



Team: [054]

ELSA MOOT COURT COMPETITION ON WTO LAW 2012-2013

Fixitania – Certain Measures affecting Financial Services and Influencing the Exchange-rate (Complainant: Libertania)

Libertania
(*Complainant*)

VS

Fixitania
(*Respondent*)

SUBMISSION OF THE COMPLAINANT

Albania • Armenia • Austria • Azerbaijan • Belgium • Bosnia and Herzegovina • Bulgaria • Croatia • Czech Republic • Denmark • Estonia • Finland • France • Germany • Georgia • Greece • Hungary • Iceland • Ireland • Italy • Kazakhstan • Latvia • Lithuania • Luxembourg • Malta • Montenegro • The Netherlands • Norway • Poland • Portugal • Republic of Macedonia • Romania • Russian Federation • Serbia • Slovak Republic • Slovenia • Spain • Sweden • Switzerland • Turkey • Ukraine • The United Kingdom

Table of Contents

| | |
|--|-----|
| Table of Contents | I |
| List of References | III |
| I. Treaties and Conventions | III |
| II. WTO Appellate Body Reports | III |
| III. WTO Panel Reports | IV |
| IV. WTO Reports and Documents | V |
| V. GATT Reports and Documents | V |
| VI. Secondary Sources, including Treatises, Articles, and Works of Publicists | V |
| List of Abbreviations | VII |
| Summary of Arguments | 1 |
| I. Fixitania’s REOFI breaches GATS Art. XVII and is not justified by para.2 of the Annex on Financial Services. | 1 |
| II. The fixed exchange-rate system is an export subsidy and is therefore per se prohibited by the SCM agreement. | 1 |
| III. Fixitania’s fixed exchange rate for the Fixi for Fixitanian exporters of national relevance (ENR) violates GATT Article XV:4. | 2 |
| Statement of Facts | 3 |
| Legal Pleadings | 4 |
| I. Fixitania’s REOFI breaches GATS Art. XVII and is not justified by para. 2 of the Annex on Financial Services. | 4 |
| 1. Fixitania’s REOFI violates the national treatment obligation in GATS Art. XVII. | 4 |
| a. The REOFI affects the supply of financial services. | 5 |
| b. The REOFI applies to like services provided by like foreign and domestic service suppliers. | 5 |
| c. Fixitania’s savings guarantee scheme accords treatment less favourable to foreign services than that accorded to domestic counterparts. | 6 |
| 2. The REOFI does not fall under para. 2 of the Annex on Financial Services. | 7 |
| 3. The REOFI is not excusable under the “public order” exception in GATS Art. XIV. | 8 |
| a. The FG’s program is not necessary to maintain public order. | 8 |
| b. Excluding foreign-owned banks from REOFI constitutes arbitrary and unjustifiable discrimination and amounts to a disguised restriction on trade. | 9 |
| II. The fixed exchange-rate system constitutes an export subsidy and is therefore per se prohibited by the SCM Agreement. | 10 |
| 1. Fixitania’s dual exchange-rate regime constitutes a subsidy under the SCM. | 10 |
| a. Fixitania’s dual exchange rate constitutes a financial contribution by the FG. | 10 |
| i. Fixitania’s exchange regime involves a direct transfer of funds from the FG to ENRs. | 10 |

| | |
|---|----|
| ii. Fixitania’s dual exchange regime also represents a service other than general infrastructure. | 10 |
| iii. GATT jurisprudence supports a broad interpretation of “financial contribution.” | 11 |
| iv. FSEGSJ’s financial contribution derives from a public body. | 11 |
| b. Fixitania’s fixed exchange regime for ENRs is a form of income or price support. | 12 |
| c. Fixitania’s dual exchange rate confers a benefit upon Fixitanian ENRs. | 12 |
| 2. Fixitania’s dual exchange-rate regime meets the specificity requirement as it amounts to an export subsidy both under the SCM Art. 3(1)(a) and GATT Art. VI. | 13 |
| a. Fixitania’s dual exchange-rate regime is a per se prohibited export subsidy under SCM Art. 3(1)(a). | 13 |
| b. Fixitania’s dual exchange-rate regime is an export subsidy under GATT Art. VI. | 14 |
| III. Fixitania’s fixed exchange rate for ENRs violates GATT Art. XV:4. | 15 |
| 1. Fixitania’s fixed exchange rate for ENRs is both an exchange action and a trade action that frustrates the intent of the provisions of the GATT and the IMF, respectively. | 15 |
| a. Fixitania’s fixed exchange-rate regime for ENRs is an exchange action that frustrates the intent of the provisions of the GATT. | 15 |
| b. Fixitania’s fixed ENR exchange-rate regime constitutes a trade action that frustrates the intent of the provisions of the IMF. | 16 |
| 2. Libertania cannot invoke an Article XV:9 exception. | 17 |
| 3. GATT Art. XV:4 takes precedence over GATT Art. XV:9. | 17 |
| 4. The WTO is not required to consult the IMF before finding a Fixitania violation of GATT Article XV. | 18 |
| 5. In case of IMF consultation, the panel has full discretion to interpret the IMF’s findings, reducing the later to the equivalence of an export opinion. | 19 |
| Request for Findings | 20 |

*List of References***I. TREATIES AND CONVENTIONS**

1. Treaties and Conventions Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (Cited as “SCM”).
2. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, T.I.A.S. No. 2322, 2 U.N.T.S. 185.
3. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (Cited as “GATT”).
4. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (Cited as “GATS”).
5. Understanding on Commitments in Financial Services, Uruguay Round Final Act, GATT Trade Negotiations Committee Document MTN/FA II-AIB, General Agreement on Trade in Services, Apr. 15, 1994.

II. WTO APPELLATE BODY REPORTS

1. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (September 9, 1997) (Cited as “ABR, EC—Bananas III”).
2. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (August 2, 1999) (Cited as “ABR, Canada—Aircraft”).
3. Appellate Body Report, *India—Quantitative Restrictions On Imports of Agricultural, Textile And Industrial Products*, WT/DS90/AB/R23 (August 23, 1999), (Cited as “ABR, India—QRs”).
4. Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (October 13, 1999) (Cited as “ABR, Canada—Milk”).
5. Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R (February 24, 2000), (Cited as “ABR, U.S.—FSC”).
6. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen*

Beef, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000) (Cited as “ABR, Korea—Beef”).

7. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005) (Cited as “ABR, U.S.—Gambling”).
8. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (September 12, 2005) (Cited as “ABR, EC—Chicken”).

III. WTO PANEL REPORTS

1. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997) (Cited as “PR, EC—Bananas III (U.S.)”).
2. Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (February 11, 2000) (Cited as “PR, Canada—Autos”).
3. Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (September 27, 2002) (Cited as “PR, U.S.—Softwood Lumber III”).
4. Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (November 26, 2004) (Cited as “PR, DR—Cigarettes”).
5. Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels*, WT/DS273/R (March 7, 2005) (Cited as “PR, Korea—Commercial Vessels”).
6. Panel Report, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R (June 17, 2005) (Cited as “PR, EC—DRAMS”).
7. Panel Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R (July 13, 2007) (Cited as “PR, Japan—DRAMS”).
8. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (August 12, 2009) (Cited as “PR, China—Publications and Audiovisual Products”).
9. Panel Report, *European Communities and Certain Member States—Measures Affecting*

Trade in Large Civil Aircraft, WT/DS316/R (June 30, 2010) (Cited as “PR, EC—Aircraft”).

10. Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012) (Cited as “PR, China—Electronic Payment Services”).

IV. WTO REPORTS AND DOCUMENTS

1. World Trade Organization, Second Report on Anti-Dumping and Countervailing Duties, L/1141, (May 27, 1960), BISD 9S/194 (Cited as “WTO Anti-Dumping Report (1960)”).

V. GATT REPORTS AND DOCUMENTS

1. Special Import Taxes Instituted by Greece, G/25, (Nov. 3, 1952), BISD 48 (Cited as “Greece Special Import Taxes (1952)”).

VI. SECONDARY SOURCES, INCLUDING TREATISES, ARTICLES, AND WORKS OF PUBLICISTS

1. Deniz Anginer, Asli Demirguc-Kunt, & Min Zhu, *How Does Deposit Insurance Affect Bank Risk? Evidence from the Recent Crisis*, (Oct. 29, 2012), available at <http://ssrn.com/abstract=2168168> (Cited as “Anginer et al. (2012)”).
2. BLACK’S LAW DICTIONARY (6th ed. 1990) (Cited as “Black’s Law Dictionary (1990)”).
3. Alan Bollard, *Being a Responsible Host: Supervising Foreign-owned Banks*, in SYSTEMIC FINANCIAL CRISES: RESOLVING LARGE BANK INSOLVENCIES (Douglas Evanoff & George Kaufman, eds.) (2005) (Cited as “Bollard (2005)”).
4. Francesca Carapella & Giorgio Di Giorgio, *Deposit Insurance, Institutions, and Bank Interest Rates*, 11 TRANSITION STUD. REV. 77 (2004) (Cited as “Carapella & Di Giorgio (2004)”).
5. Benjamin Blase Caryl, *Is China’s Currency Regime A Countervailable Subsidy? A Legal Analysis Under the World Trade Organization’s SCM Agreement*, 45 J. WORLD TRADE 187 (2011) (Cited as “Caryl (2011)”).
6. Douglas W. Diamond & Philip H. Dybvig, *Banking Theory, Deposit Insurance, and Bank Regulation*, 59 J. Bus. 55 (1986) (Cited as “Diamond & Dybvig (1986)”).
7. FIN. STABILITY BD., THEMATIC REVIEW ON DEPOSIT INSURANCE SCHEMES (February 8, 2012) (Cited as “Financial Stability Board (2012)”).
8. Gregory Hudson, Pedro Bento de Faria & Tobias Peyerl, *The Legality of Exchange Rate*

- Undervaluation Under WTO Law* (2011), available at http://graduateinstitute.ch/webdav/site/ctei/shared/CTEI/working_papers/CTEI-2011-07.pdf (Cited as “Hudson et al. (2011)”).
9. JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) (Cited as “Jackson (1969)”).
 10. Catharina E. Koops, *Manipulating the WTO? The Possibilities for Challenging Undervalued Currencies Under WTO Rules* (Amsterdam Ctr. for Int’l Law 2010 Working Paper Series), available at <http://ssrn.com/abstract=1564093> (Cited as “Koops (2010)”).
 11. Aaditya Mattoo & Arvind Subramanian, *Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization* (Peterson Inst. for Int’l Econ. Working Paper Series, Paper No. 08-2, 2008) (Cited as “Mattoo & Subramanian (2008)”).
 12. Jorge Miranda, *Currency Undervaluation as a Violation of GATT Article XV:4*, in *THE US-SINO CURRENCY DISPUTE: NEW INSIGHTS FROM ECONOMICS, POLITICS AND LAW* (S. Evenett, ed.) (2010) (Cited as “Miranda (2010)”).
 13. Andrew Mitchell & Elizabeth Sheargold, *GATT Art. XV: Exchange Arrangements* (Georgetown Law Sch. Faculty Pub. Bus., Econ. & Regulatory Law Research, Paper No. 1507253, 2009) (Cited as “Mitchell & Sheargold (2009)”).
 14. Oxford English Dictionary, Oxford University Press, available at <http://oxforddictionaries.com> (2013) (Cited as “Oxford English Dictionary (2013)”).
 15. Dani Rodrik, *The Real Exchange Rate and Economic Growth*, 11 *PAK. ECON. & SOCIAL REV.* 3 (2008) (Cited as “Rodrik (2008)”).
 16. Sebastian Schich, *Financial Turbulence: Some Lessons Regarding Deposit Insurance*, *OECD FIN. MARKET TRENDS* (2008) (Cited as “Schich (2008)”).
 17. Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96 *AM. J. INT’L L.* 561 (2002) (Cited as “Siegel (2002)”).
 18. James B. Thomson, *The Use of Market Information in Pricing Deposit Insurance*, 19 *J. MONEY, CREDIT AND BANKING* 528 (1987) (Cited as “Thomson (1987)”).

List of Abbreviations

| | |
|--------------|--|
| AB | Appellate Body |
| Art./Arts. | Article/Articles |
| DSU | Dispute Settlement Understanding |
| <i>e.g.</i> | <i>exempli gratia</i> , for example |
| EC | European Communities |
| ENR | Exporter of National Relevance |
| FCB | Fixitanian Central Bank |
| FG | Fixitanian Government |
| FSEGSJ | Fixitanian Stability, Economic Growth and Social Justice Act |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade 1994 |
| <i>Id.</i> | The same |
| IMF | International Monetary Fund |
| No. | Number |
| p./pp. | page/pages |
| para./paras. | paragraph/paragraphs |
| REOFI | Regulatory Emergency Ordinance for Financial Institutions |
| SCM | Agreement on Subsidies and Countervailing Measures |
| SDR | Special Drawing Right |
| Sec. | Section/Sections |
| U.S. | United States |
| VCLT | Vienna Convention on the Law of Treaties |
| Vol. | Volume |

WTO

World Trade Organization

*Summary of Arguments***I. FIXITANIA’S REOFI BREACHES GATS ART. XVII AND IS NOT JUSTIFIED BY PARA.2 OF THE ANNEX ON FINANCIAL SERVICES.**

- Fixitania’s REOFI provides savings guarantees only to those banks registered in Fixitania with a majority of domestic shareholders, and thus runs afoul of the national treatment obligation in Art. XVII of the GATS.
- The REOFI does not pass muster under the three-part analysis for national treatment violations: the REOFI affects the supply of financial services, it applies to like services provided by like foreign and domestic service suppliers, and it accords foreign service suppliers less favourable treatment than their domestic counterparts.
- The REOFI operates to enable Fixitania to avoid its national treatment obligation under the GATS, and therefore does not qualify as a prudential exception under para. 2 of the Annex on Financial Services.
- The REOFI does not qualify under the “public order” exception in GATS Art. XIV, since Fixitania’s program is not necessary to maintain public order and excluding foreign owned-banks from the REOFI constitutes arbitrary and unjustifiable discrimination.

II. THE FIXED EXCHANGE-RATE SYSTEM IS AN EXPORT SUBSIDY AND IS THEREFORE PER SE PROHIBITED UNDER THE SCM AGREEMENT.

- Fixitania’s fixed exchange-rate system meets all the criteria of an export subsidy, and therefore contravenes SCM Art.3.
- The fixed exchange-rate system is a financial contribution by the Fixitanian government, since it is a direct transfer of funds, and also represents a government service other than general infrastructure.
- FSEGSJ’s financial contribution derives from a public body.
- The dual exchange-rate regime is a form of income or price support, as it buoys the income of Fixitanian exporters and guarantees their ability to sell their products at a consistently low price.
- The fixed exchange-rate system confers a benefit on Fixitanian exporters, which enjoy lower costs of production and can price their cars at lower rate than Libertanian exporters.
- Fixitania’s dual exchange-rate regime constitutes a prohibited export subsidy under SCM Art. 3, since only exporters are eligible to use the favourable exchange rate.

- Fixitania's dual export regime is an export subsidy under GATT Art. VI as it constitutes a multiple currency practice.

III. **FIXITANIA'S FIXED EXCHANGE RATE FOR ENR'S VIOLATES GATT ARTICLE XV:4.**

- Fixitania's fixed exchange-rate regime constitutes a trade action that frustrates the intent of the provisions of the GATT as well as an exchange action that frustrates the intent of the Articles of Agreement of the IMF.
- The policy of pegging the Fixi to Libertania's currency amounts to an exchange-rate policy that fits squarely within the definition of "exchange action."
- The exchange action frustrates the intent of the provisions of the GATT, which include significantly reducing export subsidies.
- Fixitania's regime also constitutes a trade action, since it functions as a restrictive measure on trade.
- The fixed exchange rate system does not meet the exception under GATT Art. XV:9; and even if it does, GATT Art. XV:4 takes precedence.
- The WTO is not required to consult the IMF in determining whether GATT Art. XV has been violated. Moreover, should it choose to consult the IMF, the WTO may interpret the IMF's findings on a discretionary basis.

Statement of Facts

1. Libertania is Fixitania's largest trading partner. Until 2007, Fixitania was an open, trade-oriented economy: it allowed free movement of capital and payments with other countries and had in place a free-floating exchange rate for the Fixitanian currency (the "Fixi"), subject to restrictions in only the most exigent circumstances.
2. Following the 2007 global economic crisis, however, the Fixitanian Government ("FG") enacted a series of restrictive financial and economic measures. In 2007, the FG passed the Regulatory Emergency Ordinance for Financial Institutions (the "REOFI"). The REOFI provides guarantees for savings deposits in banks in Fixitania, but applies only to banks with a majority of *domestic* shareholders. Banks with even a slight majority of foreign shareholders did not receive the guarantees, and consequently those banks—including all Libertarian banks—lost significant business. The sole criterion for the REOFI's guarantees was the origin of a bank's shareholders.
3. Likewise, in 2008, the FG enacted the Fixitanian Stability, Economic Growth and Social Justice Act (the "FSEGSJ"). The legislation was enacted by a new government, which declared that "the forces of global financial capitalism must never again endanger the Fixitanian people and prosperity." Among other things, the FSEGSJ introduced a dual exchange-rate system, with a fixed exchange rate for export transactions of Fixitanian exporters that register as "Exporters of National Relevance" (ENRs). ENRs enjoy the ability to exchange their foreign reserve income through the Fixitanian Central Bank (the "FCB") at a fixed rate against the currency of Libertania, the Libertado. All other transactions are subject to the free-floating exchange rate. By the end of 2011, the Fixi traded at 25% higher than the fixed exchange rate enjoyed by ENRs.
4. Concurrently, Libertarian hybrid car manufacturers have been undercut by Fixitanian manufacturers; the latter's cars are priced 20% below Libertarian-made cars. According to Libertarian economists, the fixed rate for the Fixi-Libertado is 15% undervalued. They estimate that in free-market conditions, the Fixi would trade at a higher rate against the Libertado.
5. The FG's measures continue to apply, but Fixitania itself has enjoyed a strong economic recovery. In 2011, Fixitania had trade surpluses of 100 and 200 billion Special Drawing Rights ("SDRs") against Libertania and the rest of the world, respectively. In 2012, the IMF found that the Fixi under the fixed rate was "significantly undervalued" and recommended that Fixitania move to a flexible and uniform exchange rate, given its strong economic recovery.

Identification of WTO Measures at Issue

Measure 1: Fixitania’s provision of savings guarantees solely to banks with a majority of domestic shareholders.

Measure 2: Fixitania’s dual exchange-rate regime, including an undervalued fixed exchange rate for ENRs.

Legal Pleadings

I. FIXITANIA’S REOFI BREACHES GATS ART. XVII AND IS NOT JUSTIFIED BY PARA. 2 OF THE ANNEX ON FINANCIAL SERVICES.

1. Fixitania’s REOFI violates the national treatment obligation in GATS Art. XVII.

1. GATS Art. XVII:1 states that “each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”¹ Fixitania’s provision of savings guarantees to banks registered in Fixitania with a majority of domestic shareholders, and its exclusion of banks with majority foreign shareholders from this program, constitute a violation of its GATS Art. XVII national treatment obligation.

2. Fixitania’s has undertaken specific commitments under GATS for financial services in accordance with the “Understanding on Commitments in Financial Services,” and its schedule lists no limitations on its national treatment obligation in this sector. The Understanding clarifies that members “shall grant to financial service suppliers of any other Member established in its territory access to . . . official funding and refinancing facilities.”² The Understanding also states that “it does not conflict with the provisions of [GATS]”³ and thus does not remove a member’s national treatment commitments under GATS Art. XVII.

3. WTO panels and the AB have applied a three-part analysis in evaluating a potential national treatment violation.⁴ The analysis asks, firstly, whether the government measure affects the supply of services; secondly, whether the measure applies to foreign and domestic like services and service suppliers; and thirdly, whether foreign service suppliers are accorded less favourable

¹ GATS, Art. XVII:1.

² Understanding on Commitments in Financial Services, para. C(1).

³ *Id.* at Preamble, (i).

⁴ PR, *EC—Bananas III (U.S.)* [7.314], upheld by ABR, *EC—Bananas III* [244]; *see also* PR, *China—Publications and Audiovisual Products* [7.1272, 7.942, 7.956]; PR, *China—Electronic Payment Services* [7.641].

treatment than their domestic counterparts.⁵ If all three elements of this test are met, the Respondent has violated GATS Art. XVII. The REOFI meets each of these criteria.

a. The REOFI affects the supply of financial services.

4. The REOFI affects the supply of financial services. The AB in *EC-Bananas III* noted that “[t]he ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application.”⁶ This construction is consistent with the intent of the GATS drafters, who sought to ensure that the GATS would have a broad reach.⁷

5. *China—Electronic Payment Services* is apposite here. The case concerned issuer requirements that benefited a domestic payment card company by requiring all bank cards to bear its logo. The panel reasoned that because these measures affected the terms on which the domestic provider supplied its services, they had a consequential effect on the terms on which potential foreign competitors supplied their services.⁸ Likewise, the REOFI has an effect on the terms on which domestic banks in Fixitania supply financial services. By reassuring depositors of the security of their deposits, savings guarantees provided by the REOFI enhance public confidence in insured banks, thereby reducing the deposit rates and borrowing costs of these banks.⁹ In line with the *China—Electronic Payment Services* panel’s logic, the fact that the REOFI benefits domestic banks means that it has a consequential effect on the terms on which competing foreign banks supply services.

b. The REOFI applies to like services provided by like foreign and domestic service suppliers.

6. The REOFI applies to like financial services provided by like foreign and domestic banks. The panel in *China—Electronic Payment Services* suggested a marketplace test in evaluating likeness.¹⁰ The panel noted that a “likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared.”¹¹ As a consequence of the REOFI, customers transferred their holdings from non-guaranteed foreign

⁵ PR, *EC—Bananas III (U.S.)* [7.314].

⁶ ABR, *EC—Bananas III* [220].

⁷ *Id.*

⁸ PR, *China—Electronic Payment Services* [7.686].

⁹ Carapella & Di Giorgio (2004), p. 85.

¹⁰ PR, *China—Electronic Payment Services* [7.700]; see also PR, *EC—Bananas III (U.S.)* [7.322].

¹¹ PR, *China—Electronic Payment Services* [7.702].

subsidiaries to guaranteed domestic banks.¹² This satisfies the marketplace test: it indicates that domestic and foreign banks in Fixitania are direct competitors that furnish identical banking services to clients.

7. That REOFI is facially discriminatory further simplifies the likeness analysis. The panel in *China—Publications and Audiovisual Products* explained that “[w]hen 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.”¹³ Because a bank’s eligibility for the REOFI savings guarantee measure is explicitly contingent *only* on majority domestic ownership, the likeness requirement is satisfied.

c. Fixitania’s savings guarantee scheme accords treatment less favourable to foreign services than that accorded to domestic counterparts.

8. By rendering majority foreign-owned banks ineligible for participation in the government-backed savings guarantee program, the REOFI accords foreign banks less favourable treatment than domestic counterparts. GATS Art. XVII:3 states that “formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.” The AB has clarified that the “aims and effects” of a measure are not “relevant in determining whether or not that system modifies the conditions of competition between service suppliers” of domestic and foreign origin.¹⁴

9. The perceived security of a bank’s assets is one of the main competitive factors in the banking sector. A government program that assumes liability for domestic bank savings boosts market confidence in these banks, which in turn lowers their borrowing costs. This increases the interest rate spread between borrowing and lending, boosting a bank’s profitability.¹⁵ Furthermore, domestic banks can offer depositors and financial services customers the added protection of public insurance. Foreign competitors cannot offer the same level of security, which explains their loss of business and customers following the passage of the REOFI. Moreover, domestic banks potentially gain a competitive advantage to enter higher-risk segments of the financial

¹² Clarification [26].

¹³ PR, *China—Publications and Audiovisual Products* [7.975].

¹⁴ ABR, *EC—Bananas III* [243].

¹⁵ Carapella & Di Giorgio (2004), p. 85.

services market as a result of the security provided by a government deposit guarantee,¹⁶ while non-guaranteed foreign banks might not have an equal opportunity to enter these market segments. REOFI therefore modifies the conditions of competition in favour of domestic banks and affords less favourable treatment to foreign banks.

2. The REOFI does not fall under para. 2 of the Annex on Financial Services.

10. Para. 2 of the Annex on Financial Services stipulates that “a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.”¹⁷ However, the Annex qualifies this prudential exception with an anti-circumvention clause: “Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.”¹⁸

11. The language “for prudential reasons” evinces a direct connection between a measure and its objective. The REOFI’s exemption of foreign banks is contrary to its prudential objective. By bifurcating the country’s banking system into guaranteed and non-guaranteed banks, the FG has eroded consumer and market confidence in REOFI-ineligible financial firms, as demonstrated by the transfer of deposits away from foreign-owned subsidiaries to domestic banks. Aggravating the vulnerability of the foreign-owned segment of the banking system could have a broader destabilizing impact.

12. The notion that responsibility for foreign subsidiaries is more effectively allocated to other members is unsound. Foreign-owned subsidiaries are separate entities from their overseas parent bank. They are bound by the licensing requirements established by the FG, including minimum capital reserves and qualified management,¹⁹ and they are subject to the oversight of Fixitanian regulators, who have access to their financial records. The FG, as opposed to the regulatory authorities of other members, is in the best position to administer deposit insurance for licensed banks within its territory. Although deposit insurance systems vary from country to country, the extension of deposit guarantees to licensed subsidiaries is standard practice internationally.²⁰

¹⁶ See Schich (2008), p. 59; Diamond & Dybvig (1986), p. 61.

¹⁷ Annex on Financial Services, para. 2.

¹⁸ *Id.*

¹⁹ Clarification [122].

²⁰ See Financial Stability Board (2012), p. 18.

Furthermore, the risk of overseas holding banks transferring assets to Fixitanian subsidiaries in anticipation of insolvency is remote and easily remedied. Since foreign subsidiaries are within the regulatory ambit of the FG, the FG can restrict and actively monitor the transfer of assets between Fixitanian subsidiaries and their parent institutions.²¹ By deferring responsibility over Fixitanian licensed foreign-owned banks to other member states, the FG is avoiding its national treatment obligation under GATS.

13. Even assuming *arguendo* that the REOFI was initially consistent with the GATS, its continuing application is not. Fixitania's economy has recovered and the stability of the domestic financial system is no longer at risk,²² and it cannot claim that the REOFI is fulfilling its ascribed prudential purpose. The REOFI thus amounts to an avoidance of trade obligations.

3. The REOFI is not excusable under the “public order” exception in GATS Art. XIV.

a. The FG's program is not necessary to maintain public order.

14. GATS Art. XIV(a) permits otherwise illegal measures when they are “necessary to protect public morals or to maintain public order.”²³ The AB has stated that a determination of necessity requires a “weighing and balancing” of several factors.²⁴ These factors include the “‘relative importance’ of the interests or values furthered by the challenged measure,” the “contribution of the measure to the realization of the ends pursued by it,” and “the restrictive impact of the measure on international commerce.”²⁵ A panel should therefore compare the measure to possible less restrictive alternatives that are reasonably available and achieve the pursued objective.²⁶ The AB also clarified that the party invoking the exception bears the initial burden of proof to establish compliance.²⁷

15. The REOFI does not significantly contribute to the maintenance of public order; indeed, it is partially detrimental to the stability of the financial system. Segregating foreign-owned banks from a national deposit insurance system undermines consumer confidence in these institutions, potentially enhancing the risk of banking panics.¹⁶ Less trade-restrictive alternatives were reasonably available. First, REOFI eligibility could have been based on territoriality. This would

²¹ See Bollard (2005).

²² Record [7].

²³ GATS, Art. XVII.

²⁴ ABR, *U.S.—Gambling* [307].

²⁵ *Id.* at [306–10].

²⁶ *Id.* at [309].

²⁷ *Id.*

not have been prohibitively costly; insuring foreign-owned banks would lower their borrowing costs and reduce the risk of insolvency and financial contagion,²⁸ thereby diminishing the likelihood that the FG would need to fund its guarantee. Additionally, if cost was an issue, the FG could have reduced the costs of insurance by requiring banks to pay premiums.²⁹ Second, rather than exempting banks on grounds of national origin, the FG could have adopted objective non-discriminatory criteria for participation in the program. For example, such criteria could have considered the financial health of the bank, its importance within the financial system, or its exposure to short-term borrowing. Either of these alternative measures would have been consistent with trade commitments and achieved the same desired result. Excluding foreign-owned banks from the REOFI constitutes arbitrary and unjustifiable discrimination and amounts to a disguised restriction on trade.

b. Excluding foreign-owned banks from REOFI constitutes arbitrary and unjustifiable discrimination and amounts to a disguised restriction on trade.

16. The chapeau in GATS Art. XIV prohibits measures from being “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”³⁰ The exclusion of foreign-owned subsidiaries from the REOFI amounts to unjustifiable discrimination. There is no evidence that domestic banks are disproportionately important to the Fixitanian economy *per se*. Fixitania’s domestic and foreign banks do not vary significantly in size.³¹ The collapse of a large foreign-owned bank could have a greater impact on Fixitania’s financial stability than the failure of a small domestic bank. Nor do regulatory asymmetries justify discriminatory treatment. Both foreign and domestic banks are bound by the same FG licensing requirements, which impose managerial and financial standards.³² Since both domestic and foreign banks are subject to the FG’s regulatory oversight, the FG has an equivalent degree of access to the financial information of domestic banks and foreign subsidiaries with which to evaluate the default risk of each institution. Extending savings guarantees to domestic banks but not foreign-owned banks is

²⁸ Anginer et al. (2012).

²⁹ See Thomson (1987).

³⁰ GATS, Art. XIV.

³¹ Clarification [180].

³² Id. at [122].

unjustifiable. The REOFI constitutes a disguised restriction on trade, as exemplified by the continuation of the measure after the threat to financial stability and public order receded.³³

II. THE FIXED EXCHANGE-RATE SYSTEM CONSTITUTES AN EXPORT SUBSIDY AND IS THEREFORE PER SE PROHIBITED BY THE SCM AGREEMENT.

1. Fixitania's dual exchange-rate regime constitutes a subsidy under the SCM Agreement.

17. The SCM Agreement states that a subsidy exists where there is (a) “a financial contribution by a government or any public body” or any form of income or price support according to GATT Art. XVI that (b) confers a benefit on (c) a specific recipient.³⁴ Fixitania's dual exchange rate regime meets all three criteria.

a. Fixitania's dual exchange rate constitutes a financial contribution by the FG.

18. SCM Art. 1.1 states that a government can contribute financially to a business in four different ways: (a) a “direct transfer of funds”; (b) “government revenue . . . foregone or not collected;” or (c) government provision of a good or service, other than general infrastructure, and (d) the government has entrusted a private body to perform one of the three functions mentioned above.³⁵ Fixitania's dual exchange regime amounts to a financial contribution, since it both involves a direct transfer of funds by the FG and is a government provision or service other than general infrastructure.

i. Fixitania's exchange regime involves a direct transfer of funds from the FG to ENRs.

19. By requiring registered ENRs to exchange their foreign reserve income for the Fixi at a fixed exchange rate, the FG directly transfers funds to Fixitanian ENRs. Since the Fixed exchange rate for ENRs is 25% undervalued when compared to the FCM, ENRs are receiving more Fixi in exchange for Libertado than they would have if they had exchanged their foreign currency reserves on the free market. Since ENR's exchange foreign currency with the FCB at a rate determined by the FG, the extra amount of Fixi ENRs receive constitutes a transfer of funds from the government to ENRs.

ii. Fixitania's dual exchange regime also represents a service other than general infrastructure.

20. Fixitania's fixed exchange-rate regime provides Fixitanian exporters with a “service.” Not only does the regime convert Libertado into Fixi, it also decreases the costs for ENRs, since they

³³ Record [7].

³⁴ SCM, Art. 1.1.

³⁵ *Id.*; Caryl (2011), p. 194.

no longer need to hedge against exchange-rate fluctuations between the Fixi and the Libertado.³⁶ This service is not part of the “general infrastructure.” The panel in *EC-Aircraft* considered the limits of this concept: it found that “general infrastructure” could not possibly include all infrastructure fulfilling a public policy objective, as this would render the word “general” redundant.³⁷ Instead, the panel chose to interpret the concept by looking at its ordinary meaning pursuant to VCLT Art. 30.1, concluding that “the term ‘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.”³⁸ In this case, the fixed exchange-rate system is only available to ENRs, which is clearly a limited group of entities since firms that do not export cannot take advantage of the service. Accordingly, the fixed exchange-rate system is not part of the “general infrastructure” of Fixitania.

iii. GATT jurisprudence supports a broad interpretation of “financial contribution.”

21. Previous GATT panels have interpreted “financial contribution” very broadly. Measures that have been found to amount to a financial contribution include: interest reductions and deferrals, debt forgiveness, the purchase of corporate bonds, export insurance guarantees, and a government stumpage program (in which harvesting companies were permitted to cut trees), have all been found to be financial contributions.³⁹ Given this broad interpretation in GATT jurisprudence, Fixitania’s fixed exchange-rate system is plainly a financial contribution.

iv. FSEGSJ’s financial contribution derives from a public body.

22. The AB in *US—AD/CVD* noted that an “express delegation of authority in a legal instrument” as well as “evidence that a government exercises meaningful control over an entity and its conduct” are significant factors in determining whether an entity is a public body under Art. 1.1(a)(1) of the SCM.⁴⁰ The FCB has express statutory authority, is owned by the FG, and is under the direct authority of the Fixitanian Minister of Finance. In addition, the FG is responsible for determining the applicable exchange rate for ENRs. Thus, the FG is directly engaged in bestowing a financial contribution on ENRs.

³⁶ Hudson et al. (2011), p. 47.

³⁷ PR, *EC—Aircraft* [7.1015, 7.1044].

³⁸ *Id.* at [7.1036].

³⁹ PR, *U.S.—Softwood Lumber III*, [7.30]; PR, *Korea—Commercial Vessels* [7.31]; PR, *Japan—DRAMs* (as modified by ABR, [7.446]); PR, *EC—DRAMs* [7.87, 7.92].

⁴⁰ ABR, *US—Anti-Dumping and Countervailing Duties* [318].

b. Fixitania's fixed exchange regime for ENRs is a form of income or price support.

23. Under SCM Art. 1.1(a)(2), Fixitania's dual exchange regime is a "form of income or price support within the meaning of [GATT] Art. XVI." GATT Art. XVI refers to "income or price support" as a "subsidy . . . which operates directly, or indirectly to increase exports of any product from, or to reduce any product into [a Member's] territory."⁴¹ While no panel or AB has interpreted "income or price support" in the context of GATT Art. XVI, it has been interpreted in disputes concerning the Agreement on Agriculture. Income or price support, according to those cases, exists when a government commits to buying domestic agricultural products at a higher fixed price, irrespective of global market prices.⁴² Higher domestic fixed prices for the purchase of agricultural products is analogous to Fixitania's fixed exchange-rate regime for ENRs. By employing a fixed exchange rate that undervalues the Fixi, the FG commits to buying the foreign reserve income of ENRs at an artificially high price, regardless of the market price of the Fixi. Thus, Fixitania's dual exchange regime represents a form of income or price support.

c. Fixitania's dual exchange rate confers a benefit upon Fixitanian ENRs.

24. For a subsidy to exist, SCM Art. 1.1(b) requires that a benefit be conferred as a result of the financial contribution by the government or the income or price support.⁴³ In *Canada—Aircraft*, the AB explained that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage" and that one needs to determine whether the recipient is "better off" than it would have been absent the contribution.⁴⁴ In addition, the AB adopted a marketplace test, noting that "the only logical basis for determining the position [of] the recipient . . . absent the financial contribution is [by looking at] the market."⁴⁵

25. Fixitanian ENRs accrue a monetary benefit by utilizing the fixed exchange rate. The Fixi is traded freely according to supply and demand on the FCM. At the end of 2011, the FG's fixed exchange rate undervalued the Fixi by 25% relative to its FCM valuation. The IMF found that the ENR exchange rate for the Fixi was "significantly undervalued." Thus, ENRs are able to exchange their foreign reserve income at a rate considerably more favourable than the market rate. There are various avenues for arbitrage ENRs can pursue to realize profits from the

⁴¹ Caryl (2011), p. 198.

⁴² See, e.g., ABR, *EC—Chicken*; ABR, *Canada—Milk*; ABR, *Korea—Beef*; see also Caryl (2011), p. 199.

⁴³ SCM Art. 1.1(b).

⁴⁴ ABR, *Canada—Aircraft* [157]; PR, *EC—Aircraft* [7.382].

⁴⁵ ABR, *Canada—Aircraft* [157].

exchange rate disparity. For example, converted foreign reserve income could potentially be invested in property, which could then be sold for foreign currency.

26. Additionally, ENRs gain a competitive advantage from an undervalued exchange rate. Because an exporter's inputs such as labour wages are generally priced in the domestic currency, a favourable exchange rate would reduce its cost of production relative to the retail price of exports in foreign markets.⁴⁶ As a result, exporters have the ability to reduce their overseas sales price, granting them a competitive advantage vis-à-vis foreign competitors and enabling them to expand their market share, as exemplified by Fixitanian hybrid car exporters. After the adoption of a dual exchange system, Fixitanian hybrid car exporters steadily gained international market share, retailing cars at 20% below the price of comparable hybrid autos produced by Libertanian firms.

27. By operating a fixed exchange system pegged to the Libertado, the FG is effectively providing ENRs a hedge against currency fluctuations, particularly with regard to Fixitania's largest trading partner Libertania. Otherwise, ENRs might opt to contract with private financial brokers at a premium to reduce foreign currency risk. Since the FG is exchanging the Fixi below its free market value, it is evident that the FG is not charging a market-competitive price for its service, but rather is incurring a financial loss. Under SCM Art. 1.1(b), then, the fixed exchange-rate system confers monetary, competitive, and service benefits to ENRs.

2. Fixitania's dual exchange-rate regime meets the specificity requirement as it amounts to an export subsidy both under the SCM Art. 3(1)(a) and GATT Art. VI.

a. Fixitania's dual exchange-rate regime is a per se prohibited export subsidy under SCM Art. 3(1)(a).

28. Under SCM Art. 3, a subsidy is automatically deemed specific under SCM Art. 2.3 and per se prohibited under SCM Art. 3 if the subsidy is "contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance."⁴⁷ In *Canada-Autos*, the panel stated that "a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure."⁴⁸ In *US—FSC*, the AB upheld the

⁴⁶ Rodrik (2008).

⁴⁷ SCM, Arts. 2.3, 3.

⁴⁸ ABR, *Canada—Autos* [100].

panel's findings that the U.S. Extraterritorial Income Act constituted an export subsidy because taxpayers were required to export their products in order to receive the subsidy.⁴⁹ Thus, to find an export subsidy under SCM Art. 3, the panel must determine whether export is a necessary precondition to be eligible for the favourable exchange rate in Fixitania.⁵⁰

29. Only Fixitanian exporters can be granted the status of an ENR by the FCB, and only ENRs are allowed to exchange their foreign reserve income using the fixed exchange rate. The only condition to be eligible for ENR status is that the company engages in export. Thus, access to the subsidy is entirely contingent upon a producer's status as an exporter. Moreover, since the fixed exchange-rate system is used only to convert foreign reserve income, access to the subsidy is also contingent upon the action of exporting. Given the structural requirement that access be granted only after exportation has occurred, as well as the use of the term "ENR" to define the scope of applicability, the subsidy is contingent in law upon export performance. Therefore, the fixed exchange-rate system is per se prohibited under the SCM Agreement.

30. The SCM Agreement's Illustrative List of Export Subsidies in Annex I, which describes export subsidies prohibited by the WTO, further necessitates this conclusion. The list explicitly includes "currency retention schemes and any similar practices which include a bonus on exports" and the government provision of exchange rate risk programs⁵¹—which certainly captures Fixitania's dual exchange-rate regime.

b. Fixitania's dual exchange-rate regime is an export subsidy under GATT Art. VI.

31. Art. VI of the GATT provides additional supports for the conclusion that Fixitania's dual exchange regime amounts to an export subsidy. The *Ad Note* to Art. VI (2) and (3) of the GATT reflects a concern with regard to with currency and exchange measures, providing that "multiple currency practices can. . . constitute a subsidy to exports."⁵² It further defines multiple currency practices as "practices [carried out] by governments or sanctioned by governments."⁵³ While maintaining multiple currencies is not in itself sufficient to constitute an export subsidy, the references to anti-dumping claims and countervailing duties as potential responses to export

⁴⁹ ABR, *U.S.—FSC* [116–120].

⁵⁰ Caryl (2011), p. 209.

⁵¹ SCM, Annex 1.

⁵² *Ad Note* to GATT Art. VI, paras. 2, 3.

⁵³ *Id.*

subsidies suggests that an export subsidy is a multiple currency practice that is used to assist an exporting member in undermining the import tariffs of another Contracting Party.

32. Fixitania is engaged in the type of manipulative currency practice referred to in the *Ad Note* to GATT Art. VI (2). The dual exchange-rate regime grants Fixitanian exporters a disproportionate advantage in other members' markets, and therefore it is exactly the type of multiple currency practice that the contracting parties sought to identify in the *Ad Note*.

III. FIXITANIA'S FIXED EXCHANGE RATE FOR ENRS VIOLATES GATT ART. XV:4.

1. Fixitania's fixed exchange rate for ENRs is both an exchange action and a trade action that frustrates the intent of the provisions of the GATT and the IMF, respectively.

33. GATT Art. XV:4 requires contracting parties to refrain from “exchange action [that] frustrate[s] the intent of the provisions of [the GATT] and trade action [that frustrates] the intent of the provisions of the Articles of Agreement of the International Monetary Fund.”⁵⁴ Fixitania's fixed exchange-rate regime constitutes a violation of both elements of Art. XV:4.

a. Fixitania's fixed exchange-rate regime for ENRs is an exchange action that frustrates the intent of the provisions of the GATT.

34. Under its ordinary meaning pursuant to VCLT Art. 31, “exchange action” refers to “acts relating to the exchange rate,” which is equivalent to “exchange rate-based measures”.⁵⁵ GATT Arts. XV:3 and VIII support this umbrella definition, using the narrower terms “multiple rates of exchange” and “foreign exchange arrangements” respectively. The context of “exchange action” thus indicates that if the drafters had not intended for Art. XV to cover exchange-rate measures, they would have used narrower language.⁵⁶ This is also in line with the object and purpose of Art. XV:4 as undervalued exchange rates have similar effects on trade as other exchange actions like multiple exchange rates, which indisputably are covered by Art. XV.⁵⁷ It would thus be illogical for the Art. to cover multiple exchange rates and not undervalued exchange rates.⁵⁸ Indeed, the Travaux Préparatoires reflect the drafters' concern about the use of par value currency manipulation and exchange-rate controls to restrict market access,⁵⁹ further suggesting

⁵⁴ GATT, Art. XV:4.

⁵⁵ Hudson et al. (2011), p. 30.

⁵⁶ Miranda (2010), p. 119.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Miranda (2010), p. 121.

that Art. XV:4 was included to ensure protection against the manipulation of exchange-rate controls and restrictions. Thus, Fixitania's policy of pegging the Fixi to the Libertania 25% below its undistorted value amounts to an exchange-rate policy that falls under the umbrella definition of "exchange action."

35. Fixitania's fixed exchange-rate regime for ENRs frustrates the intent of GATT Arts. VI and XVI. The *Ad Note* to Art. XV:4 clarifies that in order to "frustrate . . . intent," an "appreciable departure" from the intent of a GATT provision is required. The Note also establishes, through examples, that a frustration of the intent of an *individual* GATT provision is required, not of the GATT in its entirety. Pursuant to VCLT Art. 31, and in light of the object and purpose of Art. XV:4 as analysed *supra* in subsection III, "frustrate" indicates a "prevention of success or fulfillment" of the intent of the provisions of the GATT.⁶⁰ Thus, Art. XV:4 requires subversion of the objective of a GATT provision, rather than an ipso facto violation of a provision.⁶¹

36. Fixitania's has fixed the Fixi against the Libertado at a rate that is, according to the IMF, "significantly undervalued." As a result, Fixitania's exports to Libertania benefit from a de facto export subsidy. This departs significantly from the object and purpose of GATT Art. VI, as noted *supra*, which is to substantially reduce export subsidies.

b. Fixitania's fixed ENR exchange-rate regime constitutes a trade action that frustrates the intent of the provisions of the IMF.

37. By the ordinary meaning of the term, "trade action" is understood to concern domestic and cross-border flow of goods and services.⁶² Fixitania's significantly undervalued fixed exchange rate against the Libertado is akin to an export subsidy of hybrid car exports to Libertania, which affects the flow of goods as demonstrated by the influx of Fixitanian hybrid cars in Libertania. While the WTO has never decided on a method to distinguish between exchange controls and trade restrictions, the Panel in *Greece—Import Duties* looked to the restrictive *effect* of measures on trade, independently of the *form* of these measures, suggesting that a measure can both amount to a trade action and an exchange action.⁶³ Fixitania's fixed exchange-rate regime for ENRs impacts trade and thus amounts to a trade action.

⁶⁰ Oxford English Dictionary (2013); Hudson et al. (2011), p. 29.

⁶¹ Hudson et al. (2011), p. 33.

⁶² *Id.*

⁶³ Greece Special Import Taxes (1952); Mitchell & Sheargold (2009), p. 6.

38. In the absence of an official IMF assessment as to whether the exchange-rate regime has breached the IMF Arts. of Agreement, the panel should find that by failing to move to a more flexible exchange-regime as suggested by the IMF, Fixitania frustrates the purpose of the IMF Art. of Agreement which, as explicitly stated in Art. I (iii), includes: “to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.”⁶⁴ In the spring of 2012, the IMF conveyed its discontent over Fixitania’s fixed ENR exchange rate by suggesting that Fixitania move to a more flexible and uniform exchange-rate regime for ENRs to reduce the current surpluses and economic imbalances. In addition, the IMF found that the ENR exchange rate for the Fixi is “*significantly* undervalued.” Thus, Fixitania’s exchange-rate undervaluation frustrates the intent of the IMF.

2. Libertania cannot invoke an Article XV:9 exception.

39. GATT Art. XV:9 carves out an exception to Art. XV:4, providing that “exchange controls” or “exchange restrictions” in accordance with IMF law cannot violate the WTO provisions. Because GATT Art. XV:9 fails to make explicit reference to “exchange rates,” we can infer, from the ordinary meaning of “exchange controls” and “exchange restrictions” that they refer to the “controls and restrictions themselves and not their influence on exchange rates.”⁶⁵ According to a 1960 Ministerial decision from the IMF, an exchange restriction requires a degree of “direct governmental limitation on the availability or use of exchange.”⁶⁶ This should be read as to include exchange control, as this is a form of an export restriction.⁶⁷ Fixitania’s currency peg against the Libertado is the result of an active FCB buying foreign currency, not a direct governmental restriction on the availability of foreign exchange. Thus, Fixitania’s actions do not amount to an exchange restriction according to the IMF’s own definition, and Libertania cannot invoke an Art. XV:9 defense to a violation of Art. XV:4.

3. GATT Art. XV:4 takes precedence over GATT Art. XV:9.

40. If the panel finds that Libertania’s fixed exchange rate amounts to an exchange restriction that falls under the purview of Art. XV:9, Art. XV:4 will take precedence. Under the *lex specialis* doctrine, the more specific treaty provision takes precedence over the more general

⁶⁴ IMF Arts. of Agreement, I.

⁶⁵ Koops (2010), p. 11.

⁶⁶ Hudson et al. (2011), p. 29-30

⁶⁷ *Id.*

provision.⁶⁸ Art. XV:4 is more precise, referring to actions that “frustrate the intent” of the provisions of the GATT or the IMF, while Art. XV:9 refers to the Arts. of Agreement of the IMF generally, not specifying whether it refers to intent or the letter of the Arts. of Agreement of the IMF.⁶⁹ The *lex posterior* principle also supports this reading since Fixitania and Libertania are both parties to the IMF and the WTO. The IMF was established in 1945, and amended in 1978 to incorporate the current version of Art. IV, whereas the GATT was created in 1947 and amended in 1994 without changing Art. XV. Since, pursuant to the VCLT Art. 30 (3), in case of conflict the later treaty applies, the GATT takes precedence over the Articles of Agreement of the IMF, and the incompatibility of provisions Art. XV:4 and Art. XV:9 is resolved by reading Art. XV:4 as allowing the WTO to find that an IMF-consistent provision violates the GATT. This is further supported by the Travaux Préparatoires, in which a special working party established to consider the relationship between the GATT and the IMF and the GATT said that “paragraph 9(a) was not to be interpreted so as to preclude the Contracting Parties from discussing with a contracting party the effects on the trade of contracting parties of exchange controls or restrictions.”⁷⁰

4. The WTO is not required to consult the IMF before finding a Fixitania violation of GATT Article XV.

41. GATT Art. XV:2 sets out an obligation to consult the IMF on matters pertinent to the IMF’s Articles of Agreement such as “monetary reserves,” “balance of payments” and “foreign exchange arrangements.”⁷¹ Art. XV:2 further provides that the WTO should “accept the determination of the Fund as to whether an action in exchange matters is in accordance with the IMF Articles.” This obligation excludes Fixitania’s currency undervaluation, since “exchange matters” refers to “exchange arrangements” in the previous sentence, which is understood to mean currency controls, exchange licenses and transaction taxes but not exchange action.⁷² In addition, even if exchange action would include exchange arrangements, Art. XV:2 does not *require* the panel to consult the IMF as, in reference to DSU Art. 13, “each Panel shall have the right to seek information and technical advice from any individual body it deems appropriate”.⁷³

⁶⁸ Black’s Law Dictionary (1990), p. 684; Siegel (2002), p. 609.

⁶⁹ Siegel (2002), p. 609.

⁷⁰ Jackson (1969), pp. 486–487.

⁷¹ Siegel (2002), p. 572; Hudson et al. (2011), p. 26.

⁷² Miranda (2010), p. 7.

⁷³ Hudson et al. (2011), p. 27.

5. In case of IMF consultation, the panel has full discretion to interpret the IMF's findings, reducing the later to the equivalence of an export opinion.

42. Alternatively, if the panel deems consultation with the IMF necessary, the panel is not bound by the IMF's findings. In *Dominican Republic—Cigarettes*, the panel sought a determination from the IMF as to whether a measure was an exchange restriction under Art. XV:9. While the panel “fully agreed” with the IMF's determination, it did not say whether it regarded itself as bound to do so.⁷⁴ In addition, in *India—Quantitative Restrictions*, the AB dismissed India's concern that by accepting the IMF's determinations as set out in Art. XV:2 the AB was in conflict with the requirement in the DSU Article 11 to make an “objective assessment” of the facts. The AB stated that the panel had “critically assessed” the evidence provided by the IMF, supporting the conclusion that Art. XV:2 does not require the panel to strictly implement IMF findings.⁷⁵ Rather, the IMF assessment should be viewed as a supplementary perspective, the equivalent of an amicus curiae brief.⁷⁶ WTO and GATT jurisprudence thus supports the conclusion that a panel has latitude in interpreting the IMF's findings. Accordingly, even if the panel finds that IMF consultation is required and the IMF does not find that Fixitania engaged in currency manipulation, the panel should nevertheless rule that Fixitania violated Art. XV:4.

43. This conclusion is also supported by policy considerations. To date the IMF has never concluded that a member was out of compliance with its obligations regarding its exchange-rate policies.⁷⁷ Consequently, an inability for the WTO to adjudicate challenges to exchange-rate manipulation risks carving out a loophole in the international system for currency manipulation. Since currency manipulation and other exchange actions are capable of undermining GATT commitments, the WTO should not defer to the IMF when dealing with contracting parties' exchange-rate practices.

⁷⁴ PR, *DR—Cigarettes* [7.145].

⁷⁵ ABR, *India—QRs* [149].

⁷⁶ Hudson et al. (2011), p. 27.

⁷⁷ Mattoo & Subramanian (2008), p. 6.

Request for Findings

For the above stated reasons, Libertania requests the panel to:

- i. Find that the REOFI breaches GATS Art. XVII and para. 2 of its Annex on Financial Services.
- ii. Find that the FSEGSJ breaches the SCM Agreement in conjunction with Art. VI of the GATT, since the dual exchange-rate regime constitutes a prohibited export subsidy.
- iii. Find that the FSEGSJ breaches Art. XV:4 of the GATT in conjunction with the provisions of the IMF Arts. of Agreement, in particular Art. (1)(iii) thereof, since the exchange regime constituted a manipulation of the exchange rate of the Fixi that frustrates the intent of the GATT 1947.