Team: 034C

ELSA MOOT COURT COMPETITION ON WTO LAW

2017 / 2018

Borginia – Measures Affecting Trade in Textile Products

Syldavia

(Complainant)

vs

Borginia

(Respondent)

SUBMISSION OF THE COMPLAINANT

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Brazil-Retreaded Tyres	Appellate Body Report, Brazil-Measures Affecting Imports of Retreated Tyres, WT/DS332/AB/R, adopted 3 December 2007
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LIST OF ABBREVIATIONS

AB-Appellate Body
Art./Arts.-Article/Articles
B-Borginia
BTA-Border Tax Adjustment
CO_2-Carbon Dioxide
CTE-Committee on Trade and Environment
GATT-General Agreement on Tariffs and Trade 1994
GNP-Gross National Product
HL-Handloom
ISO-International Organization for Standardization
ISO 14666-ISO 14666 Standards Related to Cotton Fabric
LFN-Love For Nature Action Plan
NESI-National Environmental and Sustainability Institute
NESI's D-NESI's decision
NT-National Treatment
PL-Powerloom
PPM-Process and Production Method
S-Syldavia
SCM-Agreement on Subsidies and Countervailing Measures
SOCA-Save Our Climate Act Tax legislation in 2015
TBT-Agreement on Technical Barriers to Trade
TEPZs-Textile Export Promotion Zones
TR-Technical Regulation
TTUFS-Textile Technology Upgrade Fund Scheme
UN-United Nations
VCLT-Vienna Convention on the Law of Treaties
WTO-World Trade Organization

STATEMENT OF FACTS

1. Syldavia (S) is a developing country, Member (M) of the WTO and founding M of the International Organization for Standardization (ISO). S's economy specializes in cotton fabrics and has a vibrant and industrialized powerloom sector. Due to Borginia's (B) Love for Nature Action Plan (LFN), its National Environmental and Sustainability Institute's (NESI) executive decision of 2015 (NESI's D) and its tax legislation of 2015 -Save our Climate Act (SOCA)-, S's cotton fabric exports to B have significantly dropped.

2. One goal behind the LFN implemented by B is to expand its traditional yarn, fabric and garment manufacturing sector. B's government fear that their traditional textile units would shift to mechanized process.

3. Pursuant to the LFN Action Plan, in 2015 NESI issued an executive decision. It prohibits to market as "Cotton Fabric" in B, fabrics -even those 100% cotton- that use energy in their process and production methods (PPM). Additionally, B levied a tax -pursuant to SOCA- on cotton fabrics that are not marketed as "Cotton Fabric". The tax is collected for imported products at the point of customs clearance.

4. Furthermore, the Ministry of Textiles of B decided to allocate the funds collected through the SOCA tax entirely to the textile units situated in the TEPZs. The collected capital was designated for the installation of modern technology by pooling the funds into a Textile Technology Upgrade Fund Scheme (TTUFS). Under the TEPZ regulations, the textile units situated in the TEPZs must sell more than 80% of their output in export markets.

5. It is S's view that the measures implemented by the government of B nullified and impaired its benefits under the GATT, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Subsidies and Countervailing Measures (SCM). After unsuccessful consultations with B, S submitted a request for the establishment of a panel to the DSB, containing the legal claims that will be further developed in this document.

SUMMARY OF ARGUMENTS

1. NESI's D is a TR inconsistent with TBT Arts. 2.1, 2.2 and 2.4.

1.1. NESI's D displays handloom (HL) cotton fabric PPM's and characteristics in a mandatory fashion for products to be marketed and sold as "Cotton Fabrics". Indeed, (i) NESI's D applies to the cotton fabrics as an identified group of products; (ii) it sets out the HL production as a specific PPM and; (iii) it is mandatory as it is the only PPM allowed for a producer to market and sell its products as "Cotton Fabrics" in B's market.

1.2. It breaches the National Treatment (NT) obligation under TBT Art. 2.1 since it discriminates imported powerloom (PL) cotton fabrics from S given that they are not allowed the "Cotton Fabric" label. NESI's D is a technical regulation (TR) granting a differential treatment for two like products: HL and PL cotton fabrics, which are like products given their physical characteristics, end-uses, consumer tastes and habits and tariff classification. Imported products are given a less favorable treatment, in the sense of causing a detrimental impact on competitive opportunities, which does not stem exclusively from a "legitimate regulatory distinction".

1.3. It breaches TBT Art. 2.2 as is a more trade restrictive than necessary measure. Despite the environmental assertions made by B in order to justify the measures taken within the LFN action plan, it is clear that the real objective pursued by NESI's D is to protect domestic HL producers of cotton fabrics. Nonetheless, if the environmental objective alleged by B is deemed to exist, measures by B are not necessary because of their degree of contribution to the environmental protection.

1.4. Also, the TR was not based on ISO 14666, a relevant international standard that is appropriate and effective for the alleged environmental protection, thereby breaching TBT Article 2.4. In fact, ISO 14666 is a relevant international standard –in accordance with TBT Annex 1.2 - for the production of cotton fabrics, which was not used as a basis for the TR.

2. NESI's D is inconsistent with GATT Arts. III:4.

2.1. NESI's D constitutes a "law, regulation or requirement" under the scope of GATT Article III:4, which breaches the NT obligation as it grants imported powerloom fabrics a less favorable treatment than that accorded to like domestic handloom cotton fabrics.

3. The SOCA tax is inconsistent with GATT Arts. II:1(a) and (b), is not justified by GATT Art. II:2(a) and, alternatively, is inconsistent with Art.III:2.

3.1 The SOCA tax is a border tax subject to analysis under GATT Art. II since the obligation to pay the tax is triggered by importation.

3.2. The SOCA tax is in breach of GATT Art.II:1(a) and (b) because it exceeds B's bound tariff

established in its Schedule of Concessions (SC) for fabrics given that the tax rate increases up to 50 cents depending on the carbon emissions per sq. mt. without a ceiling.

3.3 The SOCA tax is not justified under GATT Art.II:2(a) as it is not equivalent to the internal tax in a quantitative nor a qualitative level. The tax burden for imported PL cotton fabrics is heavier than domestic HL cotton fabrics. The SOCA tax levied on imported products exceeds the internal tax since Financially, the border tax is more expensive, and stringently controlled.

3.4 Alternatively, if the SOCA tax is found to be an internal tax, it is inconsistent with ART.III:2 for it is not eligible for Border Tax Adjustment (BTA) and imported PL cotton fabrics are taxed in excess of domestic HL cotton fabrics. 3.1. The SOCA tax is a border tax that exceeds B's bounded rate on its Schedule of Concessions (SC).

3.5. In the event the SOCA tax is regarded as an internal tax, it breaches the NT obligation for it taxes imported PL cotton fabrics in excess of HL fabrics.

4. B's subsidy for the textile units located in the TEPZ is inconsistent with SCM Arts. 3.1(a), 27.4 and 27.5.

4.1. The allocation of funds from the TTUFS to the textile units situated in the TEPZs constitutes an export subsidy, prohibited by Art. 3.1(a) of the SCM.

4.2. B's subsidy is not excluded from the scope of Art. 3.1(a) because of Art. 27.4 since B is no longer part of Annex VII(b) of the SCM. Thus, the subsidy is inconsistent with B's obligations under the SCM.

4.3. B reached export competitiveness regarding 100% cotton fabrics. Hence, B has the obligation to phase-out its export subsidies for that product according to SCM Art. 27.5 instead of implementing new ones. Thus, the allocation of funds is inconsistent with B's obligations under the SCM.

5. The NESI's D and SOCA tax cannot be justified under GATT Art. XX.

5.1. B's protectionist policy cannot be justified under GATT Art. XX, since the TBT does not have special recourse to those exceptions.

5.2. Even if the Panel finds that GATT Art. XX does apply to TBT, B's measures share the same rigid requirement. This requirement consists in the HL PPM required to market cotton textiles as "Cotton Fabric" so that the product could be tax-exempted. By those means, B's measures are applied in an arbitrary and unjustifiable discrimination against S's cotton textiles produces.

5.3. In any event, B's measures are a disguised restriction on international trade, as they are deemed as an environmental policy even though they are protectionist of its traditional industry. In that sense both, NESI's D and the SOCA cannot be justified under GATT Art. XX.

IDENTIFICATION OF THE MEASURES AT ISSUE

1. NESI's executive decision issued in 2015.

2. SOCA legislation enacted in early 2015.

3. The subsidy to the textile units situated in the TEPZs.

LEGAL PLEADINGS

I. Opening Statement.

1. B's unilateral policy is protectionist of its traditional HL textile industry -locally known as *Khadi*[1]-, considering its characterization, design, structure and operation. It encompasses three measures: (i) NESI's D,[2] (ii) the SOCA tax[3], and (iii) the allocation of funds made by B's Ministry of Textiles. The measures are aimed to confer a competitive advantage[4] to domestic HL cotton fabrics over imported PL cotton fabrics, due to S's relative market advantage[5] on PL production[6] and the consumers' tendency to prefer domestic *Khadi*.[7]

2. B's protection to its HL textile industry is based on the fact that it constitutes 15% of its industrial production[8], which ensures self-employment and is less capital intensive.[9]In fact, B has recognized a threat to its HL production due to the growing demand of cotton garments, which may lead to a shift to PL production[10]. Thus, B chose this sector to implement the LFN.[11]

3. NESI's D and the SOCA tax confer an artificial competitive edge to HL cotton fabrics. First, NESI's D prohibits PL cotton fabrics to be marketed as "Cotton Fabric", even if they are made 100% of cotton, misleading consumers. Furthermore, PL cotton fabrics are charged with a tax, from which products marketed as "Cotton Fabric" are exempted -situation that increases the former's production costs in comparison with the latter's. Likewise, B distorts competition by granting subsidies to the majority of the domestic textile industry located in the TEPZ, subject to the condition of exporting 80% of its production.[12]

4. Even B acknowledged that one of the goals of its policy is to "encourage, nurture and expand the traditional yarn, fabric and garment manufacturing sector".[13] This statement, along with all the mentioned economic factors, demonstrate the grounds of B's policy and its real aim to protect an industry deeply integrated into its culture.[14] Said protectionism directly affects S's WTO rights, and goes against the organizations object and purpose: the achievement free trade.

II. NESI's D is a TR which is inconsistent with TBT Art. 2.

[1] EMC2 Case, [1.2].
[2] EMC2 Case, [2.2].
[3] EMC2 Case, [3.1].
[4] *Michael E. Porter* (1990), [1-4].
[5] EMC2 Case, [2.4].
[6] EMC2 Case, [2.4].
[7] EMC2 Clarification, [13].
[8] EMC2 Case, [1.2].
[9] EMC2 Case, [2.5].
[10] EMC2 Case, [2.1].
[11] EMC2, Case [1.5].
[12] EMC2 Case, [1.3].
[13] EMC2 Case, [2.1].
[14] EMC2 Clarification, [13].

5. For its first claim, S submits that NESI's D is a technical regulation (TR) within the meaning of TBT Annex 1.1[15], which is inconsistent with TBT Arts. 2.1, 2.2 and 2.4.

A. NESI's D is a TR according to TBT Annex.

6. The AB[16] has performed a three-tier test to determine if a measure constitutes a TR, which requires a study of whether the measure (i) applies to identifiable products, (ii) lays down its characteristics, and (iii) is of mandatory compliance.

1. NESI's D applies to identifiable products.

7. NESI's D complies with the first tier of the referred test, for it applies to identifiable products. The AB[17] has stated that a TR can identify products through its characteristics. NESI's D lays down product characteristics for the identifiable group of cotton fabrics, establishing that only "100% handloom cotton fabric can be marketed as 'Cotton Fabric'".[18]

2. NESI's D lays down characteristics and PPMs of the product.

8. NESI's D requires 100% cotton fabrics to comply with the key PPMs of the TR to obtain the right to market them as "Cotton Fabric" (i.e. machineless spinning, weaving and knitting). Thus, NESI's D complies with the second tier of the test.

3. Compliance with NESI's D's product characteristics and PPMs is mandatory.

9. According to the AB, [19] the term "mandatory" in TBT Annex1.1 must be understood as binding in a compulsory fashion. NESI's D establishes a single and legally mandated definition of a "Cotton Fabric" product.[20] If a product does not comply with B's measure, it cannot be marketed as such.[21] Thus, NESI's D is mandatory, for the mere fact of being able to sell a product without a label does not excludes it from being mandatory.[22]

10. Consequently, NESI's D (i) applies to identifiable products, (ii) describes its characteristics and PPMs and (iii) compliance with it is mandatory. Hence, it is a TR.

B. NESI's D is inconsistent with the NT obligation under TBT Art. 2.1.

11. NESI's D is in breach of B's NT obligation under TBT Art. 2.1. The AB[23] has stated that for a measure to be inconsistent with TBT Art. 2.1, it must (i) be a TR; (ii) apply to like domestic and imported products, and (iii) grant a less favorable treatment (LFT) to the latter.[24]

1. HL and PL cotton fabrics are like products within the meaning of TBT Art. 2.1.

12. HL and PL cotton fabrics are like products. The AB[25] stated that *likeness* is determined by the competitive relationship among products, which implies the analysis of their (i) physical

[15] ABR, US -Tuna II (Mexico), [178].
[16] ABR, EC-Sardines, [176].
[17] ABR, EC-Asbestos, [70].
[18] EMC2 Case, [2.2].
[19] ABR, EC-Asbestos, [74].
[20] ABR, US-Tuna II (Mexico), [199].
[21] EMC2 Case, [2.2].
[22] ABR, US-Tuna II (Mexico), [198].
[23] ABR, US-Clove Cigarettes, [87].
[24] TBT, Art. 2.1.
[25] ABR, US-Cove Cigarettes, [120].

characteristics; (ii) end-uses; (iii) consumers' preferences and; (iv) tariff classification[26].

13. First, HL and PL cotton fabrics have the same physical properties. Both are made of 100% cotton and share the same PPMs.[27] Second, both perform the same end-use[28] as they serve to produce cotton garments. Third, since their properties are the same, consumers do not differentiate them[29]. Finally, their HS code coincides in six digits -5208.05-, which makes them the same product in terms of B's Schedule of Concessions (SC).[30] Thus, HL and PL cotton fabrics are like products and have a competitive relationship.

2. PL cotton fabrics are granted a LFT.

14. NESI's D is inconsistent with TBT Art. 2.1 since it accords a LFT to imported PL cotton fabrics. The AB[31] has performed a two-tier test regarding the granting of a LFT: (i) the measure causes a detrimental impact to imported products, and (ii) that impact does not stem exclusively from a legitimate regulatory distinction.

a. NESI's D caused detrimental impacts for the group of PL imported products.

15. NESI's D detrimentally impacts imported PL cotton fabrics since they cannot be marketed as "Cotton Fabric". In previous decisions, the benchmark used by the AB for establishing the absence of a LFT was to determine "equality of competitive conditions". [32]

16. In this case, the TR misinforms consumers. Products not marketed as "Cotton Fabric" can be rejected under the wrong assumption that they are not 100% cotton. Moreover, as imported PL fabrics are not marketed as "Cotton Fabric", they are charged with an additional tax.

17. These detrimental impacts have affected S's economy due to its comparative advantage[33] on PL cotton fabrics.[34] In fact, in the aftermath of NESI's D, S's PL cotton fabrics exports to B dropped almost 50%.[35] Hence, the TR caused detrimental impact to S's PL fabrics.

b. Detrimental impacts do not stem exclusively from a legitimate regulatory distinction.

18. The burden to prove this tier rests on the respondent as the AB[36] stated. However, S submits that NESI's D hides the interest of protecting B's HL industry as stated in the Opening Statement.

19. Thus, B's TR is inconsistent with TBT Art. 2.1 since it discriminates imported PL from like domestic HL cotton fabrics. Imported PL fabrics are accorded a LFT, modifying competition conditions since it prohibits them to be marketed as "Cotton Fabric" in B.

[26] ABR, Japan-Alcoholic Beverages II, [19-23].
[27] EMC2 Case, [2.2]-[Annex 3].
[28] ABR, EC-Asbestos, [117].
[29] *Ralf Buckley* (2013)
[30] EMC2 Case, [3.1].
[31] ABRs US-Clove Cigarettes, [104-233], US-Tuna II (Mexico) [200-300]; US- Cool, [254-350].
[32] ABR, Japan-Alcoholic Beverages II [16]
[33] *Paul R. Krugman* (2012), 37.
[34] ERMC2 Case, [2.4].
[35] EMC2 Case, [Annex 2].
[36] ABR, US-Tuna II (Mexico), [298].

C. NESI's D is inconsistent with TBT Art. 2.2.

20. NESI's D is inconsistent with TBT Art. 2.2 as it is more trade restrictive than necessary. The AB[37] established that a TR is inconsistent with TBT Art. 2.2. if it (i) does not fulfill a legitimate objective, and (ii) is more trade-restrictive than *necessary*.

1. NESI's D does not fulfill a legitimate objective.

21. NESI's D aims to protect B's HL textiles industry as it was said in the Opening Statement. Hence, the measure does not protect a legitimate objective within the meaning of TBT Art. 2.2

2. In the event the objective is regarded to be legitimate, it is not a necessary one.

22. If NESI's D fulfills a legitimate objective (e.g. protecting the environment), the measure is still inconsistent with TBT Art. 2.2 since it is not necessary. When analyzing *necessity*, the AB[38] weights the following factors: (i) the TR's contribution to the objective, (ii) its trade-restrictiveness, and (iii) the risks of non-fulfilment of the objective pursued. Moreover, the complainant may identify alternative measures.[39]

a. The measure's degree of contribution to the legitimate objective.

23. NESI's D's degree of contribution to environmental protection is doubtful. It implies a marketing prohibition that does not provide information to consumers about the ecological PPMs of the products. Thus, consumers will not develop an eco-friendly preference based on NESI's marketing regulation; and the absence of an increase of the demand of these goods will dissuade the producers' shift from PL to HL production methods.[40]

b. The trade-restrictiveness of the measure.

24. NESI's D restricts trade of PL cotton fabrics to B. The AB has stated that the analysis of restrictiveness is in similar terms of the obligation of LFT.[41] Said analysis was developed in paras. 15-17, reaching the conclusion that it is highly restrictive.

c. The risks of non-fulfilment of the legitimate objective.

25. The risk of non-fulfilling environmental protection through NESI's D is not substantial. As stated in the Opening Statement, the measure is not effective nor necessary.

d. Reasonably available alternative measures that are less trade restrictive.

26. The AB[42] has found appropriate to compare the challenged measure and possible alternatives. It is S's assertion that changing the marketing prohibition to a voluntary "Eco-friendly Cotton Fabric" label available for low emission PL production is less trade restrictive.

27. Overall, NESI's D is inconsistent with TBT Art. 2.2 since it does not fulfill a legitimate

[37] ABR, US-Tuna II, [311-323].
[38] ABR, US-Cool, [374].
[39] ABR, US-Cool, [379].
[40] *Ralf Buckley* (2013).
[41] ABR, US-COOL, [477].
[42] ibid., [471].

objective and is significantly more trade restrictive than necessary.

D. NESI's D is inconsistent with TBT Art. 2.4.

28. NESI's D is in breach of TBT Art. 2.4 since ISO 14666 was not used as a basis for its content. The AB[43] stated that (i) when there is a relevant international standard; (ii) it should be used as a basis for the TR; unless (iii) it is ineffective or inappropriate for the objective.

1. ISO 14666 is a relevant international standard.

29. ISO 14666 was legitimately adopted by an international standardizing organization for cotton fabrics following TBT Annex. 1.2.[44] The AB[45] has interpreted the absence of *consensus* in the wording of the Annex as a deliberate omission that implies that it is not required. Thus, the lack of consensus when approving ISO 14666 does not affect its status[46].

30. Moreover, it is relevant because ISO 14000[47] is a family of environmental standards. Furthermore, it highlights key PPMs that are common to HL and PL cotton fabrics according to NESI's D.[48] Consequently, ISO 14666 is a relevant international standard under TBT.

2. The international standard was not used as a basis for the TR.

31. ISO 14666 was not used as a basis for B's TR. The AB[49] has established that when there is a contradiction between the international relevant standard and the TR, the former was not used as a basis for the latter. The contradiction lays in the fact that (i) ISO 14666 allows the use of machine inputs in the cotton fabric PPM and (ii) does not include marketing restrictions, while NESI's D requires a HL PPM to market the products as "Cotton Fabric".

32. In fact, even B has recognized a contradiction between them when establishing that ISO 14666 is inconsistent with its environmental goals[50]. Thus, the analyzed international standard was not used as a basis for B's TR, which derives in an inconsistency with TBT Art. 2.4.

3. ISO 14666 is not ineffective or inappropriate to fulfill the legitimate objectives pursued.

33. Per the AB,[51] the term *legitimate objective* has the same meaning as in TBT Art. 2.2. Thus, the objective pursued by B in the case at hand is not legitimate as explained in the Opening Statement.

34. Still, if environmental protection is found to be the objective pursued by the TR, ISO 14666 has effective means for its fulfilment, since it is part of a family branch of international environmental measures technically credible, representing the sum of international expertise.[52]

35. All in all, NESI's D is inconsistent with TBT Arts. 2.1, 2.2 and 2.4 since (i) it grants a LFT

[43] ABR, US-Tuna II (Mexico), [359].
[44] TBT Annex 1.2.
[45] ABR, EC-Sardines, [222, 245, 248].
[46] EMC2 Case, [Annex 3].
[47] ISO (2009).
[48] EMC2 Case, [Annex 1].
[49] ABR, EC- Sardines, [247-248].
[50] EMC2 Case, [2.6].
[51] ABR, EC-Sardines, [286].
[52] ISO (2009).

to imported PL cotton fabrics in comparison with domestic HL cotton fabrics, in breach of the NT obligation; (ii) it is a more trade restrictive than necessary; and (iii) ISO 14666, a relevant international standard for the production of cotton fabrics, was not used as a basis for the TR.

III. NESI's D is inconsistent with the NT under GATT Art. III:4.

36. NESI's D is also in breach of GATT Art. III:4 since its NT obligation has a broader scope than TBT Art. 2.1 by not requiring the existence of a TR.[53] Thus, even if NESI's D is not considered as a TR, it would still fall under its scope.

37. To find an inconsistency with this provision,[54] it is required that (i) domestic and imported products are like products; (ii) the measure is a law, regulation, or requirement affecting the internal sale; and (iii) a LFT is accorded to imported products.

38. The analysis that must be performed under the first and third tiers are identical to the ones presented in paras. 11-17 under the TBT claims. This, considering that the AB[55] has extended the application of the elements of GATT Art. III:4 to the examination of TBT Art. 2.1.

39. Therefore, the remaining step to determine if NESI's D is inconsistent with GATT Art. III:4 is to analyze if the measure at issue constitutes a law, regulation or requirement that affects sale. NESI's D shall be regarded as a *law, regulation or requirement* within the meaning of GATT Art. III:4, since it was issued by a governmental agency with regulatory purposes.[56]

40. All in all, NESI's D is inconsistent with GATT Art. III:4, considering that the measure is a regulation that affects the internal sale of like products by the granting of a LFT.

IV. The SOCA tax is inconsistent with GATT Arts. II:1(a) and (b), II: 2(a) and III:2.

A. The SOCA tax is inconsistent with GATT Art. II:1(a) and (b).

41. Art.II:1(a) and (b) prohibits Ms to impose ordinary customs duties in excess of the bound tariff established in its SC for each product. Products shall also be exempted from all kinds of border taxes and shall not receive a LFT. According to the AB,[57] Art.II:1(b) prohibits a practice that will always be inconsistent with Art.II:1(a) because applying customs duties in excess constitutes a LFT. Thus, the SOCA tax is inconsistent with Art.II:1(b), which will consequently lead to a breach of Art.II:1(a).

42. The Panel in *EC-Chicken Cuts*[58] stated that an inconsistency with GATT Art. II:1(b) is found if the analysis of the border tax, the SC, and their comparison shows that the measure results in duties exceeding the M's SC. To develop said analysis, the nature of the SOCA tax must be determined first as a border tax.

1.The SOCA tax is a border tax under GATT Art. II:1(a) and (b).

[53] ABR, US-Tuna II, [405].
[54] ABR, Korea-Various Measures on Beef, [133].
[55] ibid.
[56] EMC2 Case, [1.6].
[57] ABR, Argentina-Textiles and Footwear, [45].
[58] PR, EC-Chicken Cuts, [7.65].

43. GATT Art. II:1(b) refers to the term *on their importation*. The AB[59] stated that this constitutes a *threshold* issue, asserting that a measure can only be inconsistent with said Art. if it is a border tax. If not, the analysis must be performed under GATT Art.III:2.

44. The AB[60] established that the ordinary meaning of *on their importation* in GATT Art. II:1(b) contains a strict temporal element which implies that the obligation to pay the charge is linked to the product at the moment of importation. Hence, "... it is at this moment, and this moment only, that the obligation to pay such charge accrues".[61] This means that a measure will be a border tax whenever the obligation to pay is triggered by importation.

45. The Ad Note on GATT Art. III defines its scope. It states that the nature of a measure is established by the moment in which the obligation accrues and not by the moment of its collection. These two events can occur simultaneously, as usually happens with customs duties.

46. In the case at hand, there are two different charges, one for imported and one for domestic cotton fabrics. The first one is a border tax that surges by virtue of importation.[62] The obligation to pay accrues upon the entry of the product into the customs territory but before it enters to the domestic market[63] and it is collected at that same moment.[64] The other one is an internal tax which is collected at the time of domestic sale.[65] Thus, the first charge is a border tax because if the product is not imported, the tax will not have to be paid.

2. The SOCA tax exceeds the bound rate established for imported cotton fabrics in B's SC.

47. The SOCA tax, as a border tax, exceeds B's obligation under its SC. This issue must be analyzed by comparing the treatment accorded to the product under the M's SC and the treatment accorded to the product under the measure at issue.[66]

48. Table C[67] shows that B bounded itself to a maximum tariff ceiling of 10% for fabrics. On the other hand, Table A[68] shows a progressive tax rate for the SOCA tax, which increases depending on the carbon emissions per sq. mt. The rate varies from 20 cents to 50 cents, per sq. mt. By comparing both treatments, it is possible to conclude that the measure can and will exceed the bound rate of 10% established in B's SC. This, because it does not have a ceiling. Therefore, the SOCA tax is inconsistent with B's obligations under GATT Art.II:1(a) and (b).

B. The SOCA tax is not justified under GATT Art.II:2(a).

49. Art.II:2(a) exempts border taxes that are equivalent to internal taxes from the prohibition of Art.II:(a) and (b). However, the measure at issue is not justified by GATT Art.II:2(a) since

[59] ABR, China-Autoparts, [127].
[60] ibid., [129].
[61] ibid.
[62] ibid., [158].
[63] PR, China-Autos, [7.18].
[64] EMC2 Case, [3.1].
[65] ibid
[66] PR, EC-Chicken Cuts, [7.65].
[67] EMC2 Case, [3.1].
[68] ibid

it does not meet the requirements established by the AB[69]: (i) the charges are equivalent, and (ii) the border tax is not levied in excess of its equivalent internal tax.

1.The border tax and the internal tax are not equivalent.

50. The SOCA tax levied on imported products is inconsistent with GATT Art. II:2 because the SOCA tax levied on domestic PL fabrics is not equivalent to the border tax levied on imported PL fabrics. The analysis of equivalence, as the AB[70] noted, must be fulfilled both in a quantitative and a qualitative perspective. Neither are satisfied by the measure at issue.

51. Qualitatively, the SOCA internal tax levied on domestic products differs from the border tax levied on imported products since it is collected in a different moment. The internal tax is collected at the time of domestic sale,[71] which makes it a consumption tax that is shifted into the products' prices.[72] The border tax is collected at the point of customs clearance[73] and therefore, it is not shifted. Moreover, the determination and control of the tax diverges between the SOCA internal and the border tax. The latter is based on self-declarations by importers on CO_2 emissions[74] and its accuracy is ascertained by several plant visits of NESI's technical staff,[75] while there is no information about the determination and control of the internal tax.

52. These disparities lead to two quantitative differences. First, given that S's importers need to pay the tax earlier -at the moment of the importation- than B's producers -at the moment of sale-, S's importers bear a bigger financial cost: they need more liquidity and are losing the value of the money in time, between the moment of importation and sale. Therefore, it is more expensive for the importer even if the nominal price of the tax is the same one. Second, S's declarations are stringently controlled while there is no information about B's.[76] Consequently, B's tax base could easily be eroded, which indefectibly leads S's importers to bear a heavier burden of the tax. In conclusion, the internal tax is not equivalent to the border tax in a quantitative nor a qualitative level. Hence, the bound tariff still applies to the border tax.

2.The border tax exceeds the internal tax.

53. As it was previously explained, the border tax that applies to the imported PL fabrics is charged in excess of the internal tax levied on domestic PL cotton fabric due to the quantitative and qualitative analysis. The reasons remain: the disparity in the moment of its collection and the control on its determination lead to a heavier tax burden for imported products. Financially, the border tax is more expensive, and stringently controlled. Thus, imported fabrics are being

[69] ABR, India-Additional Imports, [170].
[70] ibid, [175].
[71] EMC2 Case, [3.1].
[72] *Alice Pirlot* (2017), [46].
[73] ibid.
[74] EMC2 Case, [3.1].
[75] EMC2 Case, [2.3].
[76] ibid.

charged in excess of B's bound rate, which is in breach of GATT Art.II:2(a).

C. If the charge is found to be an internal tax, it is inconsistent with GATT Art. III:2.

54. S holds that this measure constitutes a border tax (e.g. an ordinary customs duty) since the AB has stated that "a charge cannot be at the same time an ordinary customs duty and an internal tax or an internal charge". [77] Yet, in case that the Panel finds the SOCA tax as an internal tax, S holds that is inconsistent with GATT Art. III:2 in accordance with the following analysis.

1. The SOCA tax is a *tax occultes* that is not eligible for (BTA).

55. GATT Art. III:2 allows internal taxes for BTA if they comply with the NT Principle. The taxes eligible for BTA are the ones "applied, directly or indirectly to… products".[78] The 1970 Working Party on BTA stated that indirect taxes -charged to products- can be adjusted but not direct taxes -charged to producers. However, they had divergent views on the subdivision of *taxes occultes* that are the ones levied on inputs incorporated or exhausted in the production process. Examples of those are "taxes on advertising, energy**,** machinery and transportation"[79]. For the Working Party "it appeared that adjustment was not normally made for *taxes occultes*" (emphasis added). [80] The logic is simple: the taxable event is not the product itself, but the producer's decision to adopt the production process. At the end, what is being charged in the *tax occultes* is the producer. Thus, the *tax occultes* are not eligible for BTA.

56. In the case at hand, the SOCA tax levied on imported cotton fabrics is a *tax occultes* and therefore, it is not eligible for BTA. Its chargeable event is the emission of carbon in the production of cotton fabrics. Indeed, the carbon input is exhausted in the production process of cotton fabrics and it is not incorporated in the final product.[81] Here, the producer or importer is the one that is being charged with this *tax occultes*. Hence, it is not eligible for BTA.

57. Yet, in the event the Panel finds that the SOCA tax is eligible for BTA, S will now proceed to explain its inconsistency under the NT obligation of GATT Art. III:2, first sentence.

2. SOCA tax is inconsistent with the NT Principle in Article III:2 of the GATT first sentence.

58. GATT Art. III:2 first sentence, requires the examination of whether (i) imported and domestic products are like products, and (ii) imported products are taxed in excess of the domestic products.[82] The AB has stated that any measure breaching Art. III:2 first sentence, by implication, breaches the second one, given the broader application of the latter.[83] Thus, S will only develop the analysis of inconsistency with GATT Art. III:2, first sentence.

[77] ABR, China-Autoparts, [184].
[78] GATT, Art. III:2.
[79] ibid.
[80] ibid.
[81] EMC2 Case, [3.1].
[82] ABR, Canada-Periodicals, [22].
[83] ABR, Canada-Periodicals, [19].

a.The imported PL cotton fabric and domestic HL cotton fabric are like products.

59. The analysis of like products was developed in para.12 to 13. The same analysis holds under GATT Art. III:2 since the AB[84] used GATT criteria for the TBT like products analysis.

b. The PL cotton fabrics are taxed in excess of the domestic HL cotton fabrics.

60. Imported PL cotton fabrics are being taxed in excess according to GATT Art. III:2. The AB has stated that there are several ways in which a M could tax in excess the imported products of another one. The analysis requires a comparison of actual tax burdens rather than merely nominal ones. Thus, "account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods… and of the rules for the tax collection ".[85]

61. In the case at hand, the SOCA tax charges in excess imported PL cotton fabrics in several ways. First, according to NESI's D, HL domestic cotton fabrics marketed as "Cotton Fabrics" are exempted from the tax.[86] Therefore, imported PL cotton fabrics are being taxed in excess since HL domestic ones are not charged. Second, the SOCA tax on imported PL cotton fabrics is collected at the point of customs clearance while the SOCA tax for domestic products is collected at the time of domestic sale,[87] financially harming importers as explained in paras. 51 to 52. Third, there is evidence of stringent surveillance of S's carbon content declarations and not of B's, allowing the latter the possibility to erode its tax base as described in paras. 51-52. Therefore, imported PL cotton fabrics are being taxed in excess than HL cotton fabrics. Thus, B is in breach of its obligation under GATT Art.III:2 first and second sentence.

V. B's allocation of funds is inconsistent with SCM Arts.3.1(a), 27.4 and 27.5.

62. S will demonstrate that B's allocation of funds to the textile units situated in the TEPZs constitutes a subsidy under SCM Art.1. Moreover, that it is contingent upon export performance -export subsidy-, which makes it inconsistent with SCM Arts.3.1, 27.4 and 27.5.

A. B's allocation of funds is an export subsidy inconsistent with SCM Art.3.1(a).

63. For a measure to be an export subsidy under SCM Art.3.1(a), it must be determined first that its nature corresponds to a subsidy.

1. The measure at issue is a subsidy according to Arts. 1 and 2 of the SCM.

64. Under SCM Art.1 and according to the AB[88], a subsidy must fulfil two requirements to be considered as such. It must: (i) be a financial contribution made by a government or public body, and (ii) confer a benefit. Additionally, according to Art.2, it must be specific.

a. The allocation of funds is a financial contribution made by B's government.

[84] ABR, Japan-Alcoholic Beverages II, [19].
[85] PR, Japan-Alcoholic Beverages II [5.8].
[86] EMC2 Case, [3.1].
[87] EMC2 Case, [3.1].
[88] ABR, US-Softwood Lumber IV, [51].

65. The decision of the Ministry of Textiles to allocate the funds is a financial contribution. SCM Art.1 includes in its subpara. (i) *a direct transfer of funds* as a form of financial contribution. The AB[89] stated that this subpara. captures a conduct in which financial resources are made available to a recipient. In this case, the Ministry of Textiles decided to allocate the funds collected through the SOCA tax from the TTUFS to the textile units situated in the TEPZs for the installation of technology.[90] Thus, the measure constitutes a direct transfer of funds under SCM Art. 1.1(a)(1)(i).

66. Moreover, for a financial contribution to be a subsidy, in terms of SCM Art. 1, it must be made by a government or public body. The AB[91] stated that SCM Art. 1.1(a)(1) covers only those entities that are vested with governmental authority. In this case, the funds were allocated by the Ministry of Textiles. Said Ministry is part of B's government, which means that it is vested with governmental authority. Thus, the measure satisfies the Art.'s first element.

b. The allocation of funds confers a benefit to B's textile units.

67. The Panel in *Canada-Aircraft*[92] stated that the ordinary meaning of benefit encompasses some form of advantage. To establish its existence, the AB[93] stated that it is necessary to analyze if the financial contribution places the recipient in a more advantageous position. The financial contribution must have some sort of trade-distorting potential[94] and leave the recipient in more favorable conditions than those available to it in the market.

68. Since the textile units situated in the TEPZs are receiving funds that will allow them to install modern technology, they are in a more advantageous position in the textile market. Receiving funds to upgrade their technology represents an advantage for this units in comparison to others in the market, since they would have to pay themselves for said technology. Thus, the measure confers a benefit to the textile units located in the TEPZs.

2.<u>The subsidy is contingent upon export performance, and therefore is prohibited.</u>

69. B's allocation is inconsistent with SCM Art. 3.1(a). This Art. prohibits subsidies that are contingent in law or in fact upon export performance -export subsidies. Moreover, SCM Art. 2.3 establishes that "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific", which means that *specificity* should not be addressed individually.

70. SCM Art. 3.1(a) refers to *de jure* and *de facto* export subsidies. The AB[95] stated that *contingent* means conditional or dependent for its existence on something else. Thus, there

[89] ABR, US-Civil Aircraft (2nd complaint), [614].
[90] Elsa case, para. 3.2.
[91] ABR, US - Antidumping and countervailing duties, [317].
[92] PR, Canada-Aircraft, [9.112]
[93] ABR, Canada-Aircraft, [154]
[94] ibid.
[95] ABR, Canada-Autos, [98].

must be a relationship "between the granting of the subsidy and actual or anticipated exportation".[96] The AB[97] stated that the legal standard for both types of contingencies is the same, but there is a difference in the evidence that may be employed to prove them. It stated that *de jure* export contingency is demonstrated with the words of the law, while *de facto* contingency is inferred from the total configuration of facts surrounding the subsidy, none of which on its own is likely to be decisive.[98]

71. Additionally, the AB[99] upheld that the standard for *de facto* contingency is met when the facts demonstrate that the subsidy would not have been granted *but for* anticipated exportation. Moreover, the AB[100] established that any fact can be relevant to demonstrate said contingency.

72. In this case, the subsidy is only granted to the textile units located in the TEPZs which are regulated by B's government and meant to permit foreign investment.[101] Under the TEPZ regulations, the units have to sell more than 80% of their output in export market.[102] Moreover, non-compliance with the TEPZs regulations could lead to adverse consequences[103] for textile producers, resulting in the appearance of an effective incentive that assures constant exports. Thus, to receive the subsidy, the units must comply with the specific export conditions.

73. All the factors analyzed above lead to conclude that the subsidy would have not been granted to the textile units *but for* the anticipated exportation. Thus, there is a clear relationship between export performance and the granting of the subsidy. Hence, the set of conditions surrounding the granting of the funds indicates that it embodies a *de facto* export subsidy, which is inconsistent with SCM Art. 3.1(a).

B. SCM Art. 27.4 does not exclude B's allocation of funds from the scope of Art. 3.1.

74. The SCM Art. 27 grants developing Ms and Less Develop Countries a special and differential treatment. Nonetheless, it contains certain requirements for a developing country to obtain such treatment.

75. SCM Art. 27.2 establishes that the prohibition of Art. 3.1(a) shall not apply to: (a) developing Ms referred to in Annex VII and (b) developing countries for a period of eight years from the date of entry into force of the WTO Agreement.[104]

76. SCM Art. 27.4 states that any developing M referred to in Art. 27.2(b) shall phase out its export subsidies within the eight-year period in a progressive manner.[105] Additionally, Doha Ministerial Declaration established that, Art. 3.1 shall apply when the M reaches the *threshold*

[96] ibid., [107].
[97] ABR, Canada-Autos, [99].
[98] ibid.
[99] ABR, Canada-Aircraft [162].
[100] ibid.
[101] EMC2 Clarification [14].
[102] EMC2 Case, para. 3.2.
[103] EMC2 Case, clarification 18.
[104] SCM, Art. 27.2.
[105] SCM, Art. 27.4.

of a Gross National Product (GNP) of $1.000 per capita under 1990 constant dollars for three consecutive years.[106]

77. B used to be listed in Annex VII(b) but it reached the *threshold* of a GNP of $1.000 per capita under 1990 constant dollars for three consecutive years in 2014. Thus, its export subsidies are no longer excluded from the scope of Art. 3.1(a) because of Art. 27.4 and must compel with the SCM's content and obligations.

C. B's allocation of funds is inconsistent with SCM Art. 27.5.

78. Art. 27.5 establishes that when a M listed in Annex VII has reached export competitiveness in any given product, it shall gradually phase out its export subsidies for such product over a period of eight years. Developing countries facing the latter situation shall have a two-year period to phase out its export subsidies.[107]

79. B used to be a country listed in SCM Annex VII(b) but it reached the *threshold* in 2014. Under those terms, in case of achieving export competitiveness, it would still have two years to phase out its export subsidies.

80. SCM Art. 27.6 establishes that export competitiveness in a product exists if a developing M's exports of that product have reached a share of at least 3.25% in world trade of that product for two consecutive years.[108] As it can be seen in Table D, B has achieved export competitiveness regarding "woven fabrics of cotton, containing 100% by weight of cotton, weighing no more than 200 gm" [109]. For the mentioned product, B's share in world trade constituted a 4% in 2014 and 4.90% in 2015.

81. Since B has achieved export competitiveness regarding 100% cotton fabric, it should be phasing out its export subsidies for such product. Instead, B implemented a new subsidy for textile units. It is true that B has two years to finally phase out those export subsidies, and that the mentioned period begins from the date in which export competitiveness exists.[110]

82. Nonetheless, implementing a new subsidy after achieving export competitiveness shows that the country is not aiming nor working to phase out its subsidies. This contravenes the purpose and content of the mentioned Art. since according to the AB,[111] all Ms have a duty to abide by their obligations under the Agreements in good faith. Thus, B's implementation of this new subsidy for cotton fabric producers is inconsistent with its obligations under Art. 27.5.

83. In conclusion, B implemented an export subsidy inconsistent with its obligations. B graduated from Annex VII and therefore, the allocation of funds is prohibited under the scope

[106] Doha (2001), [10.1].
[107] SCM, Art. 27.5.
[108] SCM, Art. 27.6.
[109] EMC2, [3.6].
[110] WTO (2017), [10.5].
[111] ABR, EC-Sardines, [278].

of SCM Art. 3.1. Moreover, B is export competitive in regard to cotton fabrics which means it should be phasing out its subsidies for them, instead of implementing new ones.

VI. B's measures are not justified under GATT Art. XX.

84. In case B argues that GATT Art. XX serves as an exception to justify its measures, S submits that TBT inconsistencies cannot be justified under it. Moreover, even if the GATT covers TBT inconsistencies, or if NESI's D is argued under GATT provisions; B's measures cannot be justified under Art. XX for not complying with the requirements of its Chapeau.

A. GATT Art. XX does not apply to the TBT.

85. GATT Art. XX does not apply to justify a M's breach of the TBT, since said Agreement does not have express recourse to the exceptions contained in GATT Art. XX. The TBT includes exceptions in its Art.2. In that sense, recourse to the exceptions of GATT Art. XX would be redundant or useless, in accordance with the effective interpretation principle.[112] Hence, B cannot justify its inconsistencies with the TBT under Art. XX.

B. B's measures do not comply with the requirements of the Chapeau.

86. Even if the Panel finds B's measures justifiable under paras.(b) or (g), they do not comply with the Chapeau.[113] This, since B's measures are designed and applied as (i) an arbitrary or unjustified discrimination between countries where the same conditions prevail or (ii) as a disguised restriction on international trade.[114] Thus, they cannot be justified under Art. XX.

1. B's measures are an arbitrary or unjustifiable discrimination affecting S.

87. To determine if a measure is creating an arbitrary or unjustifiable discrimination[115] (i) its application must result in a discrimination, (ii) such discrimination must be arbitrary or unjustifiable in character, and (iii) occur between countries where the same conditions prevail.

a. The application of B's measures results in a discrimination against S's textile suppliers.

88. The AB[116] stated that a discrimination under the Chapeau of GATT Art. XX shall be understood as a discrimination among suppliers, whether domestic or foreign, and not among products. B's measures discriminate S's textile suppliers since NESI's D According to the AB,[117] the term discrimination shall be interpreted in a different manner that it is done in GATT Art.III:4. In that sense, same AB determined that a discrimination between supplier countries is suitable under GATT Art. XX.[118]

89. Regarding NESI's D, the PPM required to market 100% cotton fabrics as "Cotton Fabric"[119] is *de facto* discriminatory for S's producers. This, since they are specialized in PL

[112] ABR, US-Gasoline, [23].
[113] ABR, China-Raw Materials, [685].
[114] ABR, US-Shrimp, [115]; ABR, Brazil-Retreaded Tyres, [215].
[115] ABR, US-Shrimp, [150].
[116] ABR, US-Gasoline, [23].
[117] PR, EC-Asbestos, [8.227].
[118] ibid.
[119] EMC2 Case, [2.2].

production while B has a competitive edge in HL production. B is discriminating S, by implementing a requirement that is designed to confer a benefit to B's traditional HL production. Same is done by the SOCA tax, since only products marketed as "Cotton Fabric" are exempted from the SOCA tax.[120] Hence, these measures directly discriminate S's PL producers.

b. B's discrimination is arbitrary and unjustifiable in character.

90. B's measures are an arbitrary and unjustifiable discrimination since (i) they result from a rigid and unbending requirement,[121] (ii) did not consider the transboundary effects they could have on S,[122] and (iii) their application does not relate with the declared policy objective.[123]

91. In this case, the discrimination is *capricious* or *random*[124], first since it results from a single and unbending requirement: B's protection of its traditional HL PPM, which not only enables cotton textiles to be sold as "Cotton Fabric", but also generates a tax exception.

92. In second place, the discrimination arises from B's failure to consider the measures' effects on S's PL sector,[125] which could have been avoided with prior negotiations with S.[126] In fact, NESI's D is a unilateral measure based on individual concerns[127]and the SOCA tax was triggered by B's Nationally Determined Contributions (NDCs),[128] which are individual commitments that are not formally part of the treaty.[129]

93. In third place, B's measures are discriminatory since they are difficult to reconcile with its declared objective[130] as explained in Opening Statement. Hence, the measures discriminate in an arbitrary and unjustifiable fashion.

c. B's discrimination occurs between countries where the same conditions prevail.

94. Both S and B have a strong textile sector that constitutes an important part of their economies. This, since S specializes in cotton fabrics and has a vibrant and industrialized PL sector, as well as B's textile industry constitutes 15% of its industrial production. Thus, from an economic standpoint, both of them share the same conditions.

95. All in all, the measures at issue constitute an arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

2. B's measures constitute a disguised restriction on international trade.

96. The SOCA tax and NESI's D constitute a disguised restriction in international trade, since

[120] EMC2 Clarifications, [32].
[121] ABR, US-Shrimp, [177], [163].
[122] ibid., [166], [172].
[123] Ibid., [165].
[124] ABR, Brazil-Retreated Tyres, [232].
[125] EMC2, [2.4].
[126] ABR, US-Shrimp, [166], [172].
[127] EMC2, [1.4], [1.5].
[128] EMC2, [3.1], [Annex1].
[129] *Daniel Klein* et al. (2017)
[130] EMC2 [1.4].

they are trade obstacles, which surge as a result of their enactment as measures supposedly justifiable under Art. XX. [131] By those means, B seeks to increase its economic conditions by excluding S's textile industry as a competitor.

97. In fact, exports from S to B dropped almost 50% over the last two years.[132] This, along with the decrease of PL textiles sale in B's market[133] demonstrates the effects that B's measures have on S's trade rights, dangerously threatening its PL textile sector.

98. For these reasons, B would abuse of its right to invoke the exceptions on GATT Art. XX, since it is disguising a protectionist policy towards self-centered aims, in detriment of S's rights and the whole object and purpose of WTO law. Hence, this Panel should not find B's measures as justifiable under GATT Art. XX.

[131] ABR, US-Gasoline, [25].
[132] ibid., [Annex 2 Table A].
[133] ibid., [Annex 2 Table B].

REQUEST FOR FINDINGS

For the above stated reasons, Syldavia respectfully requests the Panel to:

1. Find that NESI's D is a TR within the meaning of Annex 1.1 of the TBT.
2. Find that NESI's D is inconsistent with Arts. 2.1, 2.2 and 2.4 of the TBT.
3. Find that NESI's D is inconsistent with Art. III:4 of the GATT.
4. Find that the SOCA tax is inconsistent with GATT Arts. II:1(a) and (b) and II:2(a).
5. Alternatively, find that the SOCA tax is inconsistent with GATT Art. III:2.
6. Find that the allocation of funds is inconsistent with SCM Arts. 3.1(a), 27.4 and 27.5.
7. Find that none of the contested measures can be justified under paragraph Art. XX of the GATT.