foreign service suppliers by guaranteeing savings only in national banks and not in foreign banks or banks that are subsidiaries of foreign banks.
- The REOFI violates Paragraph 2 of the Annex on Financial Services, for being used as means of avoiding the commitments assumed by F under the GATS. The REOFI is a protectionist measure that was intended to be disguised as a prudential measure by F.
- The REOFI was not applied in accordance with the good faith obligation that irradiates all financial prudential measures under the GATS.
SECTION III – CASE RESOLUTION

• The REOFI made all non-Fixitanian banks lose the majority of their customers, thereby evidencing its protectionist purpose.

B. REGARDING THE FSEGSJ

Claim 1

• The FSEGSJ violates the SCM in conjunction with articles VI and XVI of the GATT.
• The FSEGSJ breaches the SCM because it constitutes a subsidy according to that agreement’s definition of subsidy.
• The fixed exchange rate granted by that measure is a form of a direct transfer of funds, made by a government body that benefits the recipients.
• The fixed exchange rate granted by the FSEGSJ to ENRs constitutes a price support for it represents a price supporting mechanism.
• The FSEGSJ is a subsidy according to the definition given by the SCM for it confers ENRs a benefit. This benefits consists in an exchange rate that being more beneficial than the one from the market, puts ENRs in a more advantageous position in the market.
• Introducing a dual exchange rate for ENRs is, according to the SCM, a prohibited export subsidy, for it is contingent in law upon export performance.

Claim 2

• The FSEGSJ violates both obligations contained in GATT Article XV:4 for it constitutes an exchange action frustrating the intent of the GATT as well as a trade action frustrating the intent of the IMF Articles of Agreement.
The term frustration has to be understood as an appreciable departure from the intent of the GATT or from the intent of a certain provision according to ad-note to GATT Article XV:4. This means a hindering of the purposes of GATT or the IMF-Articles of Agreement must be proven for determining a breach of GATT Article XV:4.

The FSEGSJ is an exchange action in the meaning of Article XV:4 since this term has to be broadly understood in a way that encompasses exchange rate actions.

The FSEGSJ frustrates the intent of the GATT given that export subsidization hinders the purposes of the GATT and also constitutes a violation of its articles VI and XVI.

The FSEGSJ is a trade action for it has effects on trade and the criterion for establishing the nature a certain measure should be its effects in both finance and trade.

The FSEGSJ frustrates the intent of the IMF Articles of Agreement because it attempts against purposes (ii) and (iii) of their first article, as well as it constitutes a currency manipulation under Article IV Section 1(iii).

F is to be deemed as a currency manipulator since the FSEGSJ is manipulates the exchange rate by preventing it to move and does so in order to gain unfair competitive advantage over other members.

**Identification of the Measures at Issue**

Measure 1: The REOFI is a measure by which the Fixitanian Government guarantees savings in F, only in banks registered in F and with a majority of domestic shareholders.
Measure 2: The FSEGSJ abolishes general freedom to export capital and introduces a fixed exchange rate regime only for those exporters who register with the Fixitanian Central Bank as ENRs. This exchange rate is determined by the Fixitanian Government, whereas all other foreign transactions are to be done under a free floating exchange rate.

**Legal Pleadings**

A. **THE REOFI VIOLATES ARTICLE XVII OF THE GATS**

In 2007, the Fixitanian Government enacted the Regulatory Emergency Ordinance for Financial Institutions (“REOFI”), a measure through which the Government guaranteed savings in banks registered in Fixitania and with a majority of domestic shareholders, but excluded foreign banks in Fixitanian territory of the benefit. Due to the measure, customers shifted their deposits from foreign banks to Fixitanian banks, causing deposit runs and the loss of the majority of customers to the domestically-owned competition.

Fixitania is a WTO Member, who undertook specific commitments in financial services in accordance with the “Understanding of Commitments in Financial Services”, and established no limitations to its national treatment obligations by inscribing “None” in its schedule in the financial services sector. Through the REOFI, Fixitania violates GATS Article XVII and its national treatment obligation, since it accords a less favorable treatment to foreign banks or subsidiaries of foreign banks in Fixitania, by only guaranteeing savings in banks registered in Fixitania and with a majority of national shareholders. For this purpose, Libertania will first prove that the REOFI affects trade in services, and therefore is subject to the GATS. Second, that the REOFI is inconsistent with GATS Article XVII.
The REOFI is a measure "affecting trade in services" covered by the GATS

According to GATS Article I:1, the General Agreement on Trade in Services applies to “measures by Members affecting trade in services.” Therefore, the REOFI is subject to GATS disciplines since: (i) it is a “measure” for the purposes of the GATS; (ii) it "affects trade in services".

The REOFI is a law passed by the Fixitanian Government, and thus a measure for the purpose of the GATS, since Article XXVIII of the Agreement defines “measure” as "any measure by a Member, whether in the form of a law, regulation, rule (...)."

Additionally, the REOFI is a measure that affects trade in services, for the term “services” is understood as “any service in any sector except services supplied in the exercise of governmental authority” and foreign banks in Fixitania provide the banking service of "acceptance of deposits and other repayable funds from the public" through commercial presence in Fixitanian territory, in accordance with article I:2(c) GATS. Moreover, the supply of this particular financial service is affected by the REOFI, since the term “affecting” was given a broad interpretation by the Appellate Body on EC-Bananas III as having "an effect on" and the REOFI has an effect in the way the service is supplied, by giving an advantage to domestic banks over foreign ones due to the guarantee scheme. The REOFI affects how foreign and domestic banks supply the financial service of acceptance of deposits and other repayable funds from the public, given that it only guarantees deposits

---

2 General Agreement on Trade in Services. Article I:1.
3 Facts of the Case. para. 4.
4 General Agreement on Trade in Services. Article XXVIII(a).
5 Facts of the Case, para. 4.
6 Annex on Financial Services, para. 5(a)(v).
7 ABR, EC – Bananas III, para. 220.
in domestic banks. On the contrary, foreign banks must supply the same financial service without the guarantee, causing customers to be motivated to transfer their deposits, since they will be repaid in case of default\(^8\). For these reasons, the REOFI affects the "acceptance of deposits and other repayable funds from the public", therefore is a measure "affecting trade in services" covered by the GATS.

2. The REOFI is inconsistent with the National Treatment obligation of Article XVII of the GATS

According to GATS Article XVII, Members shall accord to services and service suppliers of other Members treatment no less favorable than that it accords to its own like services and service suppliers, in respect to measures that affect the supply of services.\(^9\) To determine if a measure is inconsistent with GATS Article XVII, the Panel in China – Electronic Payment Services constructed a three-part test, under which it evaluated if China’s measures were inconsistent with its national treatment obligations by ordering all banks to bear a domestic bank’s logo in their electronic payment cards. The analysis set forth by the said Panel requires to (i) demonstrate that the Member has made commitments on National Treatment; (ii) assess whether the measure is a “measure affecting the supply of services”; (iii) demonstrate that the measure accords to services or service suppliers of any other Member treatment less favorable than that it accords to its own like services and service suppliers.\(^10\) Once those elements are met, it will be proven that Fixitania has violated its national treatment obligations under article XVII GATS.

a. Fixitania has made specific commitments on National Treatment

---

\(^8\) Clarifications of the Case. Question No. 26.
\(^9\) General Agreement on Trade in Services, Article XVII.1.
SECTION III – CASE RESOLUTION

Fixitania has made specific commitments under the GATS in the financial services sector, making an unlimited national treatment commitment by inscribing “None” in the national treatment column of its Schedule.\footnote{Facts of the Case. para. 2.} Article XX.1 GATS requires members to set out in their schedules the specific commitments they undertake, specifying the conditions and qualifications on national treatment.\footnote{General Agreement on Trade in Services. Article XX.1(b)} According to the Panel Report on China – Electronic Payment Services, as well as the Guidelines for the Scheduling of Specific Commitments Under the GATS, the inscription of the word “None” in the national treatment column of the schedule means that there is full commitment and the Member does not seek to limit its national treatment obligations.\footnote{Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS). S/L/92. WTO, 2001.} Therefore, Fixitania assumes the complete national treatment obligation of Article XVII, with no restrictions to its obligations.\footnote{PR, China- Electronic Payment Services, para. 7.652.}

b. The REOFI affects the supply of a financial service

GATS Article XXVIII (b) defines the supply of a service as the supply of a service as the “production, distribution, marketing, sale and delivery of a service”\footnote{General Agreement on Trade in Services. Article XXVIII}. In this regard the Panel Report in China - Publications has determined that when measures at issue govern the service suppliers, they affect the supply of the service in the sense of GATS Article XVII.\footnote{PR, China- Publications and Audiovisual Products, para. 7.1274.} Nevertheless the Panel Report in China – EPS established that in certain cases a more exhaustive analysis shall be made in order for determining the affectation of the supply of a service.\footnote{PR, China- Electronic Payment Services.} Accordingly the Panel in China – EPS established as one of those more exhaustive criteria to be analyzed whether the measure affects the terms on which

\begin{itemize}
\item production,
\item distribution,
\item marketing,
\item sale and delivery of a service
\end{itemize}
potential competitors supply their services. In this case the REOFI complies with both criteria set forth by WTO bodies as on one side it regulates commercial bank providing deposit services and on the other it gives Fixitanian banks a competitive advantage over foreign banks since it guarantees their customers their deposits will be paid in case of default.

**c. The REOFI accords to services or service suppliers of other Members treatment less favorable than that it accords to Fixitania’s own like services and service suppliers.**

Regarding the third and last element, GATS Article XVII provides that a measure is deemed to afford a less favorable treatment "if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member." Therefore, as recorded by the Panel in *China – Electronic Payment Services*, in order for there to be less favorable treatment, (i) the services or service suppliers must be “like”; (ii) a less favorable treatment must be afforded to the services or service suppliers of the other Member.

**i. The REOFI affects like service suppliers**

In order to evaluate likeness, the Appellate Body has determined that entities that provide like services are like service suppliers. On behalf of that analysis, for two companies to be like, they must compete, providing identical or analogous services. Accordingly, the Panel

---

18 PR, *China- Electronic Payment Services*.
19 Facts of the case
20 General Agreement on Trade in Services. Article XVII.
21 PR, *China- Electronic Payment Services*, para. 7.687.
22 PR, *EC-Bananas III*, para. 7.322.
SECTION III – CASE RESOLUTION

on China - Publications and Audiovisual Products established that “If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would, in our view, be "like" for purposes of Article XVII.”

Financial customers in Fixitania transferred their deposits from non-guaranteed foreign banks to guaranteed domestic banks, which demonstrates that foreign and domestic banks in Fixitania compete directly and clients consider them substitutes. Once the balance is shifted in favor of the guaranteed banks, since they provide the same service as their non-guaranteed counterparts, customers transferred their deposits from one to the other. This indicates that both guaranteed banks, favored by the REOFI, and non-guaranteed banks supply the same service, which is the acceptance of deposits and other repayable funds from the public. Therefore, based on the aforementioned jurisprudential interpretation, guaranteed and non-guaranteed banks are like service suppliers, since they provide like services.

The Panel in China – Publications and Audiovisual Products further developed the likeness test and established that “When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the “like service suppliers” requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.”

---

23 PR, China- Publications and Audiovisual Products, para. 7.702.
24 Clarification of the Case #25.
25 PR, China- Electronic Payment Services, para. 7.795.
SECTION III – CASE RESOLUTION

From the facts of the case, for a bank to be eligible for the government guarantee, it required 50% or more of domestic shareholders\textsuperscript{26}. Therefore, the REOFI distinguishes between banks exclusively on their origin in order to determine their eligibility for the benefit. GATS article XVIII(m)(ii) states that a “juridical person of another member” may refer to a juridical person owned or controlled by natural or juridical persons of that member, and according to article XVIII(n)(i) a juridical person is “owned” by persons of a member when 50% of the equity interest in it is owned by persons of that Member. From these two provisions, it is clear that the standard used in the REOFI to determine the eligibility of the guarantee is the origin of the bank, since only banks owned by Fixitanian shareholders would be guaranteed, excluding subsidiaries of foreign banks. This distinction based exclusively on origin further proves that the likeness requirement is met.

\textbf{ii. The REOFI affords a less favorable treatment to foreign service suppliers.}

GATS Article XVII:3 provides that a measure is deemed to afford a less favorable treatment “if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member”. WTO jurisprudence has determined that there is a breach of Article XVII if the measure modifies the conditions of competition to the detriment of foreign service suppliers.\textsuperscript{27} The REOFI modifies the conditions of competition between two like financial service suppliers (Fixitanian and foreign banks) to the detriment of foreign suppliers, which would be in equal conditions of competition had the measure not been enacted.

\textsuperscript{26} Facts of the Case, para. 4.
\textsuperscript{27} PR, China- Electronic Payment Services, para. 7.687.
When the government only guarantees savings in domestic banks, banks that are foreign-owned and established in the host country are in competitive disadvantage with domestic banks, since depositors will know that their deposits will be safe in case of default.\(^{28}\) Thus, guaranteed banks have an insurance to offer to their customers, which cannot be offered by their foreign counterparts. The public’s confidence in the guaranteed domestic bank increases, due to the insurance, and the depositors will more likely shift their deposits from non-guaranteed to guaranteed banks, as happened in the present case according to the facts presented.\(^{29}\) Moreover, the increase in deposits increases the bank’s possibility to loan; therefore, domestic banks are leveraged and may undertake a series of active banking operations, that may lead them to take on excessive risk;\(^{30}\) non-guaranteed banks, on the contrary, may not undertake these profitable banking operations.

As a consequence of the REOFI, in the following months of its enactment, non-guaranteed banks lost many of their customers and business.\(^{31}\) As the REOFI only benefited local banks, customers of foreign banks removed their deposits from non-guaranteed banks and deposited them in Fixitanian banks,\(^{32}\) making the market share shift significantly to guaranteed banks.\(^{33}\) Therefore, the REOFI indeed modifies the conditions of competition between national and foreign banks in Fixitania to the detriment of the latter, thus providing a less favorable treatment to foreign banks.

3. The REOFI is not in compliance with Fixitania’s commitments under the UCFS

\(^{28}\) De Meester (2009), 53-54.
\(^{29}\) Facts of the Case, para. 4.
\(^{30}\) Anginer and others (2012), 16.
\(^{31}\) Facts of the Case, para. 4.
\(^{32}\) Clarifications of the Case. Question No. 26.
\(^{33}\) Clarifications of the Case. Question No. 92.
Fixitania has undertaken its commitments in financial services in accordance with the Understanding on Commitments in Financial Services (UCFS).\textsuperscript{34} According to the national treatment obligation established in the UCFS, Members shall grant to financial service suppliers of other Members in its territory access to official funding and refinancing facilities available in the normal course of ordinary business.\textsuperscript{35} Therefore, Fixitania has not complied with the obligation of granting foreign banks with the official funding facilities that the REOFI grants to national banks, which is guaranteeing savings in national banks but not in foreign ones.

According to Article 3.2 of the Dispute Settlement Understanding (DSU), provisions under the covered agreement must be clarified in accordance to customary rules of interpretation of public international law. The Appellate Body has recognized that these rules are partially conceived in the Vienna Convention on the Law of Treaties Articles 31 and 32.\textsuperscript{36} Therefore, we must interpret the term “funding facility” using its ordinary meaning and in the light of its context.\textsuperscript{37} In addition, as WTO rules constitute a single undertaking,\textsuperscript{38} they all must be interpreted systematically and harmoniously. For instance, Article 1.1 (a)(1)(i) of the Agreement on Subsidies and Countervailing Measures uses “loan guarantees” as an example of a transfer of funds (“a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees”).\textsuperscript{39} In that sense, “loan guarantees” fall into the definition of “funding”, and constitute a form of funding.

\textsuperscript{34} Facts of the Case, para. 2.
\textsuperscript{35} UCFS, Section C. National Treatment, para. 1.
\textsuperscript{36} ABR, \textit{US-Gasoline}.\textsuperscript{37} VCLT, Article 31.1.
\textsuperscript{38} WTO Agreement, Article II.2.\textsuperscript{39} See Also ABR, \textit{Brazil – Desiccated Coconut}, p 12.
\textsuperscript{39} SCM, Article 1.1(a)(1)(i).
The deposit safeguard established by the REOFI increased the amount of deposits made to Fixitanian banks and thus worked as a funding facility, since deposits are the main funding source for commercial banks as intermediaries in the financial system. By providing guarantees to deposits, the REOFI fosters savings in Fixitanian banks and thus provides them with a funding facility. In case the REOFI had not been enacted, financial customers would not have shifted their savings to domestic banks and thus there would be no funding facilities. Due to the existence of the funding facility, the REOFI is inconsistent with Fixitania’s national treatment commitments under the Understanding on Commitments in Financial Services. The REOFI sets forth a loan guarantee to savings in banks registered in Fixitania and with a majority of domestic shareholders, thus providing an official funding facility that is not available to financial service suppliers from other Members. For the abovementioned reasons, since the REOFI accords a less favorable treatment to foreign banks in Fixitania, it is a measure inconsistent with Fixitania’s commitments under Article XVII of the GATS.

4. The REOFI is inconsistent with Paragraph 2 of the Annex on Financial Services

The REOFI violates Paragraph 2 of the Annex on Financial Services, since it is used as means of avoiding Fixitania’s commitments under the GATS under the disguise of a prudential measure. The first sentence of paragraph 2(a) of the Annex on Financial Services (AFS) permits Members to enact measures that are incompatible with the GATS when they pursue prudential purposes. Nevertheless, the second sentence of the provision requires the alleged prudential measure to be (i) in accordance with the GATS and (ii) not used as
SECTION III – CASE RESOLUTION

means of avoiding the Member’s commitments under the Agreement.\footnote{Annex on Financial Services. para. 2(a)} Regarding the first element, as previously proved, the REOFI is not in accordance with the GATS, as it violates Article XVII. Second, the REOFI is used as means of avoiding Fixitania’s specific commitments under the UCFS by not granting foreign banks established in its territory the official funding facilities available in the course of ordinary business. In this sense, the REOFI is inconsistent with the GATS.

The provision established in Paragraph 2(a) of the AFS is intended to prevent the abusive use of prudential measures. Members have the right to take measures for prudential reasons, but cannot abuse this right and use it to avoid their commitments under the GATS.\footnote{Ibid., para. 30} In this sense, it has been interpreted that the second sentence of the Paragraph 2(a) sets out a good faith standard that does not permit the avoidance of commitments under the GATS or the employment of protectionist measures.\footnote{Committee on Trade in Financial Services, Council for Trade in Services. (2010), para. 30} Similarly, the chapeau of Article XX GATT (practically identical to GATS art. XIV) prevents the abusive exercise of GATT exceptions. As stated by the Panel in US-Shrimp “\textit{an abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.}”\footnote{ABR, \textit{US-Shrimp}, para. 158.} Prudential measures shall not be used as a means of avoiding GATS commitments, including national treatment commitments.\footnote{De Meester (2009). p.21.}

The REOFI is an arbitrary measure intended to be disguised as a prudential measure. In case the measure were to be prudential and looked to protect the stability of the financial
system, national banks would not be the only beneficiaries of the insurance; the REOFI would also guarantee savings in foreign banks or banks that are subsidiaries of foreign banks. As it has been stressed by the IMF, the failure of individual financial institutions poses a risk that can affect the whole financial system; the crisis of banks impedes the provision of financial services, such as credits and payments, affecting the economy.\textsuperscript{45} In that sense, both national and foreign banks have a direct effect on the economy, regardless of their origin, proving thereby that guaranteeing only savings in national banks is a protectionist, and not prudential, behavior.

According to the IMF Working Paper on Macroprudential Policy of 2010 as well as the teaching of scholars Howard Davies and David Green on “The Global Financial Regulation”, the bankruptcy of a single financial institution can have a domino effect on other financial institutions of the system, causing the system to destabilize. Therefore, all financial institutions are crucial for the stability of the system, and the failure of any of the institutions can be threatening. Given that all financial institutions in Fixitania are the same size,\textsuperscript{46} the REOFI is proven to lack all prudential purposes, since the distinction for the eligibility of the guarantee was not based in bank size or importance but strictly on origin. Support schemes that discriminate by excluding foreign-owned banks with equal importance on the system are not genuinely taken for prudential reasons and the prudential goal is not obtained by such measure.\textsuperscript{47}

Furthermore, the movement of capital savings from a group of banks to another does not contribute to the financial stability, as intended by a prudential measure. The REOFI did

\textsuperscript{45} Jácome and others (2012)
\textsuperscript{46} Clarifications of the Case. Question No. 25.
\textsuperscript{47} De Meester (2009). p. 25.
not prevent bank runs from subsidiaries of foreign banks, but on the contrary enhanced them, making it more plausible for these banks to run out of liquidity. Moreover, the fact that the REOFI is still in force, even when the IMF has sustained that Fixitania has regained its economic strength\textsuperscript{48} proves that the measure was employed for protectionist purposes.

For these reasons, Libertania submits that the REOFI violates GATS article XVII, disregards its obligations under the UCFS, and also violates Paragraph 2 of the AFS.

**B. THE FSEGSJ BREACHES THE SCM IN CONJUNCTION WITH GATT ARTICLES VI AND XVI**

In 2008, the Fixitanian Parliament passed the Fixitanian Stability Economic Growth and Social Justice Act (“FSEGSJ” or “Fixitanian Stability Act”). This Act introduced a dual exchange regime with a fixed exchange rate for export transactions of Exporters of National Relevance (“ENR”) and a free-floating exchange rate for all other foreign transaction. ENR is a status granted to those exporters who registered with the Fixitanian Central Bank. Fixitanian exporters that have been granted with the status of ENR are both entitled and obliged to convert their foreign currency with the Fixitanian Central Bank at the fixed exchange rate. The exchange rate is fixed against the Libertado, the currency of Libertania, which is Fixitania’s largest trading partner. The Fixitanian Government sets the exchange rate applicable to ENRs, and the Fixitanian Central Bank must buy all foreign currencies offered by the exporters that have obtained the status of ENRs at the respective rate. Moreover, contrariwise to the fixed exchange rate, the free-floating exchange rate is not in any way intervened by the Fixitanian Government, but is rather a result of the free exchange rate.

\textsuperscript{48} Facts of the Case, para. 8.
supply and demand of the market. As stated by the IMF in 2012, the exchange rate for the Fixi applicable to the exporters is significantly undervalued. This more beneficial exchange rate for exporters constitutes a prohibited export subsidy, thereby breaching the Agreement on Subsidies and Countervailing Measures (“SCM”) in conjunction with the General Agreement of Tariffs and Trade (“GATT”) Articles VI and XVI.

In order to determine how the Fixitanian Stability Act is prohibited the aforementioned provisions, it will be demonstrated how said measure constitutes an export subsidy, prohibited by the Agreement on Subsidies and Countervailing Measures (“SCM”). Accordingly, in order to determine the presence of a prohibited export subsidy the following must be demonstrated: (i) the existence of a subsidy according to Article 1 of the SCM; and (ii) its contingency upon export performance.49

1. The FSEGSJ is a subsidy according to the SCM

The FSEGSJ provides an export subsidy as a consequence of the price support it confers to Fixitanias’s exporters. These types of subsidies are expressly prohibited by the SCM.50

Three elements are necessary for the existence of a subsidy51: (i) a financial contribution52 or income or price support53 must be given by a government or public body; (ii), a benefit must be thereby conferred;54 (iii) the subsidy must be specific.55 Nevertheless, according to Article 2 of the SCM, both export and import subsidies are deemed to be specific.56 Since

---

49 RP, Canada – Aircraft II, para. 7.16.
50 SCM Art 3.1(a).
51 PR, US – Export Restraints, para. 8.20. See also, PR, Canada – Aircraft II, para. 7.65.
52 SCM, art 1.1(a)1.
53 Ibid, art 1.1(a)2.
54 Ibid, art1.1(b).
55 Ibid, art 1.2.
in this case we are in the presence of an export subsidy, the specificity element must not be proven.

Accordingly, in this case in order to prove that the Fixitanian Stability Act constituted a subsidy according to the SCM the following two elements will be demonstrated: First, a financial contribution or income or price support by a government or public body, and second, that a benefit is thereby conferred.

a. Through FSEGSJ there is a financial contribution

Article 1.1(a)1 of the SCM sets forth an exhaustive list of practices of governments or public bodied that constitute a financial contribution. According to subparagraphs (i) to (iv) of article 1.1 of the SCM, a financial contribution can exist when a government practice involves a direct transfer of funds; a government revenue; provision of a service other than general infrastructure and payments to a funding mechanism.

First, it is necessary to demonstrate that the Fixitanian Central Bank is in fact a public body. WTO jurisprudence has emphasized that an entity will constitute a public body if the Government controls it. According to the facts of the case, the Fixitanian Government owns the Central Bank. Moreover, the Central Bank is also under the direct authority of Fixitanias’ Minister of Finance. Therefore, the actions of the Bank are directly attributable to the Government. In that sense it is clear that the Fixitanian Central Bank is a public body.

---

57 SCM art 1.1(a)
58 SCM art 1.1(a). See also ABR, Brazil – Aircraft; ABR, EC – Aircraft; ABR, Canada – Aircraft.
59 PR, Korea – Vessels, para 7.50.
60 Facts of the Case, para. 3.
SECTION III – CASE RESOLUTION

In the present case there this public body is making a financial contribution, since the fixed rate established for export transactions of Fixitanian exporters can be deemed as (i) a direct transfer of funds and (ii) as a provision of a service other than general infrastructure.

i. Direct transfer of funds

As a consequence of the Fixitanian Stability Act, a direct transfer of funds is being made to Exporters of National Relevance.

Additionally, Exporters of National Relevance are legally entitled and obliged to exchange foreign currency at the exchange rate fixed by the Government of Fixitania, whereas the Central Bank has the obligation of purchasing those currencies. According to the Appellate Body, a direct transfer of funds indicates an “action involving the conveyance of funds from the government to the recipient.” In this case, the transfer of funds derives from the Central Bank’s obligation to purchase the foreign currencies offered by the ENRs from their exports.

Therefore, the fixed-exchange-rate entails a financial contribution in the form of a direct transfer of funds from the Central Bank to the exporters.

ii. Provision of a service other than general infrastructure

Moreover, in this case, we are not only in the presence of a direct transfer of funds, but also of a provision of a government of services other than general infrastructure. As stated by the Appellate Body, a measure can fall within more than one type of financial contribution.

---

61 SCM art 1.1(a)(i).
63 Ibid, para 6.
64 AB, US - Measures Affecting Trade in Large Civil Aircraft, para. 614.
SECTION III – CASE RESOLUTION

In that case, the Appellate Body stated that an income tax concession could, in certain circumstances, be treated both as a direct transfer of funds as well as revenue foregone.⁶⁵

In the case at hand, the conduct of the government also falls within two types of financial contributions. The second type is the one set forth in paragraph (iii) of Articles 1.1(a)(1). This paragraph states that “there is a financial contribution by a government or any public body within the territory of a Member, i.e., where: (iii) a government provides goods or services other than general infrastructure, or purchases goods. Therefore, the following three elements will be demonstrated: that the government is (i) providing a (ii) service, that is (iii) other than general infrastructure.

First, in this case it is clear that there is a provision. As stated by the Appellate Body, the ordinary meaning of the verb ‘provide’ is to “supply or furnish for use; make available”⁶⁶ “to put at the disposal of”.⁶⁷ The service that the Fixitanian Government is putting at disposition of the Exporters is a hedging service.

According to the Dictionary of the Economist to ‘hedge’ is to “reduce your risks”; “Hedging involves deliberately taking on a new risk that offsets an existing one, such as your exposure to an adverse change in an exchange rate, interest rate or commodity rate or commodity price.” As aforementioned, the Fixitanian Stability Act provides for a fixed exchange rate, which according to the several economists, avoids the uncertainty, confusion, calculation and transaction costs that arise when the exchange rate floats and prices depend on economic fluctuation. More importantly, it eliminates the risk that free-

---

⁶⁵ ABR, US – Countervailing Measures on Certain EC Products. See also: AB, EC – Aircraft, footnote 1287.
⁶⁶ AB, EC – Aircraft, para 965.
⁶⁷ AB, US – Softwood Lumber iv, para 69
floating exchange rates have with regard to the price of the currency, especially in times
where the Price of the currency is unstable.

It is thus clear, that the hedging service provided by the Government consists in reducing
the risk inherent to the free-floating exchange rates. It is a protection from a currency risk.
This hedging service is a financial contribution in the sense of the SCM Agreement because
it is other than general infrastructure. As stated by the Panel in EC – Aircraft, general
infrastructure “refers to infrastructure that is not provided to or for the advantage of only a
single entity or limited group of entities, but rather is available to all or nearly all
entities.” In that sense, if it is demonstrated that the infrastructure was provided to a
single entity or a limited group of entities it falls under the scope of this article. The
Fixitanian Stability Act does not provide the service to all or nearly all entities. On the
contrary, it is destined solely for those exporters who are registered as Exporters of
National Relevance. Moreover, as stated in the facts of the case, in order to have access to
this hedging service, it is required to be not only an exporter, but also an exporter of goods,
thereby excluding exporters of services. However being an exporter of goods does not
suffice, because these exporters must have the status of ENRs. According to the
clarifications of the case, the fixed exchange rate is only available to the foreign currency
reserves of the ENRs stemming from export transactions. As set forth by the Panel in EC
– Aircraft, “the existence of limitations on access to or use of infrastructure, whether de
jure or de facto is highly relevant in determining whether that infrastructure is general

---

68 PR, EC - Aircraft, para 7.1035.
69 Facts of the Case, para. 6.
70 Clarifications of the Case. Question No. 39
SECTION III – CASE RESOLUTION

infrastructure. The aforementioned amount of limitations allows the conclusion that this service is different than general infrastructure, thereby fulfilling the elements to be considered a financial contribution under the Agreement on Subsidies and Countervailing Measures.

b. The fixed exchange rate confers the ENRs a benefit

As previously stated, according to the SCM Agreement a subsidy shall be deemed to exist if there is a financial contribution and a benefit is thereby confirmed. The Fixitanian Stability Act constitutes a subsidy because the two elements are present. The fixed exchange rate is a subsidy in the form of a direct transfer or funds and a provision of a service different than general infrastructure, because it confers a benefit to exporters.

A benefit “will be conferred whenever a financial contribution is granted to a recipient on terms more favorable than those available to the recipient in the market.” In that sense, a benefit will be conferred whenever it is shown (i) that it was conferred to a recipient and (ii) that the recipient is “‘better off’ than it would otherwise have been, absent that contribution”.

In the case at hand, the recipient is the group of ENRs. This recipient is clearly better off that it would be absent the financial contribution. In order to determine the existence of this benefit, a comparison is to be made between the situation of the recipient with that contribution and the same situation without it. The Appellate Body has determined that the marketplace is the appropriate benchmark for the comparison.

---

71 PR, EC - Aircraft, para 7.1037.
72 PR, EC and certain member States –Large Civil Aircraft, para 7.1091, 7.218. See also ABR, Canada – Measures Affecting the Export of Civilian Aircraft, para. 157.
73 ABR, Canada – Aircraft, para 154.
74 Ibid, para. 157. See also, PR, US – Softwood Lumber III, para 7.44.
Exporters are placed in a better economic and financial position as a consequence of the fixed-exchange rate. Absent this contribution, ENRs would have access to the exchange rate of the market. The benefit in the case at hand accrues from the fact that the fixed exchange rate, to which the ENRs have access to, is undervalued. According to the facts of the case, at the end of 2007, the fixi traded at a rate 25% higher than the fixed exchange rate. Moreover, according to the IMF, the fixed-exchange rate is “significantly undervalued”. The facts of the case also indicate that the experts consulted by the Panel agree in that the exchange rate is between 15% and 20% undervalued. Clearly all of the evidence points at the same direction: the fixed exchange rate is undervalued. This situation gives rise to the benefit received by the Exporters of National Relevance. Due to the “significantly undervalued” exchange rate they have access to, ENRs receive more Fixis for each Libertado, as compared to what they would receive in market conditions. Because the exchange rate is between 15 and 20 per cent undervalued ENRs can sell their products 15 to 20 per cent cheaper and gain more demand, or maintain their price and have more earnings, as compared to the ones they would have if they traded at the exchange rate of the market. This benefit is concretely evidenced in the facts of the case, which prove that the hybrid car industry allowed the producers to sell their products 15 per cent below market prices. Moreover, thanks to the fixed exchange rate, ENRs are placed in a better economic and financial. The possibility of selling at lower prices, entitles a competitive advantage as well as an increase of the revenues. Furthermore, a fixed

---

75 Facts of the Case, para. 6.
76 Ibid, para. 7.
77 Ibid, para. 8.
78 Ibid, para. 12.
79 Ibid, para. 8.
80 Ibid, para. 12.
SECTION III – CASE RESOLUTION

Exchange rate simplifies economic calculations and provides a more predictable basis for decision-making involving international transactions compared.\textsuperscript{81} Thus, the fixed exchange rate places the recipients in a more advantageous position in the market as they were before; thereby fulfilling the second element for a subsidy to exist.

It is thus clear that the Fixitanian Stability Act is a measure designed to confer a benefit to the exporters. First, it pegs the exchange rate not against any world currency, but against the currency of Fixitania’s largest trading partner. The facts of the case evidence how as a consequence of the growing export the current account balance for 2011 showed an overall trade-surplus of 200 billion Special Drawing Rights (SDR) with the rest of the world, and a bilateral trade-surplus against Libertania of 100 billion SDRs.\textsuperscript{82} Second, although the respondent party could argue that when the measure was taken the fixed exchange rate was hardly different as compared to the rate of the market, this was five years ago. Today it is significantly undervalued and the Fixitanian Government has not taken any action to correct it, nor does the measure have an instrument to readjust itself. Also, this argument of the respondent party could not be sustained because both the “financial contribution” and the “benefit” have to exist during the relevant period of investigation or review, and not when the measure is enacted.\textsuperscript{83}

For the aforementioned reasons, it is clear that there we are in the presence of a subsidy as defined by the SCM Agreement, for there is both a financial contribution and a benefit thereby conferred.

2. The FSEGSJ provides an export subsidy

\textsuperscript{82} Ibid, para. 8.
\textsuperscript{83} PR, \textit{US – Lead Bismuth}, para 6.73
The SCM provides for three types of subsidies: i) prohibited subsidies; ii) actionable subsidies; and iii) non-actionable subsidies. The Fixitanian Stability Act constitutes a prohibited subsidy. According to Article 3 of the SCM Agreement, subsidies contingent upon export performance shall be prohibited.

Introducing a fixed exchange regime for ENRs is a subsidy contingent in law upon export performance, which is prohibited by Article 3 of the SCM. For an export subsidy to exist two elements must be demonstrated: i) the existence of a subsidy and ii) its contingency upon export performance. As it has already been demonstrated the FSEGSJ is a subsidy, therefore it will now me demonstrated that this subsidy is contingent upon export performance.84

The granting of the subsidy is contingent upon the export transactions of ENRs. the Appellate Body ‘Contingency’ defined contingent as “(...)‘conditional’ or ‘dependent for its existence on something else’”. Article 3.1(a) of the SCM Agreement makes an explicit link between contingency and conditionality.86 Contingency can be either ‘de facto’ or ‘de iure’. De iure contingency is “the situation where one can ascertain, on the face of the law (or other relevant legal instrument), that export contingency exists. A subsidy is also properly held to be de jure export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be de jure export contingent, the underlying legal instrument does not always have to provide expressis verbis that the subsidy is available only upon fulfillment of the condition

84 PR, Canada – Aircraft II, para. 7.16.
85 ABR, Canada – Aircraft, para. 166). See also RP, Australia –Automotive Leather II, para 9.55.
86 Ibid.
SECTION III – CASE RESOLUTION

of export performance. “This means that the law must expressly provide the contingency with the subsidy, but rather it is sufficient that the existence of the contingency is derived, implicitly, from the law.”

In this case, we are in the presence of a “de iure contingency” because, although not explicitly, it is implicitly granted by the Fixitanian Stability Act.

According to the measure, ENRs are legally entitled and obliged to change their foreign currency at the fixed exchange rate, and the benefit is triggered once they bring their foreign source income into Fixitania, which derives from their export operations. As evidenced in the facts of the case ENRs “may and must transact with the Fixitanian Central Bank and must not use the FCM with regard to the foreign reserve income they generate by exporting” (emphasis added).

Thus, the faculty and obligation of exporters is applicable solely with regard to their foreign source income generated by exports. Hence, there is a relation of conditionality between the subsidy and the export transactions of Fixitanian exporters. If ENRs don’t export, they won’t have foreign reserve generated by exporting, and therefore will not be able to transact with the Fixitanian Central Bank at the fixed exchange rate. Thus, we are in the presence of a subsidy contingent in law upon export performance.

3. The FSEGSJ is a prohibited subsidy under GATT Article VI

First of all it is important to emphasize on the relationship between the SCM and the GATT. According to Article 32.1 of the SCM, “No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994”

---

87 RP, Canada – Autos, para. 10.179.
88 ABR, Canada-Autos, para 100.
89 Clarifications of the Case, Question No. 78
90 Clarifications of the Case, Question No. 39, 78.
This reflects that, as stated by the Appellate Body neither the GATT nor the SCM constitute alone the total of rights and obligations regarding subsidies,91 which shows that they are part of one single package of rights and obligations.92

In this case, the GATT ratifies that dual exchange rates can constitute export subsidies. Article VI of the GATT also supports the conclusion that Fixitania’s dual exchange rate regime is an export subsidy. The Ad Note to Article VI paragraphs 2 and 3 of the GATT clearly states, “Multiple currency practices can in certain circumstances constitute a subsidy to exports”.93 The FSEGSJ constitutes a multiple currency practice. According to its ordinary meaning, multiple currency practices arise from applying more than one exchange rate. The Merriam-Webster Dictionary defines Multiple as “consisting in more than one”; currency as the “circulation as a medium for exchange” and practice as the “usual way of doing something”. The Fixitanian Stability Act is the practice by which the Fixitanian Government grants more than one currency: the one of the market, and the fixe one for ENRs. Thus, the fact that the FSEGSJ is a subsidy also under the GATT, confirms that dual exchange rates can be prohibited export subsidies, and thus ratifies this measure as a prohibited subsidy.

In light of the above, the FSEGSJ constitutes an export subsidy expressly prohibited by the SCM in conjunction with the GATT, consequently violating these agreements.

C. THE FIXITANIAN STABILITY, ECONOMIC GROWTH AND SOCIAL JUSTICE ACT violates article XV:4 OF THE GATT

91 ABR, Brazil – Desiccated Coconut, pag 14.
92 PR, Brazil – Desiccated Coconut, para 2.46.
93 GATT ad Article VI Paragraphs 2 and 3.
SECTION III – CASE RESOLUTION

Fixitania’s fixed exchange rate for Exporters of National Relevance constitutes a trade action that frustrates the intent of the General Agreement on Tariffs and Trade (GATT) and an exchange action that frustrates the intent of the IMF Articles of Agreement.

It is first necessary to clarify, that the violation of the intent of the IMF Articles of Agreement is not subject to a WTO challenge per se, since the Articles of Agreement are not one of the WTO’s covered agreements. However, determining the frustration of the intent of these Articles is relevant for the violation of Article XV.4 of the GATT. Despite the IMF Articles of Agreement not being one of WTO’s covered agreements, the close relationship between these two institutions is undeniable, and article XV.4 of the GATT is a clear example of that.

Despite their different regulatory and surveillance scopes, the IMF and the WTO have a close relationship in many aspects. In fact, while the IMF is in charge of dealing with the international monetary and financial system, the WTO’s scope is centered in the international trading system and its contingencies. However, both institutions were created from the same idea of avoiding commercial abuses by countries, in order to avoid possible economic conflicts deriving in armed conflicts; controlling the growing international flows and to certain extend, regulating globalization.94 As a consequence, the WTO and IMF have a common mandate to achieve a coherent global policy making.95 To achieve this purpose, they have entered a cooperation agreement characterized by constant consultation of both international organizations with one another (e.g. research).96 Nevertheless cooperation cannot be limited to research or consultations only. Regarding the objective of

94 Ikenberry and Dammasch (1993)
95 This mandate is even explicitly established in Article III.5 Of the Marakesh Agreement.
96 IMF Factsheet (September 2014)
both organizations, the agreements providing their existence must be read in a way as to achieve their objectives.

The IMF has no dispute settlement system were its members can effectively claim their rights with regard to prohibited practices of other members. Currency par value manipulation and exchange controls can be used to protect domestic markets against importation of goods thereby disturbing international trade. Accordingly, American delegates to the GATT drafting commission felt constrained to include some provisions in this regard in order to fully accomplish the necessary protection to unfair trade practices.\(^97\)

GATT Article XV:4 reflects this exact position as it regulates the relationship between the international monetary system and world trade by providing contestable obligations for members. Affirming otherwise would undermine the effective treaty interpretation principle\(^98\) as Article XV would be rendered without any effect. If the WTO were not to assess a possible breach of the IMF Articles of Agreement within the context of GATT and WTO, drafters would have had no need to provide an exception such as the one contained in Article XV:4 nor procedural rules such as the ones established in Article XV:2.

Accordingly, the Fixitanian Stability Act violates GATT Article XV.4 as it constitutes both (i) an exchange action frustrating GATT’s intent; and (ii) a trade action frustrating the intent of the IMF Articles of Agreement.

GATT Article XV.4 establishes two different obligations: (i) the intent of the GATT cannot be frustrated by an exchange action; and, (ii) a trade action cannot frustrate the intent of the IMF Articles of Agreement. To assess a violation of these obligations it is first...

\(^97\) Jackson (1969)  
necessary to analyze the meaning of the term ‘frustrate’ under the intended scope of GATT Article XV.4.

1. The meaning of the term ‘frustrate’ in Article XV:4 of the GATT

Ad-note to GATT Article XV:4 defines “frustrate” as an appreciable departure from the intent of the agreement. Moreover, it is exemplified through a violation of one of its provisions by the Ad-note itself. Nevertheless, Ad-note to GATT Article XV:4 does not entirely clarify the meaning of the term “frustrate”, as it only refers to the object of the frustration and not to the frustration itself.99 In order to properly understand and clarify the meaning of this term we can rely on the rules of interpretation contained in the Vienna Convention. The ordinary meaning of the word “frustrate” is to: “prevent (a plan or attempted action) from progressing, succeeding, or being fulfilled”.100 Additionally, as stated before, the object and purpose of the GATT, is, among others, to prevent trade disturbing practices. This means that a breach of a certain provision by an exchange action is not necessary to ‘frustrate’ the intent of GATT. However, the intent of the GATT can be frustrated even without an actual violation of an obligations therein contained. Thus, a frustration of the intent is found when an exchange or trade action has an appreciable departure from the intent of either the GATT or the IMF Articles of Agreement, but not necessarily as a result from a breach of one of its provisions.

2. The Fixitanian Stability Act is an exchange action that frustrates the intent of the GATT

---

100 Oxford Online Dictionaries
SECTION III – CASE RESOLUTION

The Fixitanian Stability Act is an exchange action that frustrates the intent of the GATT in contravention of the first obligation of Article XV:4 of the GATT. In order to establish a violation to the first obligation of GATT Article XV:4, a measure must: (i) constitute an exchange action and (ii) frustrate the intent of the GATT.

Since no express definition under the Marrakesh Agreement exists for the term “exchange action” within the context of GATT article XV:4, it is necessary to use the customary rules of interpretation of public international law. Hence, the ordinary meaning of the term must be determined. Doctrine has defined exchange action as “acts relating to the exchange rate”\(^\text{102}\). The Oxford dictionary defines ‘action’ as “the fact or process of doing something, typically to achieve an aim”,\(^\text{103}\) which linked to the object of the action, namely, exchange, leads to the conclusion that ‘exchange action’ is the processes of doing something in relation with exchange, including actions related to the exchange rate regime.

Article XV itself can be considered as the relevant context for the interpretation of this term, as more precise terms like exchange agreement and exchange controls\(^\text{104}\) are used. This leads to the conclusion that exchange action is a general term intended to encompass all actions related to exchange issues. If the drafters of the GATT had the intention of giving the term “exchange action” a narrow meaning they would have selected other terms as they did for other provisions of the same article and the treaty itself. The Fixitanian Stability Act establishes a dual exchange rate, which modifies Fixitania’s exchange rate

\(^{101}\) Dispute Settlement Understanding, Art. 3.2. See also ABR, US – Gasoline, page 23.
\(^{103}\) Oxford Online Dictionaries.
\(^{104}\) GATT, Articles. XV:2 and XV:9
Accordingly, this Act constitutes a measure affecting exchange regimes and consequently an exchange action under article XV: 4 of the GATT.

In order to determine a departure from the GATT and a frustration within the meaning of GATT Article XV:4, GATT’s intent must be determined. According to its preamble and negotiating history, the objectives of the GATT are “the increase of standards of living, the attainment of full employment, the growth of real income and effective demand, the expansion of production of, an trade in goods” through the “reductions of trade barriers and the elimination of discrimination.” Moreover, Article XV:4 does not only refer to the frustration of the GATT as an isolated agreement but rather to all the ones annexed to the WTO Agreement. There is no other possible interpretation as Article XV:4 was drafted as part of the original GATT 1947, from which all other agreements such as the SCM or the GATS were given birth to for effectively accomplishing the drafters’ objectives.

The Fixitanian Stability Act not only violates more than one provision of the WTO agreement as described in sections I and II of this submission, but also undermines its intent. The export subsidy established by this measure constitutes an unfair trade practice and an illegitimate barrier to international trade, which is already affecting specific industries of Libertania such as hybrid car production and creating an unbalance in the balance of payments for Fixitania. Considering the violation of several WTO provisions as well as its departure from the intent of the WTO Agreement by creating trade distortions, Fixitania is frustrating the intent of the GATT through the Fixitanian Stability Act.

---

105 Facts of the Case, para. 6.
106 PR, US - Shrimp, para. 7.42. See also, Van den Bosche (2005).
107 Facts f the Case, para. 9
SECTION III – CASE RESOLUTION

3. The FSEGSJ constitutes a trade action frustrating the intent of the IMF Articles of Agreement

In order to establish a violation of the second obligation contained in GATT Article XV:4, two elements must be demonstrated: (i) that the measure is a trade action, and (ii) that by that trade action the intent of the IMF Articles of Agreement is frustrated.

With regard to the first element, i.e., that the measure is a trade action, it is important to bear in mind that a special subgroup of the GATT-IMF relationship in 1954 determined that the relevant criterion for establishing the nature of a measure in trade or exchange is its effect in finance and trade. It is evident, as set forth in the Report of the Working Group of Trade, Debt and Finance of the WTO on the relationship of exchange rates and international trade, that a relationship between exchange-rate fluctuations and trade flows exists and accordingly a measure can have the nature of both an exchange action and a trade action if it affects both monetary and trade flows. The establishment of a dual exchange rate regime with an undervalued exchange rate for exporters can have different effects on trade. It could, for example, send erroneous pricing information to the market.

This effect is evidenced in the present case, where Fixitanian hybrid car producers are able to sell their products 20% cheaper than their Libertanian competitors. Fixed exchange rates also allow industries to plan ahead their production without having to deal with the risks of market uncertainties. Therefore, as the Fixitanian Stability Act establishes a fixed exchange rate with extensive effects in commerce, it must be deemed as trade action.

---

108 Analytical Index of the GATT.
SECTION III – CASE RESOLUTION

Regarding the second matter, Libertania submits that the Fixitanian Stability Act frustrates the intent of the IMF Articles of Agreement because it contraries article IV Section 1 (iii) of the Articles of Agreement, as the measure (i) manipulates the exchange rate (ii) in order to gain an unfair competitive advantage.\footnote{112 Herrmann (2010).} According to the IMF Executive Board, manipulation of the exchange rate is only carried out if measures are targeted and actually affect the level of exchange rate by causing it to move or preventing such movements.\footnote{113 IMF Executive Board Decision (2012), (Annex 1.} It is clear that by maintaining a fixed exchange rate, the Fixitanian Government has prevented the movement of the level of exchange. The IMF Executive Board established that certain developments are to be taken as a symptom of currency manipulation. In this case, “the protracted large-scale intervention in one direction in the exchange market”\footnote{(I)}; “a fundamental exchange rate misalignment”\footnote{(V)} and “large and prolonged current account surpluses or deficits”\footnote{(VI)} are evidenced. The first requirement is met as the Fixitanian Stability Act was made to favor exporters since only they can access the undervalued exchange rate regime. The symptom set forth in number (V) is also present in this case, since the ENR exchange rate is around 15 to 20% undervalued.\footnote{114 Ibid. para. 7, 8, 9, and 12.} Moreover, the criterion contained in number VI of paragraph 22 is met since there have been current account surpluses of over 200 billion SDRs with the world and of over 100 billion SDRs with L during 2011.\footnote{115 Ibid. para. 7.} Another symptom that must be analyzed to perceive a malfunction of the monetary system according to paragraph 11 is the excessive depletion of reserves. In the case of Fixitania, there has been a build up of reserves: the Fixitanian Central Bank...
accumulated foreign currency reserves of about 500 billion SDRs\textsuperscript{116}. Since all of these circumstances are present on the facts of the case, it is clear that the Fixitanian Stability Act clearly manipulates the exchange rate.

According to the IMF two elements prove the intention of manipulating the exchange rate: (i) when “the member is engaged in these policies for the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate” and (ii) if “the purpose of securing such misalignment is to increase net exports.” Fixitania’s manipulation of the exchange rate can be deemed to secure an undervalued exchange rate since the fixed exchange rate has been maintained undervalued by the Government.\textsuperscript{117} It could be argued that the establishment of the dual exchange rate was done to recover the currency reserves of Central Bnk that fell in 2007. However, if this system was intended with this objective, the exchange rate should now be freely floating given that Fixitanian Central Bank has built up reserves of more than 500 billion SDRs.\textsuperscript{118}

As for the second requirement, the dual exchange regime not only stimulates exports but also constitutes a prohibited export subsidy, as explained in Section 2 of this submission. Fixitania is a currency manipulator, and thus violates the IMF Articles of Agreement, given that all the requirements of Article IV Sec.1 (iii) are met.

Moreover, even if it is considered that the Fixitanian Stability Act is in compliance with Article IV of the IMF Articles of Agreement, this measure still frustrates the intent of the Articles of Agreement, as it clearly departs from the objectives of the IMF. As stated by the IMF Articles of Agreement, the purposes of the IMF are, among others “(ii) To

\textsuperscript{116} Ibid, para. 7.
\textsuperscript{117} Ibid, para. 6.
\textsuperscript{118} Ibid, para. 6.
facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy” and to “(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.” In addition, one of IMF’s purposes was to avoid the monetary practices of the Great Depression, such as the undervaluation of currency for competitive purposes.\textsuperscript{119} Measures such as the one taken by Fixitania, frustrate the intent of the IMF since they do not provide for a balanced growth of international trade as a consequence of the economic unbalances of Fixitania,\textsuperscript{120} which cannot contribute to a balance growth of international trade. Additionally, Fixitania also departs from the intent of the IMF as its current currency exchange regime provides it with competitive advantages demonstrated by balance of payments surpluses and prices at which national manufacturers sell their products in Libertania, thereby affecting the accomplishment of objective established in Article 1 (iii) of the IMF Articles of Agreement.

Finally, with regard to jurisdiction, Libertania submits that the Panel has full jurisdiction to determine a violation of GATT Article XV:4 by analyzing the intent of the IMF Articles of Agreement. Article 1.1 of the DSU establishes that the jurisdiction of Dispute Settlement Body of the WTO is limited to claims regarding the covered agreements, including, of course, GATT and Article XV:4.\textsuperscript{121} In order to asses a violation to GATT Article XV the Panel must determine the intent of the IMF Articles of Agreement and determine if there is

\textsuperscript{120} Facts of the Case, para 8.
\textsuperscript{121} ABR, India - Quantitative Restrictions, para. 85,86,87,88,89.
a departure from such intent. Nevertheless, this interpretative exercise does not entail that the claim falls outside the subject matter jurisdiction of WTO Panels, as the Panel will not rule over a possible violation of the Articles of Agreement. As recognized by the Appellate Body, the WTO law is not in clinical isolation from the rest of public international law. WTO Panels have repeatedly referred to different international treaties in order to interpret terms under the covered agreements and even to assess jurisdictional issues. In addition, if WTO panels were not able to determine a frustration of the intent of the IMF Articles of Agreement in order to decide if there is a violation to GATT Article XV:4, then this provision would be rendered useless and the task of the panel would be reduced to inutility, attempting against the principle of effective treaty interpretation recognized by the Appellate Body.

As a consequence, Libertania submits that the Fixitanian Stability Act is also in violation of GATT Article XV:4.

4. The Fixitanian Stability Act is not covered by the exception contained in GATT Article XV:9

Article XV:9 of the GATT contains a general exception, according to which members are not precluded from using “exchange controls” or “exchange restrictions” in accordance with the IMF Articles of Agreement. Nevertheless, Fixitania cannot be covered under this exception since the Fixitanian Stability Act is neither (i) an exchange control nor (ii) an exchange restriction.

---

122 ABR, US – Gasoline. See Also ABR, Mexico – SofiDrinks and PR, US - Shrimp
The Fixitanian Stability Act is not an exchange control. The IMF Working Paper on Exchange Controls and International trade defines three types of exchange controls: “(i) controls on payments for imports and proceeds from exports, which are set to control target transactions related to international trade, including requirements for a foreign exchange budget for imports, and documentation and financing requirements for import payments and export proceeds; (ii) controls on capital transactions, which regulate transactions of capital and money market instruments, derivatives, FDI, credit operations, real estates, and personal finance and also establish controls on the operation of institutional investors and commercial banks; and (iii) Controls on FX transactions and other items that are not exclusively on trade or capital transactions, which scope is exchange taxes and subsidies, ban on currency derivative trading, controls on bank accounts, currency requirements for pricing and settlements, current transfers and invisible transactions, and trade in gold and banknotes.”

Additionally, according to the Oxford dictionary control is “The restriction of an activity, tendency, or phenomenon” and according to the Cambridge dictionary “A control is a rule or law that sets a limit on something” The Fixitanian Stability Act does not impose any restriction as the aforementioned. Neither nor does the measure constitute an exchange control in the plain sense of the word. The Government of Fixitania not by any means control quantitatively the in-flows or out-flows of currency. The measure only only pegs the Fixi against the Libertado.

124 Wei and Zhang (2007)
125 http://dictionary.cambridge.org/dictionary/american-english/control_1?q=control
The FSEGSJ is also not an “exchange restriction”. WTO Panels have determined the meaning and scope of this term. According to the Panel in Dominican Republic – Import and Sales of Cigarettes the criterion for determining an exchange restriction is “whether it involves a direct governmental limitation on the availability or use of exchange as such”. In the case of the Fixitanian Stability Act, even though there is a direct governmental action of Fixitania, there is no limitation on the availability or exchange as such and therefore there is no exchange restriction.

Accordingly, the Fixitanian Stability Act cannot be deemed either as an “exchange control” nor as an “exchange restrictions” and therefore it is not covered by the exception contained in GATT Art XV:4.

Request for findings

Libertania asks the Panel to recommend to the DSB that:

- Fixitania must bring its measures into conformity with its GATS commitments regarding National Treatment, since Libertania has demonstrated that the REOFI constitutes an unjustified discrimination between national banks and like foreign banks and subsidiaries of foreign banks, and that the measure was not enacted for prudential reasons, but as means of avoiding Fixitania’s commitments under the GATS.

- Fixitania must bring its measures into conformity with it obligations into compliance with the SCM and with articles VI and XVI of the GATT. This for L

---

126 Report of the Panel. Dominican Republic – Import and Sales of Cigarettes Paragraph 7.132, DSWT/302/R
127 Facts of the case, para. 6.
SECTION III – CASE RESOLUTION

has demonstrated that the FSEGSJ violates the SCM in conjunction with articles VI and XVI of the GATT, as it constitutes an export and thereby prohibited subsidy.

- Fixitania must bring its measures into conformity with its obligations under the GATT Article XV:4 for it has demonstrated that the FSEGSJ is (i) an exchange action frustrating the intent of the GATT as well as (ii) a trade action violating the intent of the IMF Articles of Agreement.
BIBLIOGRAPHY

A. CONVENTIONS AND TREATIES

- *Articles of Agreement of the International Monetary Fund*, 22 July 1944, 60 Stat. 1401, UNTS39
- *General Agreement on Trade in Services*, 15 April 1994, LT/UR/A-1B/S/1
- *Understanding on Commitments in Financial Services*, 15 April 1995, LT/UR/U/1

B. WTO CASES

1. WTO Appellate Body Reports

BIBLIOGRAPHY


2. WTO Panel Reports

BIBLIOGRAPHY

BIBLIOGRAPHY


C. Secondary Sources


BIBLIOGRAPHY


