

**ELSA MOOT COURT COMPETITION (EMC²)
ON WTO LAW
CASE 2017-2018**

***Borginia– Measures Affecting Trade in Textile Products
(Complainant: Syldavia)***

by

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1. Introduction

1.1. The Republic of Borginia (“Borginia”) is a collection of approximately 1000 tiny islands located in the Indian Ocean. It has beautiful beaches and attractive landscapes, which make it a very popular tourist destination. It is also one of the most populous countries in the world with a population of roughly 350 million.

1.2. Borginia is also a founding Member of the World Trade Organization (“WTO”) and is a major participant in international trade negotiations. It is also a party to the 2015 Paris Agreement (*See* Annex 1 for Borginia’s Nationally Determined Commitments) under the United Nations Framework Convention on Climate Change (“UNFCCC”). It is predominantly an agrarian economy. The agricultural sector employs roughly 20% of Borginia’s workforce. Other important sectors include tourism and the textile industry. Its textile industry, which constitutes 15% of the industrial production, is also known for its speciality fabrics, produced almost exclusively by handloom, locally known as *Khadi*.

1.3. In the last two decades, Borginia has seen a surge of investment in several areas of its economy such as health care, textiles, transport, and tourism. Several textile units have also sprung up in the Textile Export Promotion Zones (“TEPZs”). Currently, the vast majority of the textile cluster industry in Borginia is based in the TEPZs. The Borginian government provides for special investment facilitation and an approval mechanism for textile units established in the TEPZs. The TEPZs textile units are also one of the major recipients of export earnings for Borginia.

1.4. Ecologically, Borginia is vulnerable. Of late, unexpected storm surges and rising sea levels have caused significant environmental concerns in Borginia. Coastal erosion has become a serious problem. It not only impacts Borginia's thriving tourism sector, but also endangers life along the coastal areas and the country's rich fauna and flora. The National Institute of Oceanography in Borginia and various environmental groups believe that global warming could be a possible reason. In addressing the nation on its National Day in 2014, the Borginian Prime Minister stated that although global warming is a fundamental challenge which Borginia cannot solve on its own, Borginia should develop a systematic and comprehensive strategy to deal with it. The Prime Minister also highlighted the importance of "Zero-Waste, Zero-Effect" goals in its agricultural and industrial production.

1.5. Considering the size of its economy and large population, the Borginian government planned to introduce a national action plan to mitigate the environmental concerns arising from rapid industrialisation, especially in various cluster industries, and the rising sea levels. The National Environmental and Sustainability Institute ("NESI"), a Borginian governmental agency tasked with environmental planning and enforcement, decided to undertake a few pilot projects in certain identified sectors of the economy for targeted planning and implementation of its 'Love for Nature' ("LFN") Action Plan. As NESI outlined in its 2014 LFN Action Plan, environment-friendly and sustainable production practices are to be promoted in various sectors of the economy. The initial phase (2014-2020) of the LFN Action Plan includes certain identified sectors where the impact would be clearly demonstrable and evident.

1.6. In addition, in recent years NESI has introduced a program for phasing out coal-based power plants and has been providing fiscal incentives for the setting up of renewable energy based industries. Several provinces in Borginia have implemented measures including vehicle congestion taxes, cash for clunker schemes for elimination of diesel and commercial vehicles older than ten years, introduction of odd-even licence plates for passenger vehicles, mandating a cut-off date for commercial vehicles to switch to compressed natural gas, etc. Several provinces have also initiated measures such as imposing fines on the illegal burning of agricultural waste and restrictions on the use of firecrackers.

1.7. In the meantime, in order to raise awareness about the possible catastrophic consequences of rising sea levels, the Environmental Ministers of the small island States in the Indian Ocean met in the Borginian capital in June 2014 to solicit international cooperation in adopting climate change mitigation and adaptation measures. The small island States resolved to introduce a series of domestic measures as well as to form a coalition of vulnerable States to bring about a change for the introduction of binding international commitments. The suggested measures included carbon taxes, labels based on greenhouse gases (“GHGs”), and special carve outs for providing fiscal incentives in other international treaties for enabling countries to adopt clean technologies and production processes.

2. Borginia’s “Love for Nature” Action Plan

2.1. One of the goals identified by NESI was to encourage, nurture and expand the traditional yarn, fabric and garment manufacturing sector with environment-friendly methods. NESI identified the textile industry as a sector where clean and environment-friendly production and sustainability practices could be implemented first. The demand for cotton handloom textile products has risen manifold in recent times in Borginia and even in overseas markets. The Borginian government was concerned that due to rapid industrialisation and growing demand of cotton garments, some of the weaving and garment manufacturing units might turn to mechanised weaving and associated processes which could lead to higher carbon emissions. Power was predominantly produced from coal and fossil fuels in Borginia and NESI considered the powerloom industry as a significant contributor to the emission of GHGs.

2.2. Pursuant to the LFN Action Plan, NESI issued an executive decision in 2015 stipulating that only “100% handloom cotton fabric” can be marketed as “Cotton Fabric” in Borginia. In order to be marketed as “Cotton Fabric”, the fabric should be produced without using electricity or machines, or any form of conventional energy, in the entire production process from fibre to fabric. This is to ensure that throughout the entire production chain, carbon-neutral production practices are used. In February 2015, NESI issued an Office Memorandum to the Ministry of Consumer Affairs and other municipal authorities in Borginia that textile industries not implementing the LFN Action Plan and not adhering to its 2015 executive decision will no longer be able to market or sell their cotton-based fabric as “Cotton Fabric” in Borginia. The

key cotton handloom production processes identified by NESI, as integral to the carbon-neutral production practices in cotton textiles, are the following:

- **Spinning:** - In handloom fabric production, the cotton fibre is spun into thread with a spinning wheel popularly known as *charkha*.
- **Weaving:** - Thread is woven by a wooden shuttle that moves horizontally back and forth across the loom to make it into yarn.
- **Knitting:** - Knitting is a method of constructing fabric by using a series of needles to interlock loops of yarn. In handloom/*Khadi*, the needles are used by hand.

2.3. The LFN Action Plan is implemented on the basis of a self-declaration by the foreign exporters and Borginian producers. However, NESI technical staff have been undertaking several plant visits to ascertain the accuracy of the self-declaration made by various producers. NESI's 2015 and 2016 Annual Reports indicate that NESI staff have inspected more than 200 plant sites in key exporting countries of textile products including the textile units in Syldavia, another coastal State that has a long-standing trading relationship with Borginia. During these verification visits, the producers are often required to submit detailed reports on the nature and quantum of carbon emissions. However, the Annual Reports do not provide any details of the plant visits of Borginian textile units.

2.4. Syldavia is a developing country and is also a Member of the WTO. Syldavia specialises in cotton fabrics, and has a vibrant and industrialised powerloom sector. However, pursuant to NESI's executive decision in 2015 and its various steps in connection with the LFN Action Plan, Syldavia's cotton fabric exports to Borginia have significantly dropped (*See Annex 2*).

2.5. Borginia, in the meantime, has been undertaking various activities including textile fairs, exhibitions and interactive sessions with the powerloom producers in other countries, including several cities in Syldavia. The aim of these activities has been to highlight the superior features of handloom products, such as their almost zero carbon emissions, their less capital-intensive nature, and their potential for ensuring self-employment mainly in rural areas. As a matter of fact, Cotex, a Borginian government funded Cotton Textiles producers' agency, had already arranged fully sponsored visits to various handloom operators in other countries, including

Syldavia, to familiarize producers with handloom production and acquire the requisite technology.

2.6. Both Borginia and Syldavia are founding members of the International Organisation for Standardisation (“ISO”) and have actively participated in ISO’s activities since its inception. During 2013-14, both Borginia and Syldavia were engaged in the discussions for the adoption of the ISO 14666 – *Standards related to Cotton Fabric* (See Annex 3). While Syldavia was a major proponent of ISO 14666, Borginia repeatedly objected to the adoption of the draft standard at every stage of the standard setting process and argued that the aforesaid standard is not based on any consensus. According to Borginia, the ISO 14666 is inconsistent with the goals enunciated in the LFN Action Plan and its environmental goals. Borginia argued that ISO 14666 cannot be recognized as an “international standard”.

3. Borginia’s implementation of “Save our Climate Act, 2015”

3.1. In early 2015, Borginia passed a tax legislation entitled “Save Our Climate Act, 2015” (“SOCA”). This legislation was passed in the immediate aftermath of the Paris Agreement. The SOCA tax seeks to encourage carbon mitigation steps initiated by various industries. Specifically, in the case of fabrics, the tax was determined by the carbon emission per square metre in the production process. It is based on self-declarations by importers on the amount of carbon emissions in the production of the product concerned. In the case of imports, the tax is collected at the point of customs clearance and alongside other applicable customs duties. Specifically, in the case of cotton fabrics, SOCA is applicable to both domestic and imported fabrics and, in the case of domestic fabrics, it is collected at the time of domestic sale (See Table A). However, products marketed as “Cotton Fabrics” in Borginia are exempt from this tax since the amount of carbon emissions in the production process is considered negligible. In the Goods and Sales Tax (“GST”) imposed in Borginia, there is a separate classification for handloom and powerloom items (See Table B). Borginia’s WTO tariff commitments and the applied rates on cotton fabrics are provided in Table C.

Table A: - Carbon Tax Rate and Structure

Product	Carbon Content	Tax Rate
Fabric (per sq. mt.)	> 1000 gms	20 cents
	> 2000 gms	30 cents
	> 3000 gms	40 cents
	> 4000 gms	50 cents

Table B: - Classification under Goods and Services Tax and the Tax Rates

Product Description	HS Code	Tax Rate
Fabrics woven with the use of Handloom	5208.05.10	5%
Fabrics woven with the use of Powerloom	5208.05.90	5%

Table C – WTO Schedule of Concessions on Cotton Fabric: Republic of Borginia

Product Description	HS Code	Bound Rate	(MFN) Applied Rate	Any Preferential Rate
Woven fabrics of cotton, containing 100% by weight of cotton, weighing not more than 200 gm.	5208.05	10%	10%	NA

3.2. The SOCA tax collected by Borginia on fabric and other textile-related products is pooled into a Textile Technology Upgrade Fund Scheme (“TTUFS”). The Ministry of Textiles in Borginia also decided to allocate the funds entirely to the textile units situated in the TEPZs for the installation of modern technology. Under the TEPZ regulations, the textile units situated in the TEPZs have to sell more than 80% of their output in export markets. The remaining 20% can be sold within the Domestic Tariff Area (“DTA”) after payment of the basic customs duty and any other applicable duties.

3.3. Although Borginia is a leading economy in terms of the overall GDP, its per capita income levels are one of the lowest in the world. Accordingly, it is also included as one of the Annex VII (b) countries under Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). The per capita GNP for Borginia has been calculated by the World Bank as US \$1020 for 2012, US \$1050 for 2013 and US \$1080 for 2014 at constant 1990 dollar terms.

3.4. Borginia’s export details of cotton textiles under Chapter 52 of the Harmonized System Nomenclature are provided in Table D.

3.5. Borginia has not submitted any request to the SCM Committee for the extension of export subsidies under Article 27.4 of the SCM Agreement.

3.6. Syldavia alleges that Borginia’s allocation of funds to the textile units situated in the TEPZs distorts the prices of textile products in the world market and has adversely affected its sales.

Table D: - Borginia’s Exports of Textiles/Cotton Fabric under Chapter 52 of Harmonized System Nomenclature as calculated by the WTO Secretariat

Product Description	HS Code	Exports (in Kg) in 2014	Share in World Trade in 2014	Exports (in Kg) in 2015	Share in World Trade in 2015
Woven fabrics of cotton, containing 85% or more by weight of cotton, weighing not more than 200 gm	5208	18,43,67,000	2%	23,96,77,100	2.6%
Woven fabrics of cotton, containing 100% by weight of cotton, weighing not more than 200 gm.	5208.05	1,76,89,010	4%	2,34,349,493	4.90%
Overall Textile Exports	52	67,89,34,067	2%	11,27,030,551	2.75%

4. SYLDAVIA'S PANEL REQUEST TO THE DSB AND CIRCULATED TO WTO MEMBERS

4.1. Syldavia conducted consultations with Borginia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXII of the General Agreement on Tariffs and Trade 1994. In Syldavia's view, Borginia's measures nullified and impaired the benefits accruing to Syldavia under the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

4.2. After unsuccessful consultations with Borginia, Syldavia submitted a request for the establishment of a panel to the DSB, containing the following legal claims:

1. NESI's decision in 2015 that only "100% handloom cotton fabric" can be marketed as "Cotton Fabric" in Borginia is a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement 1994 and is inconsistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement 1994, as well as with Article III:4 of the GATT 1994.
2. The tax levied on the imported cotton fabric in excess of other applicable custom duties is inconsistent with Articles II:1 (a) and (b), II: 2(a) and III:2 of the GATT 1994;
3. The allocation of funds from the Textile Technology Upgrade Fund Scheme to the textile units situated in the TEPZs in Borginia is inconsistent with Borginia's obligations under Articles 3.1(a), 27.4 and 27.5 of the SCM Agreement 1994.

4.3. In response to Syldavia's claims, Borginia contests each of the claims of violation and submits that, in any event, NESI's decision of 2015 and the SOCA tax are justified under Article XX of the GATT 1994.

5. SELECTED DOCUMENTS

- ISO/IEC Directives Part 1, Consolidated ISO Supplement- Procedure specific to ISO (3rd Edition, 2012).
- Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendation with relation to Articles 2, 5 and Annex 3 of the TBT Agreement, WTO Document G/TBT/1/Rev.10 (2011).
- WTO General Council, Article 27.4 of the Agreement on Subsidies and Countervailing Measures—Decision of 27 July 2007, WT/L/691.
- Doha WTO Ministerial 2001: Ministerial: Declarations and Decisions WT/MIN(01)/17 ¶10.5.
- GATT, Report of the Working Party on Border Tax Adjustments, L/ 3464 (1970).

6. INDICATIVE LIST OF RELEVANT CASE LAW

- Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS 412/AB/R, WT/DS 426/AB/R, adopted May 2013.
- Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL)*, WT/DS384/AB/R/WT/DS386/AB/R, adopted 23 July 2012.
- Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS 381/AB/R, adopted 13 June 2012.
- Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012.
- Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS/ 339/AB/R, adopted 12 January 2009.
- Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223.

- Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002: VIII.
- Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII.
- Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R WT/DS169/AB/R adopted 10 January 2001, DSR 2001: I.
- Appellate Body Report, *Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/RW, adopted 21 July 2000, DSR 2000: VIII.
- Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII.
- Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996, DSR 1996: I.
- GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, unadopted, circulated 3 September 1991, BISD 39S/155.
- GATT Panel Report, *Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (Spf) Dimension Lumber*, adopted 19 July 1989, L/6470 - 36S/167.
- GATT Panel Report, *United States-Taxes on Petroleum and Certain Imported Substances* L/6175, adopted 17 June 1987.

7. INDICATIVE BIBLIOGRAPHY

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- Kaufmann, Christine, and Weber Rolf H., "Carbon-related border tax adjustment: mitigating climate change or restricting international trade?", *World Trade Review* 10, no. 4 (2011): 497.
- Low Patrick, Marceau Gabrielle, and Reinaud Julia, "Interface between the Trade and Climate Change Regimes: Scoping the Issues", *Journal of World Trade* 46 (2012): 485.

- Miranda Jorge, “Analysis of WTO Implications of the Proposed ‘Border Adjusted’ Tax”, *Global Trade and Customs Journal* 12 no. 6 (2017): 214.
- Pauwelyn, Joost, "Carbon leakage measures and border tax adjustments under WTO law” in *Carbon leakage measures and border tax adjustments under WTO law* (2013).
- Rajamani, Lavanya, "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-obligations", *Journal of Environmental Law* 28 (2016): 337.
- Roessler, Frieder, "India–additional and extra-additional duties on imports from the United States", *World Trade Review* 9, no. 1 (2010): 265.
- Trachtman, Joel P, "WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes", *Resources for the Future Discussion Paper 16-03* (2016).
- Waters, James J, "Achieving World Trade Organization compliance for export processing zones while maintaining economic competitiveness for developing countries", *Duke Law Journal* 63 (2013): 481.

Annex 1

In late 2015, the Paris Agreement was concluded and came into force on November 5, 2016 - thirty days after ratification by at least 55 countries and by countries representing at least 55% of global emissions. Borginia deposited its instrument of ratification of Paris Agreement and has made certain Nationally Determined Contributions (NDCs) under the Agreement, the details of which are as follows: -

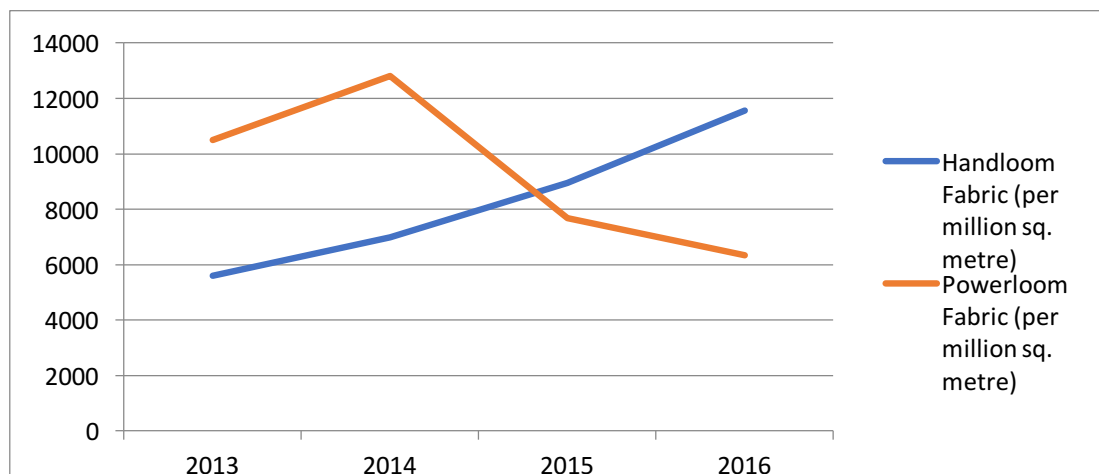
“To reduce greenhouse gas emissions by 20% by 2030, taking 2010 as the base year;

To increase the share of non-fossil fuels in primary energy consumption to around 15%;

To create an additional carbon sink of 2.5 to 3 billion tonnes of CO₂ equivalent through additional forest and tree cover by 2030.”

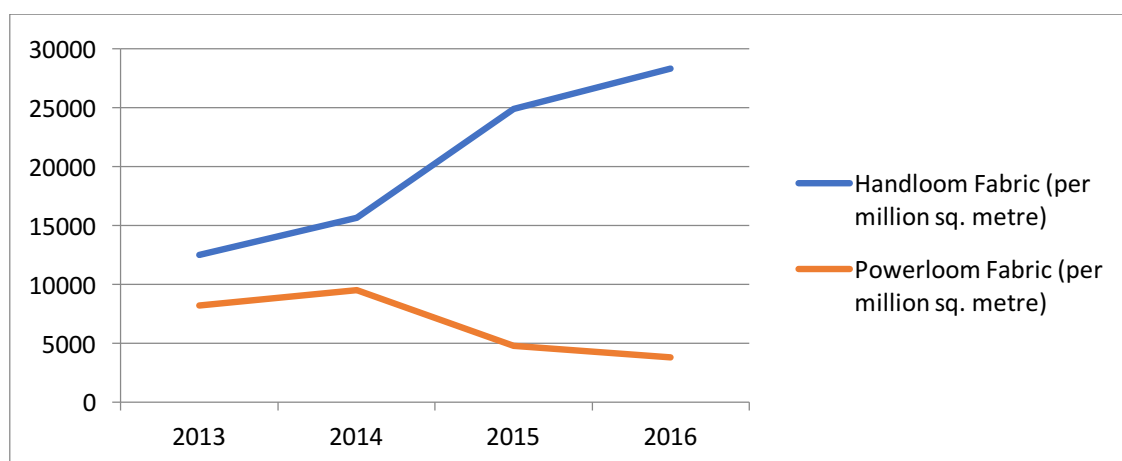
Annex 2

Table A: Exports from Syldavia to Borginia



Year	Handloom Fabric (per sq. metre)	Powerloom Fabric (per sq. metre)
2013	5600	10500
2014	6980	12800
2015	8950	7680
2016	11560	6350

Table B: Sales of the Domestic Industry in Borginia



Year	Handloom Fabric (per million sq. metre)	Powerloom Fabric (per million sq. metre)
2013	12500	8200
2014	15650	9500
2015	24875	4755
2016	31320	3800

Annex 3

ISO Standard 140666

The ISO (International Standardization Organisation) has also developed a standard for '100% cotton fabric' in the year 2014. The specifications for this standard include the following:

- (i) The product should be covered by HS 5208.05
- (ii) The cotton content per square metre of the fabric must be 100%; the fabric should not use any other yarn, either natural or synthetic.
- (iii) The fabric must be subject to the processes of ginning, spinning, weaving and knitting (either by **hand** or by **machine**).