

17th Edition of the John H. Jackson Moot Court Competition 2018-2019
Zycron – Certain Measures Related to Electric Vehicles Charging Points and Infrastructure

BENCH MEMORANDUM

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1 SUMMARY OF THE FACTS OF THE CASE

1.1 Introduction to the case: facts and clarifications

1.1. This dispute arises from a challenge brought by Avilion ("Complainant"), a developed country which is a founding Member of the World Trade Organization ('WTO') and a signatory to the revised Government Procurement Agreement ('GPA'), against certain measures adopted by Zycron ("Respondent"), another developed country and founding Member of the WTO and signatory of the GPA.

1.2. The dispute between both countries started shortly after the discovery of new uses for 'Solaris', a metal capable of conducting electricity five times more rapidly than Silver. Batteries containing Solaris have the benefit of not losing their capacity as quickly as Lithium batteries, and can also be easily reused. The case at issue concerns measures related to efficient electric vehicles ('EVs') charging points and related infrastructure, all of which only use Solaris.

1.3. Zycron is located in the Matte Peninsula, which hosts the world's largest reserves of Solaris. Besides Zycron, the Matte Peninsula comprises two neighbouring countries, Uqbar and Tlön. Avilion is the only country located outside the Matte Peninsula with Solaris mines. The extraction of Solaris has raised significant concerns about its environmental and social impact. Because of the hazardous nature of the mining sector, the extraction of Solaris has been traditionally associated with the intensive use of manual labour in poor health and safety conditions.

1.4. For years, the global EV battery and charging point market has been dominated by a limited number of manufacturers, led by 'Charging Queen', the major exporter of EV batteries and charging points in the world. Charging Queen is incorporated in Avilion, and has a very poor record of labour rights protection.

1.5. Zycron and Tlön were at war for decades throughout the second half of the 20th century over natural resources, in particular Solaris mines. On 21 September 2012, the two countries signed a comprehensive agreement designed to bring peace and end conflict on the Matte Peninsula and in particular over the extraction, processing, uses and trade of Solaris, known as the Orbis Tertius Agreement (OTA). The OTA includes a plan to completely integrate the Solaris industry in the two countries to ensure that both countries will benefit from the development of Solaris and will no longer have a need to fight for control over it.

1.6. The current government of Zycron, led by Maxima Madrugada, has pledged to establish a long-term plan of transport electrification in the country, boosting domestic manufacturing and employment, as well as driving sustainable economic growth. The measures at issue in this dispute are part of this plan.

1.2 The measures at issue

1.7. The dispute relates to three different instruments: 1) the comprehensive agreement designed to end conflict on the Matte Peninsula and over the extraction, processing, uses and trade of Solaris (Orbis Tertius Agreement - OTA); 2) the adoption of the 'Going Electric Act' (GEA), with the scope of

ensuring the electrification of the transport and designed to increase public investment in EV charging infrastructure in Zycron; and 3) the 'Made in Zycron' Initiative, enacted with the objectives of increasing manufacturing sector growth (including job creation), enhancing global competitiveness of Zycron manufacturing, and ensuring sustainability of growth, associated to the extraction of Solaris.

1.8. The Orbis Tertius Agreement (OTA) was signed on 21 September 2012, to bring peace between Zycron and Tlön after decades of war mainly over the control of natural resources, in particular Solaris mines. The OTA includes a plan to completely integrate the Solaris industry in the two countries to ensure that both will benefit from the development of Solaris and will no longer have a need to fight for control over it. The OTA also seeks to prevent the use of Solaris for military purposes as a means of ensuring that there will be no further conflicts over access to Solaris, stipulating, that each party shall suspend the export of Solaris to countries that allow its military use. The OTA is also open to other countries committed to the peaceful development and use of Solaris.

1.9. The 'Going Electric Act' (GEA) was adopted in December 2016, with the primary objective of increasing the number of public EV charging points along all highways and some provincial roads within the next 20 years. The provisions of the GEA are implemented by Zycron's Ministry of Infrastructure and Electric Transport (MIET) is the government department responsible for 'all matters regarding the EV sector'.

1.10. In April 2018, the MIET issued a procurement open competitive call for a long-term framework purchasing agreement for the installation and the management of efficient EV charging points, using Solaris, across Zycron's territory. The MIET's procurement process of EV charging points was governed not only by the objectives set in the GEA, but it is also shaped by the 'Made in Zycron' Initiative which was launched in January 2017 to radically reform the regulation of public procurement in Zycron. In order to achieve the goals set in the 'Made in Zycron' Initiative and to clarify its procurement policy in relation to the procurement associated with the expansion of EV infrastructures, on 17 March 2018, the MIET issued the Procurement Directive n.12-2018/2019 '2018 EV Charging Points Procurement Directive' (Directive n.12). Moreover, in order to mitigate the socio-environmental risks associated with the Solaris mining activities, the MIET circulated throughout the Ministry the Guideline on 23 March 2018 (also referred as White Guideline), which calls for 'the observance of the applicable domestic and international obligations in the field of environmental, social and labour laws at the relevant stages of the procurement procedure'.

1.11. The procurement requirements regulating the public acquisition of EV charging points, together with the regulation affecting the industrial development around the use of Solaris, inside Zycron and in the OTA, are at the centre of this case.

1.3 Background to the dispute: broad issues addressed in the case

1.12. The case revolves around a number of unresolved and topical issues in WTO law, including the appropriate balance between the regulatory space for domestic industrial policies and non-discrimination commitments; the competing priorities of fighting climate change and protecting labour rights in modern production; and emerging issues in new preferential trade agreements, such as the accumulation of rules of origin.

1.13. The measures at issue consist of a series of interrelated domestic legal instruments that impose various procurement requirements, from traditional local content requirements to the promotion of labour rights.

1.14. Article III:8 generally excludes government procurement from GATT the scope of the GATT, however the participants will be asked to argue on the scope of application of the derogation set out in Article III:8 GATT, building on the reasoning of the Appellate Body ('AB') in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* and *India – Solar Cells*. As part of this debate, the participants will be asked to argue on whether government procurement also constitutes an exception from the MFN obligation, in the absence of a similar wording in Article I GATT. Moreover, the participants will need to consider the implications of the interpretation of Article III:8 GATT in shaping the coverage of the plurilateral Agreement on Government Procurement. Questions in this respect may include the following: did the AB in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* interpret the requirements in Article III:8 GATT too restrictively? Could this interpretation result in a circumvention of the fundamental obligations of non-discrimination due to the limited coverage of the GPA?

1.15. Another important topic addressed in the case is the plurilateral status of the GPA within the WTO multilateral trading system. Based on the facts provided, the participants will be asked to discuss the appropriate order of the analysis among the different WTO agreements applicable in the dispute, with a particular focus on the text and legal import of the revised GPA. The fact that panels or the AB have not yet interpreted the provisions of the revised GPA raises another interesting element to this moot court problem.

1.16. The participants will also have to confront the legal complexity of the general exceptions in GATT 1994 (and possibly extend the analysis to the GPA general exceptions). When acting as respondents, the participants will need to decide under which subparagraph(s) of Article XX to justify the adopted measures. In addition to paragraphs (b) and (g) of Article XX GATT, which typically cover environmental protection policies, the respondents may seek to justify the measures under paragraphs (a) and (j). The possibility to justify discriminatory procurement measures on the basis of the protection of labour rights will be put under scrutiny. In particular, the participants will have a chance to discuss the relevance of the application of a soft law instrument in the case (namely the March Guidelines). Moreover, the interpretation of the term "local short supply" under Article XX (j) GATT in light of objectives of industrial development will represent an important point of discussion together with the standard of "essential" in general exceptions, as emerged in the recent cases of *India – Solar Cells* and *EU – Energy Package*.

1.17. To avoid particularly controversial issues that have emerged only very recently, claims and defences relating to Security Exceptions, including those under the GATT Article XXI, shall not be raised or developed by the participants.

1.4 Timeline

- 21 September 2012 – Signing of the Orbis Tertius Agreement (OTA) Tlön - Zycron
- 8 June 2014 – Tlön obtained WTO observer status (Clarification n.2).
- 18 November 2014 – Zycron signed the revised GPA (Clarification n.4)
- 6 April 2015 – Zycron accession to the revised GPA enters into force.

- 18 May 2015 – Maxima Madrugada wins the general election in Zycron
- 1 October 2016 – Announcement of the ‘Going Electric Plan’ (GEP)
- 15 December 2016 – Enactment of the ‘Going Electric Act’ (GEA)
- 21 January 2017 – ‘Executive Order n. 12 launching the ‘Made in Zycron’ Initiative.
- 15 December 2017 – Scandal on the mines of Charging Queen
- 1 January 2018 – OTA enters into force (Correction C)
- 5 February 2018 –Zycron and Tlön adopt Customs Regulation No. 50 to implement Articles 3.1 and 3.2 of the OTA.
- 15 February 2018 – Signing of the OTA Protocol
- 17 March 2018 – MIET issued the Procurement Directive n.12-2018/2019
- 23 March 2018 – MIET issues the non-binding White Guideline (hereinafter the March Guideline)
- 1 April 2018 – MIET issues a competitive call for EV Charging Points
- 1 July 2018 – OTA Protocol enters into force and is notified to the WTO (Correction C)
- 30 July 2018 – Uqbar initiates negotiations to accede to the OTA
-

2 WEIGHT OF CLAIMS

2.1. The following table is based on the score sheet for the written submissions and indicates the relative weight that the panel may wish to give to the different claims and their elements. The weight is based on the novelty and complexity of claims.

Requirements in the ‘Made in Zycron’ Initiative, in Directive n.12 and the March Guideline	
1. GATT Article III:8(a) <ul style="list-style-type: none"> • Measures covered by Article III:8(a) GATT and cumulative requirements • Competitive relationship between products purchased and products discriminated 	10%
2. GATT Article III:4 <ul style="list-style-type: none"> • Treatment less favourable and detrimental impact on imports 	5%
3. GATT Article I:1 – most favoured nation treatment	5%
4. GATT Article XX <ul style="list-style-type: none"> • Article XX(a) GATT - necessary to protect public morals • Article XX(b) GATT - necessary to protect human, animal or plant life or health • Article XX(g) GATT - conservation of exhaustible natural resources 	20%

<ul style="list-style-type: none"> • Article XX(j) GATT - essential to products in general or local short supply • Article XX Chapeau 	
5. GPA <ul style="list-style-type: none"> • Coverage of the GPA • Violation of GPA Article IV:1-2 • Justification under GPA Article III:2 	10%
On the implementation of the OUF established in Zycron in the GEA and on the accumulation of Rules of Origin in the OTA	
<ul style="list-style-type: none"> • SCM Agreement Article 1.1(a) and (b) – Existence of a subsidy, financial contribution and benefit analysis • SCM Agreement Article 3.1(b) - Whether the measure at issue is a prohibited subsidy, and therefore the specificity requirement is fulfilled. 	10%
<ul style="list-style-type: none"> • GATT Article I:1 – most favoured nation treatment • GATT Article XXIV - Customs Unions and Free-trade Areas 	20%
<ul style="list-style-type: none"> • GATT Article XI: 1 - General Elimination of Quantitative Restrictions 	10%
Implementation of the accumulation of origin rule in the OTA and Zycron Custom Regulation n.50	
<ul style="list-style-type: none"> • Agreement on Rules of Origin Article 2(b) and (c) 	10%

3 CLAIMS AND STRUCTURE OF THE BENCH MEMORANDUM

3.1. The following arguments should not be understood as indicating the only way that the case can be argued from either side. Rather, they simply illustrate the issues that the participants will have to address. As Case Authors, we recognise that one of the main difficulties of arguing this case consists in grouping the key issues in the case and how the claims relate to the measures. The students may opt to address the topics by measure or by provision. As we drafted the case around specific typologies of measures, we have structured the analysis of the bench memorandum around the measures described in the Case Facts. To support the panellists in their work, we provide the following tables to guide them in the possible grouping of the issues.

3.2. We approached the writing of this Bench Memorandum as guidance for the panellists, without having the ambition to conduct a full and comprehensive analysis of the jurisprudence of all the legal aspects of this case. For this reason, the memo is intentionally designed to focus on providing some guidance on what we believe are the most original and less explored legal issues touched in this year edition. As we can also assume that the panellists have a strong knowledge of basic principles of WTO law, the analysis of the jurisprudence of Art III:4 GATT, Art XI, Art. XX GATT and Art. XXIV GATT is less extensive, in order to leave space to the explanation of Art III:8 GATT, the GPA provisions, the SCM Agreement and the Agreement on Rules of Origin.

3.3. Organisation of the Legal Analysis

3.1.2 By Measures

Measure	Claims
<p>"EV Charging Points Procurement Requirements" set in the Made in Zycron Initiative, read in conjunction with Procurement Directive n.12 and the March Guideline (para. 4.9 of the case)</p>	<p>GPA Coverage – Article I and II GPA</p> <p>Articles IV:1 and IV:2 of the GPA (national treatment and MFN obligations) and relationship with Article III:2 GPA exceptions</p>
	<p>Article III:4 of the GATT and relation with Article III:8(a) of the GATT (less favourable treatment for imported products/exception for government procurement)</p>
	<p>Article I:1 of the GATT (MFN violation, considering the treatment of Tlön) and Article XX GATT exceptions</p>
<p>"Official Unitary Fee", which will be paid weekly by the Government of Zycron to the successful bidder, even if no cars have used the charging stations in a week (para. 4.6 of the case)</p>	<p>Subsidy under Art. 1 of the SCM Agreement (1(a)(1)(i) transfer of funds) whereby a benefit is conferred</p>
	<p>Art 2. Specificity</p>
	<p>Art. 3.1(b) of the SCM Agreement (prohibited subsidy contingent upon the use of domestic goods considering the "Made in Zycron" initiative)</p>
<p>"Accumulation of Origin Rule", by which Solaris metal and products containing Solaris originating from an OTA party shall be treated as a domestic product in the importing OTA party and thus be subjected to zero tariffs (para. 2.4 of the case) + "official certification" from the end-user that the metal will only be used for peaceful purposes (para. 2.3 of the case)</p>	<p>Subsidy under Art. 1 of the SCM Agreement (1(a)(1)(ii) revenue foregone) whereby a benefit is conferred</p>
	<p>Art 2. Specificity</p>
	<p>Art. 3.1(b) of the SCM Agreement (prohibited subsidy contingent upon the use of domestic goods)</p>
	<p>Art. I:1 of the GATT (MFN violation considering the 0% tariff treatment of Tlön)/exception under Art. XXIV of the GATT</p>

	Art. XI:1 of the GATT (export restriction through the mechanism of "official certification")
	Articles 2(b) and 2(c) of the RO Agreement ("official certification" as an instrument to pursue trade objectives and to restrict, distort or disrupt international trade)

3.1.3 By Provision

	Claims	Measures
GPA	Article IV: 1-2 GPA	Whether the " EV Charging Points Procurement Requirements " - set in the Made in Zycron Initiative, read in conjunction with Procurement Directive n.12 and the March Guideline -are "covered procurement" under the GPA Agreement – using Art I(i) and Article II GPA Whether the " EV Charging Points Procurement Requirements " result into a treatment less favourable for Avilion are in violation of Article IV GPA
	Article III:2 GPA	Whether the " EV Charging Points Procurement Requirements " can be justified under GPA General Exceptions
GATT	Article III:4	Whether the " EV Charging Points Procurement Requirements " accord less favourable treatment to imported products;
	Article III:8	Whether " EV Charging Points Procurement Requirements " can fall within the requirements for the derogation for public procurement measures under GATT
	Article I:1	Whether the " EV Charging Points Procurement Requirements " grant an exception in case of shortage of supply in favour of OTA parties represents a violation of MFN;

		OTA – considering the 0% tariff treatment to Tlön)/exception under Art. XXIV of the GATT
	Article XX	Whether the “ EV Charging Points Procurement Requirements ” can be justified under <ul style="list-style-type: none"> • Article XX(a) GATT - necessary to protect public morals, based on the labour right considerations included • Article XX(b) GATT - necessary to protect human, animal or plant life or health, grounded on the environmental relevance of the measure, • Article XX(g) GATT - conservation of exhaustible natural resources, based on the impact on the preservation of clean air of the measure • Article XX(j) GATT - essential to products in general or local short supply, due to the limited supply of Solaris AND satisfy the requirements under the chapeau.
	Article XI:1	OTA - export restriction through the OTA mechanism of "official certification"
	Art. XXIV of the GATT	OTA - Exception for OTA MFN violation considering
SCM	Subsidy under Art. 1 of the SCM Agreement (1(a)(1)(i) transfer of funds)	Whether the OUF and the foregone duties due to the implementation of the OTA’s accumulation of origin, fall under the definition of subsidies within the meaning of Article 1.1(a) of the SCM Agreement.
	Subsidy under Art. 1 of the SCM Agreement (1(a)(1)(ii) revenue foregone) whereby a benefit is conferred	Whether the OUF, as well as the accumulation of origin in the OTA, confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.
	Art 2. Specificity	Whether the implementation of the OUF as well of the accumulation of origin rule in the OTA, are in violation of Article 3.1(b) of the SCM Agreement, can be qualified as subsidies contingent upon the use of domestic over imported products, and therefore deemed to be specific.
	Art. 3.1(b) of the SCM Agreement	
RO	Articles 2(b) and 2(c) of the RO Agreement	Whether the OTA "official certification" is an instrument to pursue trade objectives and to restrict, distort or disrupt international trade

4 THE EV CHARGING POINTS PROCUREMENT REQUIREMENTS SET IN THE 'MADE IN ZYCRON' INITIATIVE, IN DIRECTIVE N.12 AND THE MARCH GUIDELINE

4.1 General Aspects

4.1. Avilion claims that the procurement requirements established in the 'Made in Zycron' Initiative, Directive n.12, and the March Guideline are inconsistent with Zycron's obligations under Article I:1 and Article III:4 of the GATT 1994, and Articles IV:1-2 of the GPA. The procurement requirements at issue are the result of a combination of four different governmental measures. The overarching objectives behind these procurement measures at issue are contained in the GEA; the 'Made in Zycron' Initiative (established by the Executive Order of January 2017) defines the Zycron's regulation of public procurement; and the Procurement Directive n.12-2018/2019 specifies the requirements for the procurement measures issued under the GEA. Moreover, the MIET issued the March Guideline, an un-published soft-law instrument to provide guidance on the internal procurement competitions. All these procurement measures, read together, establish a series of requirements for the procurement of EV charging stations in Zycron. Avilion will argue that these regulations include local content requirements (LCRs) that are inconsistent with the provisions of the GPA and the GATT.

4.2. All four procurement measures apply to an open competitive call for a long-term framework purchasing agreement for the installation and the management of public EV charging points, using Solaris, across Zycron's territory issued by MIET [para. 4.6 Case Fact]. The technical specifications of the open call, which define the goods and the services procured by the MIET, include: 1) a feasibility study; 2) EV charging stations and charging points, including all the Solaris chargers, the cables and the component required; 3) installation of the charging points; and 4) their management.

4.3. The application of these government procurement requirements will invite the participants to reflect on the following legal points:

- a. the application of the plurilateral Government Procurement Agreement (GPA) to the measures at issue;
- b. The violation of the principle of non-discrimination in Article IV GPA and its possible exception under Article III:2 GPA;
- c. The application (simultaneous or not) of the GPA and the GATT to the measures at issue;
- d. The exclusion of government procurement from the coverage of GATT Article III, by virtue of Article III:8 of GATT 1994;
- e. The coverage of government procurement measures under Article I GATT 1994;
- f. The possible justification of the alleged violations of the GATT under Article XX GATT 1994

4.4. A difficulty that the participants may face consists in the fact that the procurement requirements at issue involve, at the same time, the procurement of goods (for EV charging stations) and the procurement of services (the management of the charging points, the supply of charging services for EVs' owners in Zycron). The claims under the GPA and GATT focus on the local content requirements imposed on the input (Solaris) of the goods provided (EV charging stations).

4.5. In the analysis of the procurement measures at issue, it is important to consider the logical sequence of potential claims under the different covered agreements. In particular, the question will arise whether the measures at issue fall within the scope of the GPA. Complainants are expected to begin their analysis with that agreement before moving on to the GATT, while respondents will seek to show that the GPA does not apply to the measures at issue.

4.6. As the measures at issue in this claim consist of procurement requirements set forth in the GEA, the Made in Zycron Initiative, Directive 12 and the March Guideline, we will commence our analysis in this bench memo by focusing on the complaints under the GPA the *lex specialis* on procurement matters.¹ We will then move on to the consistency of the challenged measures with Article III:4 of the GATT 1994 (and the derogation in its coverage included in Article III:8).

4.1.1 Whether the measures at issue fall within the scope of the GPA and are inconsistent with Article IV of the GPA

4.7. Government procurement is subject to the GPA for all signatory Parties. The original GPA entered into force on 1 January 1996. In March 2012, the new revised text of the GPA was adopted and entered into force on 6 April 2014. Although this dispute relates to the revised GPA, as this agreement has not yet been addressed in the WTO jurisprudence by panels or the AB, the case-law relating to the 1994 text may be instructive (even if very limited) and cited where appropriate.

4.8. Both parties of the dispute are signatories of the revised GPA. Avilion claims that the procurement requirements in the Made in Zycron Initiative, read in conjunction with Directive n.12 and the March Guideline, are inconsistent with Article IV:1-2 of the GPA. The parties will be expected to address whether the revised GPA is applicable to the challenged measures, whether the challenged measures are inconsistent with Article IV:1-2 of the GPA, and whether the measures could be justified under Article III:2 of the GPA.

4.1.1.2 Whether the measures relate to “covered procurement” under the GPA Agreement

4.1.1.2.1 Legal Standard and Relevant Jurisprudence

4.9. Before analysing the possible violation of Article IV GPA, it is important for the participants to determine first if the revised GPA applies to any measure regarding covered procurement (Article I and Article II:1 of the GPA).

4.10. “Measure” is defined in Article I(i) of GPA as “any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement.” Article II:2 sets out the following definition of “covered procurement”:

[...] procurement for governmental purposes:

of goods, services, or any combination thereof:

¹ Similarly to the position laid out in the case of the relationship between the TRIMs Agreement and the GATT Agreement in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para 7.69-7.70

as specified in each Party's annexes to Appendix I; and

not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;

by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;

for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's annexes to Appendix I, at the time of publication of a notice in accordance with Article VII;

by a procuring entity; and that is not otherwise excluded from coverage in paragraph 3 or a Party's annexes to Appendix I.

4.11. The structure of the Appendix I Annexes is set out in Article II:4 GPA. For each Party, Appendix I indicates:

- a. in Annex 1, the central government entities whose procurement is covered by the Agreement;
- b. in Annex 2, the sub-central government entities whose procurement is covered by the Agreement;
- c. in Annex 3, all other entities whose procurement is covered by the Agreement;
- d. in Annex 4, the goods covered by the Agreement;
- e. in Annex 5, the services, other than construction services, covered by the Agreement
- f. in Annex 6, the construction services covered by the Agreement; and
- g. in Annex 7, any General Notes.

4.12. Each Party's Appendix I Annexes also specify the minimum threshold values above which procurement is covered by the agreement. To determine whether the measure at issue relates to covered procurement, it is necessary to consider all these aspects.

4.13. Article XXIV:12 of the GPA states that: 'The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.' The panel in *Korea – Procurement* reasoned that this reference to an "integral part" should be treated the same way panels and the Appellate Body treated tariff Schedules which are 'integral parts' of the GATT.² Thus, it follows that participants should consider the Schedules appended to the GPA as treaty language and utilize the customary rules of interpretation of public international law (particularly Articles 31-33 of the Vienna Convention in arguing the scope of Zycron's GPA schedule.

² Panel Report, *Korea – Procurement*, para. 7.9

4.1.1.2.2 Possible arguments for Avilion

4.14. Avilion can argue that the procurement measures - as laid down by the Made in Zycron Initiative read in conjunction with Procurement Directive n.12 – are all under the coverage of the Zycron's GPA Schedule of Commitments. The MIET is included in the government bodies listed in Zycron's GPA Schedules of Commitments, Annex 1. Even if the exact amount cannot be calculated accurately, the value of 280,000,000 Zycronian Dollars (ZD) is the estimated potential value of the procurement contract (1 ZD = 0.13 USD). The value is above the thresholds identified in the Zycron's GPA Schedules of Commitments. The costs of the feasibility study, the manufacturing of the solar power charging points and its installation are covered by the payment of the estimated potential value of the procurement contract (280 000 000 Zycronian Dollars) while the operational costs of the charging stations are covered by the Official Unitary Fee (OUF), which is not included in the potential value of the procurement contract [Correction n.20 and 21]. Note to the Panellists: For further details on the OUF, please see Section 5 of this Bench Memo.

4.15. Annex 5 of Appendix I of Zycron's GPA Schedules includes maintenance and repair services, architectural services, engineering services and integrated engineering services. Annex 4 of Appendix I of Zycron GPA Schedule of Commitments states simply that that "The Agreement covers procurement of all goods procured by the entities listed in Annexes 1 through 3, unless otherwise specified in the Agreement." [Correction A]. Avilion will also have to argue that none of the exceptions provided in Annex 7 to Zycron's GPA Schedules apply. With respect to "for governmental purposes" and "not for commercial sale or resale" the arguments necessary to make this claim may contradict those necessary for other claims Panellists may wish to push participants on the inconsistency of the arguments. .

4.1.1.2.3 Possible arguments for Zycron

4.16. Zycron can argue that the procurement measures do not fall within the coverage of Zycron's GPA Schedule of Commitments as General Notes Annex 7 to Zycron's GPA Schedules of Commitments specifies that: 'The Agreement shall not apply to contracts awarded under: - an international economic integration agreement intended for the joint implementation or exploitation of a project by the signatory States; - an international peace agreement.' Therefore, as the procurement measures are focused on the regulation of the procurement of energy efficient EV charging points exclusively using Solaris and the OTA agreement has the main scope of the integration of the Solaris industry between the Parties, these procurement measures should be excluded from the GPA coverage, via the General Notes Annex 7 to Zycron's GPA Schedules of Commitments. It could be noted that it is irrelevant that the procurement requirements set in Made in Zycron Initiative and Directive n.12 allocate a preference to foreign countries linked to Zycron by an economic integration agreement, namely the OTA (and, in a circular way, they are excluded from the application of the GPA because of the establishment of the OTA)As for Avilion, Zycron's arguments with respect to "for governmental purposes" and "not for commercial sale or resale" may contradict those necessary for other claims Panellists may wish to push participants on the inconsistency of the arguments..

4.1.1.3 Whether the measure is inconsistent with Articles IV:1-2 of the GPA

4.1.1.3.1 Legal Standard and Relevant Jurisprudence

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:

- a. domestic goods, services and suppliers; and
- b. goods, services and suppliers of any other Party.

2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

- a. treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
- b. discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

4.17. The signatories to the GPA agree that, when purchasing goods for their own governmental consumption, they will do so on a non-discriminatory basis from suppliers originating in other signatories of the GPA. More precisely, Article IV of GPA imposes a two-pronged obligation on parties to the GPA.

4.18. First, Article IV:1 (a) aims at ensuring the respect of the national treatment principle: each GPA party must provide “treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers” in the procurement practices covered by the GPA Agreement. Second, according to Article IV:1(b), GPA parties must accord treatment no less favourable to “goods, services and suppliers of any other Party”. Both national treatment and MFN shall be granted immediately and unconditionally within the scope of application covered by the agreement and to “to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party”.

4.19. In the GPA, the standard of the non-discrimination obligation is expressed in terms of “treatment no less favourable”. Typically, participants would and should refer to jurisprudence in other agreements (GATT and GATS) interpreting the same type of national treatment obligations, in particular that less favourable treatment requires that the measures at issue modify the conditions of competition to the detriment of the goods or services of the complaining Member. It is at the discretion of the students to follow the same order of analysis as conducted in the context of Art III:4 GATT (see Section 4.1.2 of this Bench Memo).

4.20. We want to draw the panellists' attention to the fact that there is no reference to the likeness of the procured goods, services, or suppliers in the wording of the GPA. Therefore, the question may

arise whether the non-discrimination standard is to be interpreted differently in the context of the GPA than it is interpreted in the context of the GATT and other covered agreements. One could argue that likeness is implied by the very nature of a procurement exercise (i.e., the goods would have to be like to even be competing against each other for a particular procurement). However, in the literature on the topic it has been argued that the principle of non-discrimination in public procurement has to take into consideration the relevance of the modification of the conditions for competition resulting from the procurement regulatory measures, comparing them to the normal conditions in public and private markets.³

4.1.1.3.2 Possible arguments for Avilion

4.21. Avilion could argue that the eligibility requirements imposed by Directive n.12 on the use of Solaris-products exclusively extracted in Zycron [4.9 Case Facts] consist in a modification of the conditions of competition to the detriment of the goods and services of another GPA Party, Avilion. Avilion argues that the procurement measures impose a local content requirement that excludes its suppliers (namely Charging Queen) from competition despite the requirement, set in the text of the Made in Zycron Initiative as established in the Executive Order of 21 January 2017, that all made in Zycron Laws shall be applied consistent with national and international law.

4.22. Charging Queen, a company from Avilion, includes Solaris as inputs in the production process [Clarification n.18]. Avilion end-users (including Charging Queen) have complained to their government that they have suffered continuous delays and increased costs in the importation process of Solaris from Zycron, due to their inability to obtain the validation of end-user certificates [Case Facts 2.6]. The inability to obtain the validation of end-user certificates to prove the extraction of Solaris from Zycron (or any of the OTA members) will make Charging Queen unable to participate to the procurement competition in compliance with the requirements set in Directive n.12. The requirement set in the Made in Zycron Initiative (namely Sec.2 "Policy"), read in conjunction with Directive n.12, will always exclude the participation of Charging Queen from the procurement competition due to its inability to source the Solaris input exclusively from Zycron.

4.1.1.3.3 Possible arguments for Zycron

4.23. It would be difficult to argue that the procurement requirements are not a form of local content requirement modifying the conditions of competition on the market in favour of domestic producers of Solaris EV charging points. Zycron may want to concede on this element and focus on the issues of coverage of the GPA (in particular the Annex 7 exception to coverage) and the possible justifications under GPA general exceptions. Zycron can also refer to the requirement, set in the Executive Order of 21 January 2017, that all measures falling in the scope of the Made in Zycron Initiative shall be applied consistent with national and international law. It will, however, be difficult to argue that the exclusion of "Charging Queen" did not violate this requirement

4.24. Zycron can argue that the procurement requirements set by the Made in Zycron Initiative, read in conjunction with Directive n.12, do not categorically exclude Charging Queen from the competition. The exception to the LCR set in Directive n.12 allows the possibility to use Solaris sourced outside Zycron from foreign countries linked to Zycron by an international economic integration agreement (like in the case of OTA). What Charging Queen is suffering is the continuous delays and increased

³ Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International 2003) 163.

costs in the importation process of Solaris from Zycron or OTA countries, due to their inability to obtain the validation of end-user certificates to prove the origin of Solaris (Case Facts 2.6). This is something related to the OTA agreement and it has nothing to do with the procurement requirements set in the Made in Zycron Initiative and in Directive n.12.

4.25. Even if it is not explicitly included in the official claims, Zycron could argue that Article X:6 of the GPA⁴ provides context for the understanding that GPA Parties are free to pursue the conservation of natural resources or protect the environment through their procurement and that locally produced products have e.g. a lower carbon-footprint due to reduced transport requirements. However, Zycron can argue that the requirements imposed are not technical regulations but qualification requirements and for this reason Article X:6 GPA is not directly applicable. Students can also try to argue that this is a violation of the prohibition of offsets under Article IV:6 GPA, as involving a *de facto* discrimination against foreign goods. Note to the panellists: the relationship between Article X.6 GPA and the prohibition of non-discrimination set in Article IV GPA has never been clarified, as there is no jurisprudence on the issue and it is still an open question in the literature (for example if it can be used as context).

4.1.1.4 Whether the measure at issue can be justified under Article III:2 GPA - Security and General Exceptions

4.1.1.4.1 Legal Standards and Relevant Jurisprudence

4.26. Article III GPA provides that:

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.

4.27. If not excluded from the GPA coverage, procurement measures resulting in a violation of the principle of non-discrimination can be justified under Article III GPA, e.g. taking into consideration environmental concerns, together with the protection of labour rights and health concerns. Due to the similarity of the wording with Article XX GATT and XIV GATS, the same interpretation of the general exceptions expressly addressed in the subparagraphs and the chapeau may arguably apply.

⁴ Article X:6 GPA provides that: "For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment."

4.28. An important textual difference with Article XX GATT General Exceptions relevant to the case at issue is paragraph (d) of Article III:2, which refers expressly to procurement practices related to “goods or services of persons with disabilities, philanthropic institutions or prison labour”. The wording of the provision opens to a potentially broad interpretation, encompassing discriminatory procurement practices with references to the ILO Convention No. 159 concerning Vocational Rehabilitation of Employment of Disabled Persons (1983), and to the ILO Convention n. 29 on Forced Labour. However, it is quite unclear if an extensive interpretation of other ILO standards can be included, for example going beyond the evolutionary interpretation of forced labour into the concept of prison labour.

4.1.1.4.2 Possible Arguments for Avilion and for Zycron

Already advanced in connection with Article XX GATT 1994 in relation to the subparagraphs and the chapeau of Article III:2 GPA (See Section 4.1.1.4 of this Bench Memo). It is up to the panellist to accept virtually the same arguments or question the students on the possible difference in the legal standards applicable to both general exception provisions.

4.1.2 Whether the measures at issue are inconsistent with Article III:4 of the GATT 1994

4.1.2.1 Legal Standard and Relevant Jurisprudence

4.29. Avilion claims that the procurement requirements established in the ‘Made in Zycron’ Initiative, in Directive n.12 and the March Guideline, are inconsistent with Zycron’s obligations under Article III:4 of the GATT 1994.

4.30. Article III:4 GATT provides, in the relevant part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

4.31. For a measure to be found inconsistent with the national treatment obligation of Article III:4 of the GATT 1994, the following elements must be demonstrated: 1) that the measure at issue is a law, regulation or requirement covered by Article III:4; 2) the imported and domestic products are like products ; and 3) that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.⁵ Each element of this three-tier test of consistency has been extensively discussed in the jurisprudence (even if we will not fully explore it in this bench memo).

4.32. ‘Laws, Regulations and Requirements Affecting ...’ → The national treatment obligation of Article III:4 applies to domestic regulations affecting the sale and use of products. As discussed below, Article III:8(a) of the GATT 1994 explicitly excludes laws, regulations or requirements governing government procurement from the non-discrimination obligation of Article III, provided that the measures meet the requirements set out in that provision. For this reason, the analysis (and the arguments of the parties) conducted in that respect can also be applied in this circumstance.

⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

4.33. Likeness → The Appellate Body considered the meaning of the concept of 'like products' in Article III:4 in *EC – Asbestos*. Having the AB concluded that the determination of 'likeness' is a determination of the nature and extent of a competitive relationship between and among the products at issue, the Appellate Body subsequently noted that the determination of likeness employs four general criteria in analysing 'likeness': (i) the properties, nature and quality of the products; (ii) the end uses of the products; (iii) consumers' tastes and habits – also referred to as consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products⁶. It could be relevant in this case to notice that there have been a number of disputes in which panels have sidestepped the 'likeness' issue and have proceeded on the assumption that there are 'like' products when the measure at issue distinguishes between products solely on the basis of their origin as in the panel in *China – Publications and Audiovisual Products*⁷. The panel in *US – COOL (Article 21.5 – Canada and Mexico)* noted that 'the products at issue can be distinguished solely on the basis on origin' and thereby concluded that the products at issue were like products within the meaning of Article III: 4 of the GATT 1994.⁸

4.34. Less favourable treatment → A measure accords less favourable treatment to imported products where it modifies the conditions of competition in the marketplace to the detriment of the group of imported products as compared to the group of like domestic products. For a measure to be found to modify the conditions of competition in the marketplace to the detriment of imported products, there must be a "genuine relationship" between the measure and the detrimental impact.⁹ A key issue in the present dispute is the precise definition of the concept of a "detrimental impact on the conditions of competition for like imported products". In this case, what a complainant does have to show is that the measure has some adverse effect on the conditions of competition for like imported products and an asymmetrical impact as compared to like domestic products.

4.1.2.2 Possible arguments for Avilion

4.35. 'Laws, Regulations and Requirements Affecting ...' → Avilion can submit that the procurement requirements at issue are governmental measures imposing local content that affect the internal purchase of EV charging points in Zycron within the meaning of Article III:4 of the GATT 1994. More precisely, the procurement requirements set in the Made in Zycron Initiative and in Directive n. 12 are "requirements" as impose compulsory conditions for the eligibility for the participation in the MIET procurement calls. These requirements mandate a "necessary prerequisite" for the use of domestically manufactured Solaris products, through enforceable contractual procurement obligations.

4.36. Likeness → Avilion asserts that the products at issue (the efficient EV charging points containing Solaris) are like, as the only distinguishing feature is the origin. The procurement requirements set out in Directive n.12 – established for the implementation of procurement calls conducted by the MIET under the Made in Zycron Initiative – impose the sole requirement of the exclusive use of Solaris products exclusively produced or manufactured in Zycron.

⁶ Appellate Body Report, *EC – Asbestos* (2001), para. 101.

⁷ Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.1446.

⁸ Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)* (2015), paras. 7.633–7.634.

⁹ Appellate Body Report, *EC – Seal Products*, para. 5.117.

4.37. Less favourable treatment → Avilion could argue that procurement requirements set in the Made in Zycron Initiatives and in Directive n.12 (setting the procurement specifications of the award of contract procured by the MIET) modify the conditions of competition between the manufacturers of EV charging points on the base of the origin of Solaris, granting an advantage to domestic producers sourcing Solaris domestically from Zycron. According to Directive 12, the possibility to participate in the competitive bid for the MIET framework agreement is conditional on the circumstance that the Solaris (essential for the construction of EV charging points) is sourced in Zycron. Even if exceptions are granted, the procurement requirements have a detrimental impact on the competitive opportunities of foreign producers of EV charging points sourcing Solaris outside Zycron, as compared to Zycronian producers be able to source Solaris domestically.

4.1.2.3 Possible arguments for Zycron

4.38. First of all, Zycron should argue that the measures do not fall within the scope of application of Article III:4 GATT, because of the derogation set out in Article III:8 GATT (see Section 4.1.3 of this Bench Memo).

4.39. It would be difficult for Zycron to advance any argument to contest that the Made in Zycron Initiative are "any law, regulation, or requirement affecting internal sale, purchase or use". Even unpublished, soft-law measures such as the March Guideline have been found to be measures within the meaning of Article 3 DSU and thus challengeable in WTO dispute settlement. Similarly, it would be difficult for Zycron not to agree with Avilion that EV charging points and their components manufactured with Solaris domestically sourced in Zycron and those imported from a foreign country are "like products" within the meaning of Article III:4 GATT.

4.40. Less favourable treatment → Zycron could argue that there is no less favourable treatment under Article III.4 of the GATT 1994 because the scope of the domestic content requirements set in Directive 12 read in conjunction with the Made in Zycron Initiative is not absolute. There is nothing in the Made in Zycron Initiative that has the potential to have a detrimental impact on the conditions of competition in the EV charging markets, as the procurement requirements do not completely impede the procurement of EV charging points produced with Solaris outside Zycron. In the case of Solaris not produced in sufficient quantity in Zycron, there is the possibility of allowing foreign EV chargers of a satisfactory quality.

4.41. Moreover, Zycron could argue that there is not a "genuine relationship" between the measure and the alleged detrimental impact on foreign producers. The detrimental effect that Avilion is denouncing is linked to the cumbersome certification process to prove the origin of Solaris from Zycron or from OTA countries and the inability to obtain the validation of end-user certificates. However, this certification process is result of the implementation of the OTA and not resulting from the procurement requirements set in the Made in Zycron Initiative and in Directive n.12.

4.1.3 Whether the measures at issue are covered by Article III:8(a) of GATT 1994

4.1.3.1 Legal Standard and Relevant Jurisprudence

4.42. Zycron claims that the procurement requirements established in the 'Made in Zycron' Initiative, in Directive n.12 and the March 2018 Guideline, are not inconsistent with Zycron's obligations under Article III:4 of the GATT 1994 by virtue of the derogation in Article III:8 of GATT 1994.

4.43. Article III:8 of GATT excludes measures governing government procurement from the ambit of the rest of Article III GATT. Article III:8 GATT provides:

(a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

4.44. Article III:8 GATT, which limits the scope of the national treatment obligation under Article III GATT, has been interpreted by the Appellate Body in two disputes: *Canada – Renewable Energy/Canada – Feed in Tariff Program* and *India – Solar Cells and Solar Modules*. For the first time in *Canada – Renewable Energy*, the AB clarified the interpretation of Article III:8(a) GATT as derogating from the national treatment obligation of Article III:4 GATT¹⁰.

4.45. According to the AB in *Canada - Renewable Energy/Canada - Feed in Tariff Program*, a certain number of requirements should be cumulatively met in order to justifiably invoke the application of Article III:8(a) GATT.¹¹ These are the requirements set by Article III:8(a): 1) the measures in question are "law, regulations or requirements governing procurement"; 2) the entity procuring products is a "governmental agency", 3) the procurement of the products should be done "for governmental purposes", and 4) the product purchased are not procured "with a view to commercial resale or with a view to use in the production of goods for commercial sale." The AB has explained that these requirements are cumulative in nature, and if a measure fails to meet one of those requirements, it will not be exempted from the national treatment obligations of Article III:4 of GATT 1994.

4.46. Article III:8(a) describes the types of measures falling in its scopes as laws, regulations or requirements governing the procurement by governmental agencies of products purchased "for governmental purposes." The AB clarified in *Canada - Renewable Energy/Canada - Feed in Tariff Program* that the term "governmental purposes" is limited to measures concerning products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions.¹² The scope of these functions must be determined on a case-by-case basis.¹³ Moreover, III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm's-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm's length.¹⁴

4.47. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program* and *India – Solar Cells* the AB noted that that the derogation provided for in Article III:8(a) "becomes relevant only if there is discriminatory treatment of foreign products that are covered by the obligations in Article III".¹⁵ Therefore, regarding the application of Article III:8(a) GATT in respect to the "product purchased", in

¹⁰ Appellate Body Report, *FIT-Renewable Energy (2014)*, para. 5.56.

¹¹ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para 5.75.

¹² Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para 5.67.

¹³ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para 5.74.

¹⁴ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para 5.71.

¹⁵ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

order to Article III:8(a) GATT to apply, the product purchased by the government should always be in a competitive relationship with the product discriminated against.

4.48. In *India – Solar Cells*, the AB has further clarified the interpretation of the competitive relationship between the two products in the provision of Article III:8(a) GATT. The AB held that the discriminated product of foreign origin must be either 'like', or 'directly competitive' with or 'substitutable', in order to be in a 'competitive relationship' with the product purchased.¹⁶ In that dispute, India argued the possibility to include inputs and processes of production used in respect of products purchased in the interpretation of Article III:8(a). The AB clarified that "this question arises only after the product subject to discrimination has been found to be like, directly competitive with, or substitutable for - in other words, in a competitive relationship with - the product purchased. In respect of the latter issue, although a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not displace the competitive relationship standard. Under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement".¹⁷

4.1.3.2 Possible arguments for Avilion

4.49. Avilion could contest the applicability of the derogation of Article III:8 GATT to the procurement requirements set by the 'Made in Zycron' Initiative, Directive n.12 and, the March 2018 Guideline on the following basis:

- a. Avilion can argue that the measures at issue are not exempted under Article III:8(a) GATT because this provision does not apply when a government purchases one product but it discriminates against a different product. Avilion can underline that Zycron acquires EV charging points (together with construction and maintenance services) while the product that is subject to local content requirements is the Solaris mineral, i.e. a mere input in the procured product. Thus, Avilion can argue that "the products purchased" by Zycron (EV's charging points) are not in a competitive relationship with the products subject to discrimination (Solaris as input, according to Procurement Directive n.12). This would be similar to the arguments put forward in *Canada – Renewable Energy* with respect to electricity vs electricity generating equipment.
- b. Avilion can argue that the promoting manufacturing growth in the EV sector, as clearly expressed in the GEA setting the objectives of the Made in Zycron Initiative, should not be understood as "governmental purpose" under Article III:8(a) GATT.

4.50. Avilion can argue that the procurement measures are done for commercial resale, where the sellers under Article III:8(a) GATT are both the Zycronian government and the winning bidder of the framework agreement, while ultimately the consumers that use the charging stations are the buyers in this transaction.

¹⁶ Appellate Body Report, *India - Solar Cells*, para 5.22.

¹⁷ Appellate Body Report, *India - Solar Cells*, para 5.24.

4.51. Avilion may further argue that the winning bidder and future charging points operators may generate a profit thanks to the OUF, paid weekly by the government and thanks to the possibility to charge all the users of the charging points apart from the Zycronian EV owners.

4.1.3.3 Possible arguments for Zycron

4.52. In response, Zycron could submit that the government procurement derogation under Article III:8(a) GATT is applicable to the measure at issue and, by virtue of that derogation, the procurement requirements set in the Made in Zycron Initiative and Directive n.12 are not inconsistent with Article III:4 GATT.

4.53. The measures identified by the 'Made in Zycron' Initiative - read in conjunction with Directive n.12 and the March 2018 Guideline - are to be interpreted as procurement measures and therefore not subject to the GATT national treatment discipline.

4.54. Zycron can argue that the Made in Zycron measures qualify as "law, regulations or requirements governing procurement" (contradicting the position of Avilion on Article III:4 GATT) and these procurement activities are conducted "by governmental agencies for governmental purposes and not with a view to commercial resale". Moreover, the MIET is a "governmental agency", an entity performing functions of government and acting for or on behalf of government.

4.55. Zycron can elaborate regarding the nature and the characteristic of the object of the procurement measures at issue (similarly to India's position in *India – Solar Cells*). In particular, Zycron can argue that Solaris is indispensable for the solar power generation of the charging stations to be procured, as it is an integral input of the procured charging system. In light of the objectives set in the GEA and in the Made in Zycron initiative, Zycron can argue that by purchasing energy-efficient charging points, it is effectively purchasing Solaris.

4.56. Zycron can additionally argue that a narrow interpretation of the competitive relationship between the goods procured and their inputs discriminated would narrow down the scope and intent of the provision in Article III:8(a) GATT, which would be an unnecessary intrusion into the exercise of government actions relating to the procurement of energy-efficient public infrastructures.

4.57. Zycron can argue that the availability of public EV charging points and the provision of affordable charging opportunities to all consumers is a legitimate governmental purpose, addressing the challenge of ensuring the sustainable growth in the EV sector and energy security in the country. Zycron can also cite UN Sustainable Development Goals n. 9 and n. 13.

4.58. Zycron can argue that the procurement activities initiated under the Made in Zycron Initiative are not conducted for commercial resale. The purpose of the procurement activities identified by the regulations at issue is to provide public availability of EV charging stations and a free charging service for all Zycronian owners of EV cars. The winning bidder is operating the charging facilities in cooperation with MIET and it is not free of charge in excess or for profit the charging facilities.

4.1.4 Whether the measures at issue are inconsistent with Zycron's obligations under Article I of GATT 1994

4.1.4.1 Legal Standard and Relevant Jurisprudence

4.59. Avilion submits that the procurement requirements set out in the Made in Zycron Initiative, read in conjunction with Directive n.12 and the March Guideline, are inconsistent with Article I:1 of the GATT 1994 because they grant an advantage to OTA countries that is not immediately and unconditionally granted to Avilion.

4.60. Article I:1 GATT provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

4.61. To establish an inconsistency with Article I:1 the following elements must be demonstrated: 1) the measure at issue falls within the scope of application of Article I:1; 2) the imported products at issue are "like" within the meaning of Article I:1; 3) the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; 4) that advantage is not accorded "immediately" and "unconditionally" to "like" products originating in the territory of all WTO Members.¹⁸ The AB has emphasized that Article I:1 protects expectations of equal competitive opportunities for like imported products from all WTO Members.¹⁹ It follows that Article I:1 does not prohibit Members from attaching any conditions to the receipt of an "advantage"; instead, it prohibits only conditions that have a detrimental impact on the competitive opportunities for products imported from a Member as compared to like products from another country.

4.62. In the context of the discussion on the exclusion of government procurement from the GATT, the issue has been raised whether government procurement also constitutes an exception from the obligation to observe MFN treatment. Article I of the GATT does not contain provisions limiting the scope of its application equivalent to Article III:8 GATT. The panel in *EC – Commercial Vessels* stated that the disciplines of the GPA provide an exemption from *both* national treatment and MFN obligations.²⁰ Looking into the negotiating history in the context of the ITO Charter, that panel concluded that, with respect to government procurement, WTO members aimed to introduce a carve-out from both the MFN and the national treatment obligation, based on the inclusion of the phrase "all matters referred to in paragraphs 2 and 4 of Article III." The Panel concluded that "It is noteworthy in this regard that in a discussion on draft Article 18.8(a) of the Havana Charter corresponding to Article III:8(a), it was observed at a meeting in February 1948 that: "... the Sub-Committee had

¹⁸ Panel Report, *EU – Energy Package*, para. 7.236-237

¹⁹ Appellate Body Reports, *EC – Seal Products (2014)*, para. 5.87.

²⁰ Panel Report, *EC – Commercial Vessels*, paras 7.81-7.83.

considered that the language of paragraph 8 would except from the scope of Article 18 [national treatment] and hence from Article 16 [MFN treatment], laws, regulations and requirements governing purchases effected for governmental purposes where resale was only incidental. ...” This suggests that negotiators understood that the reference to government procurement in Article 18.8(a) would also apply in the context of the MFN clause (Article 16). Thus, the relevant drafting history that we are aware of shows that the exclusion of government procurement from the national treatment article would also apply to the MFN clause. (emphasis in the original).²¹ Panellists may wish to push participants on the relevance of negotiating history and where it fits in within the VCLT structure for interpretation such that the Panel could resort to it.

4.1.4.2 Possible arguments for Avilion

4.63. On the basis of the lack of a provision equivalent to Article III:8 GATT, Avilion could argue that Article I:1 GATT does apply to the procurement requirements at issue and request to proceed with the analysis under Article I:1.

4.64. Avilion could argue that the procurement measures are covered by Article I:1 GATT as “requirements” within the meaning of Article III:4 of the GATT 1994, therefore it is a measure covered by Article I:1 (recall that Article I:1 applies to “all matters referred to in paragraphs 2 and 4 of Article III”).

4.65. Avilion could argue that the Solaris products originated in Zycron or in OTA countries are like the Solaris products manufactured in Avilion, on similar basis as argued under Article III:4 GATT.

4.66. Procurement Directive n.12 grants an advantage to the countries linked to Zycron by an economic integration agreement, in particular OTA, granting them a margin of preference in the award of the procurement contracts under the MIET framework agreement. This advantage is not granted unconditionally and immediately to like products from Avilion.

4.67. The procurement requirements set in Directive n.12 have a detrimental impact on the competitive opportunities on imported products from Avilion.

4.1.4.3 Possible arguments for Zycron

4.68. Zycron could argue that Article I:1 GATT does not apply to the procurement requirements at issue, on the basis of the same reasoning raised in relation of Article III:8 GATT.

4.69. Regarding the likeness test, Zycron could try to argue that the requirement of sourcing Solaris products from countries linked to an international economic agreement is associated to the strategic sensitivity that the extraction of Solaris (and the associate possible military use) has in many countries. The OTA has the main object to prevent the use of Solaris for military purposes and avoid conflicts in the management of Solaris resources. For this reason, the end-user certification from OTA countries will provide to a significant variable in the differentiation of the use of Solaris (non-military Solaris). In this case, the final consumer of Solaris products is Zycron government.

²¹ Panel Report, *EC – Commercial Vessels*, fn 205.

4.70. It would be difficult for Zycron not to agree with Avilion that Directive n.12 grants an advantage to the products originating from a specific group of countries, in this case Solaris exporting countries that signed an economic integration agreement with Zycron (OTA).

4.1.5 Whether the measures at issue can be justified under Article XX of GATT 1994

4.1.5.1 Zycron's legal claim

4.71. Zycron could argue that, even if the procurement requirements set in the Made in Zycron Initiative read together with Directive 12 and the March Guideline were found to be inconsistent with Articles I:1 or III:4 of the GATT 1994, it would still be justified under Article XX GATT.

4.72. The procurement requirements could be justified under Article XX(a) as necessary to protect public morals or under Article XX(b) as necessary to protect human health, animal health or the environment; by protecting the environment under Article XX(g) as relating to the conservation of exhaustible natural resources; or under Article XX(j) as essential to the acquisition or distribution of products in general or local short supply.

4.1.5.2 Legal Standard

4.73. Article XX GATT: General Exceptions, provides, in relevant part:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(...)

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(...)

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. (...)”

4.1.5.3 Relevant Jurisprudence

4.74. The assessment of a justification under Article XX involves a two-step analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, and then analysed for consistency with the chapeau of Article XX.²²

4.75. A provisional justification under one of the subparagraphs requires that the measure addresses the particular interest specified in that paragraph and that there be a “sufficient nexus” between the measure and the interest protected”. In the context of subparagraphs (a) and (b), the measure must be “necessary” to protect the particular interest at stake and in the context of subparagraph (j) the measure must be “essential”. In *EC – Seal Products*, the AB reaffirmed its finding in *Korea – Various Measures on Beef* that a “necessity” analysis involves a process of “weighing and balancing” a series of factors, including the importance of the objective pursued by the measure, the contribution of the measure to that objective, and the measure’s trade restrictiveness.²³ A comparison between the challenged measure and reasonably available alternative measures must be undertaken (such a comparison might be unnecessary where the measure is not trade restrictive or makes no contribution to the identified objective).²⁴ While the burden of proving the necessity of a measure rests on the responding party who invokes the exception, a complaining party must identify reasonably available alternative measures that the responding party could have taken. Given the structure of the moot and the rules that rebuttals may only address what was stated by the complainant in the case in chief, complaining parties should be urged by the panellists to raise any alternatives in their opening argument and not in the rebuttal.

4.1.5.3.1 Article XX(a) GATT - necessary to protect public morals

4.1.5.3.1.1 Relevant Jurisprudence on Article XX(a) GATT

4.76. The Panel in *China – Publications and Audiovisual Products* recalled that “the content and scope of the concept of ‘public morals’ can vary from Member to Member, as they are influenced by each Members’ prevailing social, cultural, ethical and religious values.”²⁵ In *EC – Seal Products*, the Appellate Body emphasized that Members must be given some scope to define and apply for themselves the concept of public morals according to their own system and values. Moreover, in *Colombia – Textiles*, the Appellate Body held that an Article XX(a) analysis proceeds in two steps. First, the measure must be “designed” to protect public morals. Second, the measure must be “necessary” to protect such public morals. With respect to the “design” of the measure, there must be a relationship between an otherwise GATT-inconsistent measure and the protection of public morals, i.e. the measure must “not be incapable” of protecting public morals

4.1.5.3.1.2 Possible Argument for Zycron on Article XX(a) GATT

4.77. Zycron could argue that, if found inconsistent with its GATT obligations, the Made in Zycron Initiative, read in conjunction with the Procurement Directive 12 and Guideline, is “necessary to protect public morals” within the meaning of Article XX(a) GATT on the following basis:

²² Appellate Body Reports, *EC – Seal Products*, para. 5.185.

²³ Appellate Body Reports, *EC – Seal Products*, paras. 5.213-5.214

²⁴ Appellate Body Report, *US – Gambling*, paras. 309ff.

²⁵ Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

4.78. Objective → Zycron could claim that the protection of labour rights and in particular the prohibition of child labour is a central part of public morals in the country. The existence of public moral concerns over labour rights in Zycron is reflected by the public indignation for the labour conditions on the Solaris mines that led to the 2018 March Guideline. Moreover, following the public indignation resulting from this dramatic episode, Zycron's government officially expressed its intention to sign the ILO Conventions soon and to adjust all domestic policies to them.

4.79. Zycron's administrative instrument that focuses the protection of labour right consideration is the 23 March 2018 Guideline, which calls for 'the observance of the environmental, social and labour law provisions at the relevant stages of the procurement procedure'. The March Guideline should be read in conjunction with Directive n.12 in the context of the procurement activities issues under the GEA and Made in Zycron Initiative. In particular, the Guideline states that 'Zycron's contracting authorities shall take into consideration the compliance of the supplier with domestic and international obligations in the fields of environmental, social, and labour law in determining whether to award contracts or purchase goods and services from that supplier'.

4.80. Contribution → The implementation of the March Guideline read in conjunction with Directive 12 effectively lead to the exclusion of Charging Queen from the procurement competition. Charging Queen has a well-documented poor record of labour protection, as emerged in the December 2017 scandal relating to its hiring of 33 underage workers that died trapped in a collapsed Solaris mine. This terrible accident was widely reported in the international media, and it has triggered a public debate in Zycron about working conditions in Solaris mines.

4.81. Trade restrictiveness → The March Guideline has the legal status of a soft law instrument that is asking for the enforcement of labour standards represent the least trade restrictive regulatory instrument to take into consideration the enforcement of labour rights and minimising the trade distortive effects. For this reason, Zycron could argue that the procurement requirements are no more trade restrictive than necessary to enforce compliance with its requirements.

4.1.5.3.2 Article XX(b) GATT - necessary to protect human, animal or plant life or health

4.1.5.3.2.1 Relevant Jurisprudence on Article XX(b) GATT

4.82. In *Brazil – Retreaded Tyres*, the Appellate Body explained that a "necessity" assessment under Article XX(b) entails an analysis of all relevant factors: "In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued." Moreover, the Appellate Body in *Brazil – Retreaded Tyres* held that the weighing and balancing exercise is a "holistic operation" that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually.²⁶

²⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para.182.

4.1.5.3.2.2 Possible Arguments for Zycron on Article XX(b) GATT

4.83. Zycron could argue that the procurement requirements set in the Made in Zycron Initiative, read together with Procurement Directive n.12 and the March Guideline, are “necessary to protect human, animal or plant life or health” within the meaning of Article XX(b) on the following basis:

4.84. Objective → The procurement requirements set in the Made in Zycron Initiative, read together with Directive n.12 and the March Guideline, have been established to implement the objectives set in the GEA by the Madrugada government. The GEA that has the main goal of reducing air pollution and incentivise the development of electric transport infrastructures as a pillar of Zycron’s support for the UN Sustainable Development Goals (SDGs) of 25 September 2015. In particular, the GEA explicitly cites Goal 3 (Ensure healthy lives and promote well-being for all at all ages) and Goal 13 (Take urgent action to combat climate change and its impacts). Zycron could refer to the fact that the WTO has endorsed in various declarations the importance of trade to achieve SDGs.²⁷

4.85. Contribution → The procurement requirements at issue contribute to these objectives as they enforce the procurement of the construction and management of solar-powered and energy-efficiency EV charging stations, exclusively using Solaris. As results of the efforts to electrifying transport in Zycron, the enactment of the GEA resulted in an increased demand of EVs in the country, drastically reducing the individual use of petrol and diesel cars, and resulting into a reduction of their associated GHG emission.

4.86. Trade restrictiveness → The Made in Zycron Initiative is not more trade restrictive than necessary to enforce compliance with its requirements.

4.1.5.3.3 Article XX(g) GATT - relating to the conservation of exhaustible natural resources

4.1.5.3.3.1 Relevant Jurisprudence on Article XX(g) GATT

4.87. Three aspects of Article XX(g) GATT are worth considering in the analysis: the interpretation of the term “conservation of exhaustible natural resources”, the clarification of the meaning “relating to” and the requirement “made effective in conjunction with”. In *US – Shrimp*, the Appellate Body addressed the meaning of the term “exhaustible natural resources” contained in Article XX(g) and it emphasized the need for a dynamic interpretation of the term “exhaustible”, noting the need to interpret this term “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment” ... not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources.”²⁸

4.88. In interpreting the term “relating to” under Article XX(g), the Appellate Body in *US – Gasoline* noted that all the parties and participants to the appeal agreed that this term was equivalent to “primarily aimed at”. Moreover, in *China – Rare Earths*, the Appellate Body held that the term “relating

²⁷ WTO, Mainstreaming trade to attain the Sustainable Development Goals (WTO, 2018) available at https://www.wto.org/english/res_e/booksp_e/sdg_e.pdf

²⁸ Appellate Body Report, *US – Shrimp*, paras. 128-131.

to" requires "a close and genuine relationship of ends and means" between that measure and the conservation objective of the Member maintaining the measure.²⁹

4.89. In *US – Gasoline*, the Appellate Body described the term "measures made effective in conjunction with" as a "requirement of even-handedness in the imposition of restrictions"³⁰ and the Appellate Body in *China – Rare Earths* held that to comply with the "made effective" clause in Article XX(g), the Member concerned must impose a "real" restriction on domestic production or consumption that reinforces and complements the restriction on international trade.³¹

4.1.5.3.3.2 Possible Arguments for Zycron on Article XX(g) GATT

4.90. Zycron could argue that the procurement requirements set in the Made in Zycron Initiative, read together with Procurement Directive n.12 and the March Guideline, are measures "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g) on the following basis:

4.91. Objective → Zycron could argue that the Made in Zycron Initiative is aiming at the conservation of exhaustible natural resources, quoting the AB in *US – Gasoline* found that clean air was an exhaustible natural resource. The Made in Zycron Initiative has been established to implement the objective set in the GEA by the Madrugada government that has the main goal of reducing air pollution and transport-related CO2 emissions in Zycron through electrifying road transport. Road transport makes a significant contribution to emissions of all the main air pollutants (as different WHO and UN studies can show).

4.92. Contribution → The procurement requirements at issue contribute to these objectives as they enforce the procurement of the construction and management of solar-powered and energy-efficiency EV charging stations, exclusively using Solaris. As results of the efforts to electrifying transport in Zycron, the enactment of the GEA resulted in an increased demand of EVs in the country, drastically reducing the individual use of petrol and diesel cars, and resulting into a reduction of their associated emission.

4.93. Trade restrictiveness → The Made in Zycron Initiative is not more trade restrictive than necessary to achieve the environmental policy objectives.

4.1.5.3.4 Article XX(j) GATT - essential to the acquisition or distribution of products in general or local short supply

4.1.5.3.4.1 Relevant Jurisprudence on Article XX(j) GATT

4.94. In *India – Solar Cells*, the Appellate Body recognized that this was the first case that the Appellate Body had been called upon to interpret Article XX(j). The Appellate Body considered that the analytical framework for the "design" and "necessity" elements of the analysis contemplated under Article XX(d) was relevant *mutatis mutandis* also to Article XX(j). In particular, in *India – Solar Cells*, the AB clarified the term 'essential' in Article XX(j) in light of the legal threshold of the necessity analysis under Article XX(d). The AB held that the same "necessity" analysis under Article XX(d) is relevant in assessing

²⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.94.

³⁰ Appellate Body Report, *US – Gasoline*, p. 20.

³¹ Appellate Body Reports, *China – Rare Earths*, paras. 5.93-5.94.

whether a measure is "essential" within the meaning of Article XX(j): "Having said this, we recall that a 'necessity' analysis under Article XX(d) involves a process of 'weighing and balancing' a series of factors. We consider that the same process of weighing and balancing is relevant in assessing whether a measure is 'essential' within the meaning of Article XX(j). In particular, we consider it relevant to assess the extent to which the measure sought to be justified contributes to: 'the acquisition or distribution of products in general or local short supply'; the relative importance of the societal interests or values that the measure is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken."³² Here the participants could be questioned about the concept of "essential" in comparison with the standard of "necessary".³³

4.95. Referring to the AB report in *India – Solar Cells*, the Panel in *EU – Energy Package* clarified that, in order to be justified under Article XX (j), the following factors should be taken into consideration: (i) the measure is "designed" to address "the acquisition or distribution of products in general or local short supply"; and (ii) the measure is "essential" to the acquisition or distribution of products in general or local short supply. Moreover ... that the measure must "be consistent with the principle that all Members are entitled to an equitable share of the international supply of the products concerned"; ".³⁴ Finally, relying on the AB Report in *India – Solar Cells*, the Panel in *EU – Energy Package* added a temporal dimension and clarified that the products at issues should be "presently in short supply" and not simply that they may become in short supply in the future. In essence, the panel held that (j) is not about preventing a situation of short supply, but rather addressing one that already exists.

4.1.5.3.4.2 Possible Arguments of Zycron on Article XX(j) GATT

4.96. Zycron could argue that the procurement requirements contained in the Made in Zycron Initiative, read together with Procurement Directive n.12 and the March Guideline, are measures "essential to the acquisition or distribution of products in general or local short supply" within the meaning of Article XX(j) on the following basis:

4.97. Objective → The procurement measures at issue aim at defining the requirements for the procurement of the construction of EV energy-efficient charging points exclusively using Solaris. Students can interpret the concept of "local short supply" differently depending on what they identify as the product in short supply. On one hand, they can argue that is Solaris in short supply. On the other hand (similarly to the position of India in *India –Solar Cells*), they can argue that the lack of domestic manufacturing capacity of EV charging products to satisfy the demand is in "general or local short supply" within the meaning of Article XX(j).

4.98. If arguing that the lack of manufacturing capacity of EV charging points in Zycron represents a situation of local and general short supply, Zycron could refer to the fact that the market of EV batteries and charging points has been traditionally dominated by a very limited number of manufacturers, led by Charging Queen incorporated in Avilion. The lack of domestic manufacturers

³² Appellate Body Report, *India – Solar Cells*, para. 5.63

³³ The AB did not say that 'necessary' and 'essential', but that the word 'essential' is defined as '[a]bsolutely indispensable or necessary' and that: The word 'essential' in turn is defined as '[a]bsolutely indispensable or necessary'. The plain meaning of the term thus suggests that this word is located at least as close to the 'indispensable' end of the continuum as the word 'necessary' Appellate Body Report, *India – Solar Cells* (2016), para. 5.62

³⁴ Panel Report, *EU – Energy Package*, 7.247 – 7.248

and the vulnerability of the risks associated to a market dominated by very few players, shows that a general and local supply shortage exists and that Zycron is facing the risks associated with the high dependence on imports.

4.99. If arguing that Solaris is the mineral in short supply, Zycron may stress the fact that Solaris is mainly present in the Matte Peninsula, where Tlön has the world's largest reserves of Solaris. Moreover, Zycron could argue that the procurement requirements aim to regulate the public demand of Solaris-made charging stations in the geographical market of Solaris, with a significant effect on the (future) available supply of Solaris in this market.

4.100. Zycron asks that the term "short supply" is examined in the context of the overall objectives of energy efficiency and sustainable growth set in the GEA at the base for the acquisition of EV charging stations. Moreover, Zycron may suggest to interpret Article XX(j) GATT in consonance with the preamble of the Marrakesh Agreement Establishing the World Trade Organization (as context under VCLT Article 31) which refers to the "optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development".

4.101. Contribution → The procurement requirements are essential to this objective, as stated in the preamble of the Made in Zycron Initiative, by ensuring that the procured infrastructure of EV charging points in the territory are developed only with the use of products made of Solaris sourced in Zycron. This procurement requirement will boost the local manufacturing of EV charging points and the development of emerging technology for the efficient use of Solaris in charging stations.

4.102. Trade restrictiveness → Zycron can argue that the requirements set in the Made in Zycron Initiative are not more trade restrictive than necessary to enforce these objectives as Directive n.12 even provides some flexibility in the procurement of Solaris-products, extending the possibility to source them in foreign countries linked to Zycron by an international economic integration agreement.

4.1.5.3.4.3 Possible arguments for Avilion

4.103. Apart from rebutting Zycron's claims, Avilion will need to identify alternative measures that Zycron could have taken instead of adopting the procurement requirements. These alternative measures must:

- a. be less trade restrictive than the requirements of the Made in Zycron Initiative, for example they could involve subsidy schemes for the development of Solaris-based technology to enhance the efficiency in the charging infrastructures or directed to support domestic manufacturers of EV charging stations. Subsidy schemes would be less restrictive of trade than the procurement requirements set in the Made in Zycron Initiative, as they would not distort the competition and best-value for money in the procurement process. Moreover, Avilion could suggest that the labour right concerns could also be addressed with labelling schemes highlighting the compliance of ILO standards in the Solaris mining sector.

- b. achieve at least the same level of contribution to the objectives pursued by Zycron as the challenged procurement requirements, depending on how exactly Zycron formulates its objectives.
- c. be reasonably available to Zycron, i.e., they must be enforceable, technologically and administratively feasible.

4.1.5.3.5 Article XX GATT Chapeau

4.1.5.3.5.1 Relevant Jurisprudence

4.104. The function of the chapeau is “to prevent the abuse or misuse of a Member’s right to invoke the exceptions contained in” Article XX.³⁵ As clarified by the AB on various occasions, the *chapeau* of Article XX imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have been provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX.

4.105. In *EC – Seal Products*, the AB noted that the examination of whether a measure is applied in a manner that would constitute a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” necessitates, as a first step, an assessment of whether the “conditions” prevailing in the countries between which the measure allegedly discriminates are “the same”. In this respect, the AB clarified that only “conditions” that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the *chapeau*.

4.106. Where countries in which the same conditions prevail are differently treated, the question arises whether the resulting discrimination is “arbitrary or unjustifiable”. This analysis “should focus on the cause of the discrimination, or the rationale put forward to explain its existence. Thus, [o]ne of the most important factors’ in the assessment of arbitrary or unjustifiable discrimination is the question of whether “the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”³⁶

4.1.5.3.5.2 Regarding Defences under Article XX GATT for Avilion

4.107. Avilion could submit that the application of the procurement requirements set in the Made in Zycron Initiative, read in conjunction with Directive n.12 and the March Guideline, do not meet the requirements of the chapeau of Article XX. Avilion could argue that the procurement measures set in the Made in Zycron Initiative do not meet the requirements of the chapeau of Article XX on the following basis:

4.108. Same conditions prevailing in different countries → Avilion could argue that the conditions prevailing in both countries (Zycron and Avilion) are the “same” in all relevant respects. Given that Zycron is seeking to justify the Made in Zycron requirements under Art XX(a), Art XX(b) and Art XX (g), it follows that the condition relating to the potential labour and environmental impact, in particular

³⁵ Appellate Body Report, *US – Shrimp*, paras. 119-120.

³⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230.

the risks associated to human health and the consequences on the level of protection of labour rights, are relevant to the circumstance of the case. Moreover, regarding the justification under Art XX(j), both countries even if not located inside the Matte Peninsula, are countries where there is availability of Solaris. For this reason, there is no evidence that the risks that Zycron alleges to exist are different across the countries concerned.

4.109. Rational relationship → Avilion can claim that the local content requirements imposed in the Made in Zycron Initiative are not rationally related to the objectives of sustainable economic development, fighting air pollution and protection of labour rights as identified by Zycron. To the contrary, eliminating the possibility of Avilion's firms to participate in the procurement competition and to provide efficient EV charging points to Zycron fundamentally undermines the achievement of these objectives.

4.110. Avilion can argue that the objectives actually pursued by the Made in Zycron Initiative is the growth of the domestic manufacturing sector of EV charging points and the creation of jobs in this strategic industrial sector linked to the mining activities of Solaris, as clearly stated in the Executive Order of January 2017 launching the initiative.

4.1.5.3.5.3 Possible arguments for Zycron

4.111. In response, Zycron could argue the following:

- a. Zycron could try to argue that the conditions prevailing in the countries are different on the basis that Avilion, even if it has Solaris mines, is not situated in the Matte Peninsula and cannot rely on a sufficient extraction of Solaris. Moreover, the risks associated to the sustainability of Solaris mining are very different in Avilion, a country that is not part of the OTA agreement, aiming at ensuring the peaceful and sustainable control of Solaris mining.
- b. Even if the conditions prevailing in the respective countries were found to be the same, the different treatment does not amount to an "arbitrary or unjustifiable discrimination" as the measure provides enough flexibility to minimise its distortive impact on trade. The local content requirement of using Solaris produced or manufactured in Zycron is not resulting in an absolute prohibition to import Solaris products from Avilion. In case of insufficiency of domestic sources, only a preference is given to parties of an integration agreement like OTA, which is open to Avilion to be signed.

Note to the Panellists: For any reference in the argument to Article XXIV GATT, please see Section 6.2.

5 ON THE IMPLEMENTATION OF THE 'OFFICIAL UNITARY FEE' (OUF) ESTABLISHED BY ZYCRON IN THE GEA, AS WELL OF THE ACCUMULATION OF ORIGIN RULE IN THE OTA

5.1 General Aspects

5.1. Two challenged measures fall within Avilion's claims under the SCM Agreement. More precisely, Avilion claims that the implementation of the 'official unitary fee' (OUF) established by Zycron in the

GEA, as well of the accumulation of origin rule in the OTA, are subsidies within the meaning of Article 1.1, and are in violation of Article 3.1(b) of the SCM Agreement.

5.2. In order to make these claims, Avilion must show that:

- a. each of the measures represents a 'financial contribution by a government or any public body' under SCM Article 1.1(a)(1) or 'income or price support' within the meaning of SCM Agreement Article 1.1(a)(2)
- b. each of the measures confers a 'benefit' within the meaning of SCM Agreement Article 1.1(b); and
- c. the OUF and the foregone customs duties are 'specific' as they are inconsistent with SCM Agreement Article 3.1(b) because these subsidies are contingent on the use of domestic over imported goods.

5.2 Existence of a Subsidy

5.3. The Panel in *US – Export Restraints* held that: “Article 1.1 makes clear that the definition of a subsidy has two distinct elements (i) a financial contribution (or income or price support), (ii) which confers a benefit.”³⁷

5.4. Under Article 1.1(b), a subsidy is deemed to exist only if the financial contribution confers a 'benefit' on the recipient. In *US – Carbon Steel (India)*, the Appellate Body noted that “Article 1.1 of the SCM Agreement stipulates that a 'subsidy' shall be deemed to exist if there is a 'financial contribution by a government or any public body' and 'a benefit is thereby conferred'”.³⁸ In *Brazil – Aircraft*, the Appellate Body emphasized that “a 'financial contribution' and a 'benefit' [are] two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists”.³⁹

5.2.1 Legal Standard

5.5. Under Article 1 of the SCM Agreement, a subsidy shall be deemed to exist if:

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:
 - (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

³⁷ Panel Report, *US – Exports Restraints*, para. 8.20.

³⁸ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.8.

³⁹ Appellate Body Report, *Brazil – Aircraft*, para. 157.

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

5.6. In turn, Art. XVI of GATT provides, in its relevant part (emphasis added):

Section A — Subsidies in General

1. If any contracting party grants or maintains any subsidy, including **any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory**, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. (...)

Section B — Additional Provisions on Export Subsidies

2. The contracting parties recognize that **the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.**

3. **Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products.** (...)

Ad Article XVI

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

(...)

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such

processing as is customarily required to prepare it for marketing in substantial volume in international trade.

5.2.2 Relevant Jurisprudence

5.7. The Appellate Body found, in *Japan – DRAMs (Korea)* that the meaning of "funds" includes not only money, but also financial resources and other financial claims more generally.⁴⁰ Furthermore, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body held that the phrase "e.g. grants, loans, and equity infusion" in Article 1.1(a)(1)(i) represents illustrative examples of direct transfers of funds:

[T]he fact that the words 'grants, loans, and equity infusion' are preceded by the abbreviation 'e.g.', indicates that they are cited as examples of transactions falling within the scope of Article 1.1(a)(1)(i). **These examples, which are illustrative, do not exhaust the class of conduct captured by subparagraph (i).** The inclusion of specific examples nevertheless provides an indication of the types of transactions intended to be covered by the more general reference to 'direct transfer of funds'.⁴¹ (emphasis added)

5.8. The Appellate Body in *US – Large Civil Aircraft (2nd complaint)* stated that a "direct transfer of funds" in subparagraph (i) captures "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient". Based on the examples in subparagraph (i), the Appellate Body elaborated:

It is clear from the examples in subparagraph (i) that **a direct transfer of funds will normally involve financing by the government to the recipient.** In some instances, as in the case of grants, the conveyance of funds will not involve a reciprocal obligation on the part of the recipient. In other cases, such as loans and equity infusions, the recipient assumes obligations to the government in exchange for the funds provided. Thus, the provision of funding may amount to a donation or may involve reciprocal rights and obligations.⁴² (emphasis added)

5.9. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body summarized that a determination of "benefit" under Article 1.1(b) of the SCM Agreement seeks to identify whether the financial contribution has made "the recipient 'better off' than it would otherwise have been absent that contribution".⁴³ The Appellate Body has further explained that whether a benefit has been conferred should normally be determined by assessing whether the recipient has received the financial contribution on terms more favourable than those available to the recipient in the market.⁴⁴

5.10. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* considered whether it would be appropriate to incorporate an adjustment to represent normal fees and charges for the calculation of a market benchmark to determine whether the measures at issue conferred a "benefit". The Panel stated:

⁴⁰ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 250.

⁴¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614. See also Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251

⁴² Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617.

⁴³ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 635 – 636, 662, and 690

⁴⁴ Appellate Body Report, *Canada – Aircraft*, para. 157.

In our view, it is not necessary that any fees charged for the lending at issue be 'analogous' to the commercial fees charged by a market lender in order for it to be appropriate to include such fees into the relevant market benchmark. Indeed, such an approach would neglect the potentially advantageous waiver of any such fees that might be relevant to a benefit analysis.

We therefore consider that, in principle, a difference between the sums that the market would have generally charged by way of normal fees and expenses for comparable financing to LA/MSF, and the amounts, if any, charged by the relevant member State for LA/MSF financing, should be factored into a consideration of whether a benefit has been conferred.⁴⁵

5.11. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body noted the implications of the characterization of a transaction under Article 1.1(a) of the SCM Agreement for the determination of whether a benefit has been conferred:

"[T]he characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted. For instance, the context provided by Article 14 of the SCM Agreement presents different methods for calculating the amount of a subsidy in terms of benefit to the recipient depending on the type of financial contribution at issue. However, although different characterizations of a measure may lead to different methods for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a 'financial contribution' or 'any form of income or price support' has conferred a benefit to the recipient."⁴⁶

5.2.3 Possible Arguments for Avilion

5.12. Avilion argues that the measures established by Zycron in the GEA, in particular the OUF, as well as the accumulation of origin in the OTA, fall under the definition of subsidies within the meaning of Article 1.1 of the SCM Agreement.

5.2.3.1 Regarding the OUF

5.13. Avilion could argue that the official unitary fee (OUF) falls under the definition of subsidies within the meaning of Article 1.1(a) of the SCM Agreement as the official charging fee should be considered a financial contribution.

5.14. Article 1.1(a)(1) envisages three different possibilities as regards the nature of the bodies involved in making a financial contribution. First, a government in its own right may directly make a financial contribution. Second, a public body may make the financial contribution. Third, a private body is entrusted or directed by the government to give the financial contribution. This would be clearly the first scenario of a financial contribution.

⁴⁵ Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras.6.426-6.247.

⁴⁶ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.130.

5.15. To ensure easy access to the electricity network the Going Electric Act (GEA) has set the primary objective of increasing the number of public EV charge points along all highways and some provincial roads within the next 20 years. As defined in the GEA, the goal of the act is to have charging points every 3 kilometres along all highways, and every 50 km on busy provincial roads (Case Facts 3.4). Moreover, the financial contribution provided by the OUF is not covered by the amount of the procurement contract, but an additional financial contribution provided to the winning bidder (Clarification n. 20).

5.16. The same GEA stipulates that charging stations will remain state-owned and that after a bidding process, charging stations' private operators will be awarded a contract valid for a 10-year period, renewable for additional 10 years. The GEA stipulates that the charging points' operators will obtain the OUF, in order to cover the costs of operation of the stations and reasonable profit, and to make sure that individual consumers will have access to charging stations. However, the OUF is paid weekly by the government, and calculated considering an average of cars using the charging stations daily and the amount of electricity charged in each vehicle. As important evidence to consider the OUF as a subsidy, it is important to note that Zycron guarantees a minimum weekly fee, even if no cars have used the charging stations in a week (see Case para 4.6). The OUF would be then a subsidy under Article 1.1(a)(1)(i) of the SCM Agreement as it is a financial contribution paid by directly a government (Zycron's Ministry of Infrastructure and Electric Transport - MIET).

5.17. In *US – FSC*, the Appellate Body held that in determining if revenue “otherwise due” has been foregone, a comparison must be made between the revenue actually raised and the revenue that would have been raised “otherwise”. The Panel and the Appellate Body agreed that the basis of comparison in determining what would otherwise have been due “must be the tax rules applied by the Member in question”.⁴⁷ This involved examining the situation that would have existed but for the measure in question and determining whether there would have been a higher tax liability in the absence of the measure.⁴⁸

5.18. In *Canada – Autos*, the Appellate Body found that foregoing of revenue “otherwise due” involves giving up an entitlement to raise revenue that it could ‘otherwise’ have raised in comparison to a ‘defined, normative benchmark’. In that case, it was Canada providing an exemption from its normal MFN duty for motor vehicles. Thus, the normative benchmark was the regular MFN duty, and the revenue foregone was the difference between that duty and the zero duty actually charged.⁴⁹

5.19. In *EU – PET (Pakistan)*, the Appellate Body expanded on the concept of the normative benchmark when it noted that the “comparison under Article 1.1(a)(1)(ii) should be between the rules of taxation applied by the Member concerned to the alleged subsidy recipients, on the one hand and the rules of taxation applied by the same Member to comparably situated taxpayers that are not recipients of the alleged subsidy, on the other hand”. After recognizing that governments generate revenues through the imposition of duties or taxes, the Appellate Body noted that the “exemption from, or the remission of these duties or taxes, such as those referred to in paragraphs (g), (h) and (i)

⁴⁷ Appellate Body Report, *US – FSC*, para. 90.

⁴⁸ Panel Report, *US – FSC*, para. 7.45.

⁴⁹ Appellate Body Report, *Canada – Autos*, para. 91.

of Annex I of the SCM Agreement, may be found to meet the definition of government revenue foregone in Article 1.1(a)(1)(ii) of the SCM Agreement”.⁵⁰

5.2.3.2 Regarding the accumulation of origin rules

5.20. Avilion could argue that as a consequence of the implementation of Zycron Customs Regulation No. 50, adopting customs regulations to implement Articles 3.1 and 3.2 of the OTA, after qualifying under the accumulation of origin rule in the OTA (with the importer merely submitting an electronic self-declaration), Solaris and Solaris products would be qualified as domestic product in the importing OTA party and thus be subject to zero tariffs. These foregone customs duties would be then a subsidy under Article 1.1(a)(1)(ii) of the SCM Agreement as a government revenue that is otherwise due is foregone (in this case, a 4% ad valorem tariff for exports of Solaris and Solaris products to other countries).

5.21. In *Brazil – Taxation*, the Appellate Body held that the non-collection of the tax revenue by the Brazilian Government at the time when it normally would do so amounts to “government revenue that is otherwise due” being “foregone or not collected” within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.⁵¹

5.22. The Appellate Body has explained that a panel examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement must: (i) identify the tax treatment that applies to the income of the alleged subsidy recipients; (ii) identify a benchmark for comparison; and (iii) compare the challenged tax treatment and the reasons for it with the benchmark tax treatment.⁵² In *Brazil – Taxation*, the Appellate Body held that to determine whether the revenue that is otherwise due is foregone, the challenged treatment must be compared to an objectively identifiable benchmark. This does not presuppose, that such a comparison should necessarily be made between the group of the entities that allegedly benefits from a subsidy, on the one hand, and the group of all the other entities, on the other hand. Even if not all taxpayers in the benchmark group were paying the full amount of the relevant tax, this would not necessarily mean that there is no revenue foregone with respect to the taxpayers benefiting from a subsidy. The case does not provide detailed information on the tax treatment of comparably situated taxpayers, but it is mentioned that all non-OTA importers of Solaris and Solaris products are subject to the 4% ad valorem tariff for exports.⁵³

5.23. Avilion could also argue that the exemption from custom duties could also be considered as a form of income or price support, under Article 1(a)(2) of the SCM Agreement, which operates directly or indirectly to increase exports of Solaris (which is traded mostly as a primary product) but only between Tlön and Zycron. In theory, Avilion could also have claimed a violation of Article XVI:1 of GATT, due to the lack of notification of a subsidy (the foregone customs duties), however, this issue was not claimed in the present case.

⁵⁰ Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.96 and 5.97.

⁵¹ Appellate Body Reports, *Brazil – Taxation*, para 5.221.

⁵² Appellate Body Reports, *Brazil – Taxation*, para 5.162.; Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 812-815.

⁵³ Appellate Body Reports, *Brazil – Taxation*, para 5.209.

5.2.4 Possible Arguments for Zycron

5.2.4.1 Regarding the OUF

5.24. Zycron could argue that the 'official unitary fee' (OUF), does not fall under the definition of subsidies within the meaning of Article 1.1 of the SCM Agreement, as no product is being subsidized by Zycron. The OUF are fees due to a service that is effectively provided by charging stations' operators. The fact that a minimum OUF is guaranteed every week, even in the absence of electric vehicles (EVs) charging in those stations, is merely a way of compensating the costs incurred for the operator of being available for eventual charges. The whole point of the GEA is to guarantee access to charging stations of EV users, and there is no way of determining with certainty if those charging points will be used or not. But the mere fact that those charging points exist promotes the use of EV.

5.25. Zycron could also argue that in the unlikely event that the OUF is considered a subsidy, there are no trade distortive effects of the OUF. It has been argued in some subsidy literature that payments for public goods may not be considered subsidies and most definitions limit the use of the term "subsidy" to transfers to firms.⁵⁴ If private provision of a good or service is possible, government funding may be presumed to result in subsidization. But that is not the case here, as the GEA is explicit having the charging stations state-owned.

5.26. Finally, Zycron could also argue that in the hypothetical scenario where the OUF is considered a subsidy, it would be a subsidy to service providers, (operators of charging stations), and the SCM Agreement does not apply to services, as only covers subsidies on goods.

5.2.4.2 Regarding the accumulation of origin rules

5.27. Zycron could argue that the Government is not 'due' any revenue, from the OTA importers of Solaris and Solaris products, as the goods are essentially domestic, and that claim that the OTA accumulation of origin rule and the consequent decision not to charge customs duties, cannot be considered as a financial contribution, as this rule is only the consequence of the effective implementation of an international agreement, which is in any case justified under GATT Article XXIV (see Section 6.2 of this Bench Memo).

5.28. Zycron could also point out that in any case the OTA is open to other countries to enter the agreement, and to have access to it and its self-declaration certification process, Avilion just need to commit not to export Solaris for military purposes.

5.29. In the unlikely event that the implementation of OTA's accumulation of origin rules are considered foregone duties, and that these are interpreted as a form of income or price support, Zycron could point out that Ad Article XVI GATT stipulates that the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be

⁵⁴ Boss, Alfred; Rosenschon, Astrid (2006) : Der Kieler Subventionsbericht: Grundlagen, Ergebnisse, Schlussfolgerungen, Kieler Diskussionsbeiträge, No. 423

deemed to be a subsidy. So even if all non-OTA importers of Solaris and Solaris products from Zycron are subject to the 4% ad valorem tariff for exports, that duty does not constitute a subsidy.

5.30. In the same line, the Panel in *US – Upland Cotton* found that "the text of Article XVI:3 itself indicates that the provision is limited to 'export subsidies' and does not address rights and obligations of Members relating to other types of subsidies".⁵⁵

5.2.5 Benefit

5.2.5.1 Possible Arguments for Avilion

5.31. Avilion could argue that the measures established by Zycron in the GEA, in particular the OUF, as well as the accumulation of origin in the OTA, confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

5.32. The OUF would confer a benefit to Zycronian operators of EV charging stations which also are companies that produce charging points and therefore compete with international producers, including Charging Queen's imports (see Case para. 4.6). The benefit is a non-repayable fee that is received, even if no cars have used the charging station.

5.33. The implementation of OTA's Rules of Origin, also confer a benefit to Zycronian producers of EVs and charging points because the non-payment of the 4% *ad valorem* export tariffs by exporters of Solaris and Solaris products put them in advantageous circumstance in the market, vis-à-vis importers of countries that are not OTA members. Several panels had previously concluded that, whenever there is revenue foregone by the government, a benefit is conferred.⁵⁶

5.2.5.2 Possible Arguments for Zycron

5.34. Zycron could reject the claim that the 'official unitary fee' (OUF), confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement, as those fees are due to a service that is effectively provided by charging stations' operators. The fact that a minimum OUF is guaranteed every week, even in the absence of electric vehicles (EVs) charging in those stations, is just a way of compensating the costs incurred for the operator of being available for eventual charges, as the whole point of the GEA is to guarantee access to charging stations of EV users, and there is no way to determining with certainty if those charging points will be used or not. But the mere fact that those charging points exist promotes the use of EV.

5.35. Similarly, Zycron could claim the foregone customs duties, by virtue of the OTA accumulation of origin rule, cannot be considered as conferring a benefit, as this rule is only the consequence of the effective implementation of an international agreement, which is in any case justified under GATT Article XXIV (see Section 6.2 of this Bench Memo). Similarly, Zycron could also point out that the OTA is open to other countries to enter the agreement, and to have access to it and its self-declaration certification process, Avilion just need to commit not to export Solaris for military purposes.

⁵⁵ Panel Report, *US – Upland Cotton*, para. 7.997.

⁵⁶ Appellate Body Reports, *Brazil – Taxation*, para 5.186; Panel Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.169-7.171; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, fn 509 to para. 7.271; *US – FSC*, para. 7.103; *US – FSC (Article 21.5 – EC)*, paras. 8.44-8.48; Appellate Body Reports, *US – FSC*, para. 140; *US – FSC (Article 21.5 – EC)*, para. 198

5.36. Finally, Zycron could argue that even though OUF could be considered as a flat contribution, not always linked to the actual use of the charging points by EV owners, there is the possibility that in the future the charging points will be overused, so it compensates the costs in period of underuse.

5.3 Specificity – Prohibited Subsidies

5.37. The question here is to determine whether the measure at issue is a prohibited subsidy within the meaning of Article 3.1(b) SCM (i.e. an import substitution subsidy). If so, it follows, that the specificity requirement is fulfilled.

5.3.1 Legal Standard

5.38. According to Article 1.2 of the SCM Agreement “A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2”.

5.39. Article 2.3 of the same Agreement adds that any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

5.40. Article 3 of the SCM Agreement provides that:

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) **subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.**

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

5.3.2 Relevant Jurisprudence

5.41. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body noted that Article 3.1(b) of the SCM Agreement “regulates so-called import-substitution subsidies, which are one of only two kinds of subsidies prohibited under the SCM Agreement”.⁵⁷

5.42. In *US – Tax Incentives* and *Canada – Autos*, the Appellate Body stated that a subsidy would be “contingent” upon the use of domestic over imported goods “if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy”.⁵⁸ In *Brazil – Taxation*, the Appellate Body held that the ordinary meaning of ‘contingent’ is ‘conditional’ or ‘dependent for its existence on something else’, a subsidy would be prohibited under Article 3.1(b) if it is ‘conditional’ or ‘dependent for its existence’ on the use of domestic over imported goods. Therefore, a subsidy would

⁵⁷ Appellate Body Report, *Canada – Renewable Energy*, para. 5.6.

⁵⁸ Appellate Body Report, *US – Tax Incentives*, para. 5.7; Appellate Body Report, *Canada – Autos*, para. 126.

be 'contingent' upon the use of domestic over imported goods where the use of those goods is a condition, in the sense of a requirement, for receiving the subsidy.⁵⁹

5.43. In *US – Tax Incentives*, the Appellate Body noted that the term "use" in Article 3.1(b) refers to the action of using or employing something and "may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the production of a good". In the same case, the Appellate Body also noted that the term "goods" in Article 3.1(b) is qualified by the adjectives "domestic" and "imported", which implies that the "goods" concerned should be at least potentially tradable.⁶⁰

5.44. The Appellate Body in *Canada – Autos* held that the term "contingency" under Article 3.1(b) covers contingency both in law and in fact, and that the legal standard expressed by the term "contingent" is the same for both.⁶¹ In *Brazil – Taxation*, the Appellate Body confirmed this interpretation, clarifying that Article 3.1(b) prohibits those subsidies that are *de jure* or *de facto* contingent such that they require the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy".⁶² A subsidy will be *de jure* contingent upon the use of domestic over imported goods "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", or can "be derived by necessary implication from the words actually used in the measure". The existence of *de facto* contingency "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case". The Appellate Body has observed that proving *de facto* contingency "is a much more difficult task".⁶³

5.45. Again, in *US – Tax Incentives*, the Appellate Body noted that the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods. Rather, the question is whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.⁶⁴

5.3.3 Possible Arguments for Avilion

5.46. Avilion can argue that both the OUF and the foregone duties as a result of the implementation of the OTA's accumulation of origin rule are "contingent" upon the use of domestic over imported goods within the meaning of Article 3.1(b) SCM.

⁵⁹ Appellate Body Reports, *Brazil – Taxation*, para 5.241.

⁶⁰ Appellate Body Report, *US – Tax Incentives*, paras. 5.8 and 5.9.

⁶¹ Appellate Body Reports, *Canada – Aircraft*, para. 167; *Canada – Autos*, para. 143.

⁶² Appellate Body Reports, *Brazil – Taxation*, para 5.245.

⁶³ Appellate Body Reports, *Brazil – Taxation*, para 5.243.

⁶⁴ Appellate Body Report, *US – Tax Incentives*, para. 5.18.

5.3.3.1 Regarding the OUF

5.47. Avilion could argue that the OUF is de facto contingent to the use of domestic goods, as an “upstream” subsidy to a service supplier that could pass through to a good.

5.48. As mentioned in the facts of the case, the OUF helps Zycronian companies to produce cheaper charging points and therefore compete with international producers, including Charging Queen's imports (see Case para. 4.6), leading to de facto import substitution. Zycronian companies that are charging point operators and have obtained an OUF, are able to produce charging points cheaper and compete with international producers. This is because of the economies of scale of manufacturing charging points for Zycron for at least 10-years, together with the guaranteed fixed income provided by the OUF, due to the management of the charging stations.

5.49. Avilion could note that, only the winning bidder of the MIET procurement framework call can receive the OUF. In order to participate to the procurement competition, companies have to comply with the requirements of the Made in Zycron Initiative in order to compete for the public contract and have the chance to receive the OUF. The Made in Zycron Initiative, read in conjunction with Procurement Directive n.12, requires in explicit terms the use of inputs and products produced in Zycron.

5.50. In *United States — Certain Measures Related to Renewable Energy (DS563)* China requested consultations with the United States on 14 August 2018, concerning certain measures allegedly adopted and maintained by the governments of certain US states and municipalities in relation to alleged subsidies or alleged domestic content requirements in the energy sector.⁶⁵ China claimed that the measures appear to be inconsistent, among others with Articles 3.1(b) and 3.2 of the SCM Agreement, because they appear to grant and maintain subsidies contingent upon the use of domestic over imported goods. Avilion may argue that the US measures questioned by China are similar to the OUF, as they imply the payment of cost recovery incentives for generating electricity from a customer-generated electricity renewable energy system (The Renewable Energy Cost Recovery Incentive Payment Program ("RECIP") of the State of Washington); financial incentives to users that install renewable energy distributed generation technologies that are installed to meet all or a portion of the electric energy needs of a facility (The Self-Generation Incentive Program ("SGIP") of the State of California); and one-time incentives to its customers who purchase/lease and install solar photovoltaic systems ("The Solar Photovoltaic Incentive Program ("SIP") implemented by the Los Angeles Department of Water and Power ("LADWP")).

5.3.3.2 Regarding the accumulation of origin rules

5.51. Avilion should argue that OTA's accumulation of origin rule, is clearly *de jure* contingent to the use of domestic goods, as according to Article 3.2 of the OTA raw Solaris metal and processed products containing Solaris metal originating from an OTA party (Zycron or Tlön) shall be treated as a domestic product in the importing OTA party and thus be subject to zero tariffs.

5.52. The implementation of the accumulation of origin rule in the OTA, allows Zycronian companies to produce cheaper Solaris charging points and therefore compete with international producers, leading to de facto import substitution. To benefit from the 0% tariff, an importer of Solaris and Solaris

⁶⁵ WT/DS563/1.

products from either Zycron or Tlön, must submit an electronic self-declaration that these products are not to be used for military purposes. In contrast, exports of Solaris and Solaris products from Zycron and Tlön to Avilion (which affects Charging Queen, as well as to other non-OTA countries) are charged with a 4% *ad valorem* tariff and require an official certification process.

5.53. The OTA's accumulation of origin rule is only beneficial to Solaris that is produced domestically in Zycron or Tlön. The increase the supply of Solaris with zero tariffs (the subsidized domestic goods) in Zycron (the relevant market), increases the use of these goods downstream and adversely affects exports to other non-OTA countries. In *US – Tax Incentives*, the Appellate Body noted that Article 3.1(b) of the SCM Agreement does not prohibit the subsidization of domestic production per se but rather the granting of subsidies contingent upon the use of domestic over imported goods. The Appellate Body distinguished these two situations as follows:

We recall that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" per se but rather the granting of subsidies contingent upon the "use", by the subsidy recipient, of domestic over imported goods. Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement.

We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.⁶⁶

5.3.4 Possible Arguments for Zycron

As a general defence, Zycron could point out that the legal standard under Article 3.1(b) of the SCM Agreement is not the same as that under Article III:4 of the GATT 1994. In *Brazil – Taxation*, the Appellate Body noted that in order to establish an inconsistency with Article 3.1(b) of the SCM Agreement, a measure must be "contingent ... upon the use of the domestic over imported goods". By contrast, to find an inconsistency with Article III:4 of the GATT, it is sufficient that the measure at issue alters the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods. Establishing the existence of a contingency requirement to use domestic over imported products under Article 3.1(b) of the SCM Agreement is thus a more demanding standard than demonstrating that an incentive to use domestic goods exists under Article III:4 of the GATT 1994. Accordingly, while establishing that a measure provides an incentive to producers to use domestic goods would be sufficient to find an inconsistency with Article III:4 of the GATT 1994, it would not suffice to also find that the same measure is contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement.⁶⁷

5.3.4.1 Regarding the accumulation of origin rules

5.54. With respect to the accumulation of origin rules as a consequence of the implementation of Zycron Customs Regulation No. 50, implementing Articles 3.1 and 3.2 of the OTA, Zycron could claim

⁶⁶ Appellate Body Report, *US – Tax Incentives*, para. 5.15 (footnotes omitted).

⁶⁷ Appellate Body Reports, *Brazil – Taxation*, para 5.254.

that the foregone customs duties are the consequence of the effective implementation of an international agreement, and in that sense no duty is "due" to Zycron.

5.55. In *US – FSC*, the United States argued that, since there is no requirement to tax export-related foreign-source income, a government could not be said to have “foregone” revenue if it elects not to tax that income. The Appellate Body held that “(...) taken to its logical conclusion, this argument by the United States would mean that there could never be a foregoing of revenue 'otherwise due' because, in principle, under WTO law generally, no revenues are ever due and no revenue would, in this view, ever be 'foregone'. That cannot be the appropriate implication to draw from the requirement to use the arm's length principle”.⁶⁸ This conclusion would not be applicable in this case as, Zycron does not have the choice of deciding whether to impose custom duties to the export of Solaris and Solaris products. This is a consequence of a core obligation of the OTA.

5.56. Once more, Zycron could also point out that the OTA is open to other countries to enter the agreement, and to have access to it and its self-declaration certification process, Avilion just need to commit not to export Solaris for military purposes.

5.3.4.2 Regarding the OUF

5.57. Zycron could argue that the implementation of the 'official unitary fee' (OUF) established by Zycron in the GEA, cannot be a violation of Article 3.1(b) of the SCM Agreement, as in the unlikely event that the OUF is considered a subsidy, it would be a subsidy to service providers, (operators of charging stations), and the SCM Agreement does not apply to services, as the SCM Agreement which only covers subsidies on goods.

In the unlikely event that it would be considered that the OUF is an “upstream” subsidy to a service supplier that could pass through to an exported good, the OUF is not limited to domestic service suppliers. The MIET issued an open competitive call for a long-term framework purchasing agreement for the installation and the management of public EV charging points, using Solaris, across Zycron’s territory that is open to all companies that observe of the environmental, social and labour law provisions at the relevant stages of the procurement procedure. **Note to the Panellists: For any reference in the argument to Article XXIV GATT, please see Section 6.2**

6 WHETHER IMPLEMENTATION OF THE ACCUMULATION OF ORIGIN RULE IN THE OTA AND THE ZYCRON CUSTOMS REGULATION NO. 50, IS INCONSISTENT WITH ZYCRON’S OBLIGATIONS UNDER ARTICLE I:1 AND ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 2(B) AND (C) OF THE AGREEMENT ON RULES OF ORIGIN.

6.1 Violation of Article I:1 GATT

6.1. Avilion claims that the implementation of the accumulation of origin rule in the OTA and the Zycron Customs Regulation No. 50, is inconsistent with Zycron’s obligations under Article I:1 GATT, as it allows imports of Solaris and Solaris products with zero tariffs, only between Zycron and Tlön, without extending that benefit to other WTO Member States.

⁶⁸ Appellate Body Report, *US – FSC*, paras. 97-98.

6.1.1 Legal Standard

6.2. Article I GATT, states in Paragraph 1, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation, that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

6.1.2 Relevant Jurisprudence

6.3. The Appellate Body (AB) explained, in *Canada – Autos*, that the object and purpose of Article I “is to prohibit discrimination among like products originating in or destined for different countries”.⁶⁹

6.4. In *EC – Seal Products* the Appellate Body introduced an order of examination to determine a violation of Article I:1 GATT:

Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are 'like' products within the meaning of Article I:1; (iii) that the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members. Thus, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to like products originating from all other Members.⁷⁰

6.1.3 Possible Arguments for Avilion

6.5. As mentioned in the facts of the case, Zycron, Tlön and Uqbar – the three largest producers of Solaris, all countries located in the Matte Peninsula – regularly charge a 4% *ad valorem* tariff for exports of Solaris and Solaris products to other countries.

6.6. However, since the entry into force of the OTA the imports of Solaris between Zycron and Tlön have 0% tariff, due to the implementation of the ‘accumulation of origin’ rule, in OTA Articles 3.1 and 3.2, as they are treated as domestic products.

‘Article 3.1: Accumulation

1. Each Party shall provide that Solaris is originating if it is produced in the territory of one or more of the Parties by one or more producers, provided that:

(a) the Solaris is wholly obtained or produced entirely in the territory of one or more of the Parties;

⁶⁹ Appellate Body Report, *Canada – Autos*, para. 84

⁷⁰ Appellate Body Report, *EC – Seal Products*, para. 5.86.

(b) the Solaris is produced entirely in the territory of one or more of the Parties, exclusively from originating materials; or

(c) the Solaris is produced entirely in the territory of one or more of the Parties using non-originating materials.

3. Each Party shall provide that Solaris originating in one or more of the Parties that is used in the production of another good in the territory of another Party is considered as originating in the territory of the other Party.

4. Each Party shall provide that production undertaken on a non-originating material in the territory of one or more of the Parties by one or more producers may contribute toward the originating content of a good for the purpose of determining its origin, regardless of whether that production was sufficient to confer originating status to the material itself.

Article 3.2: Tariffs on Solaris "originating" within the territory of OTA Parties

Pursuant to Article 3.1, raw Solaris metal and processed products containing Solaris metal originating from an OTA party shall be treated as a domestic product in the importing OTA party and thus be subject to zero tariffs.

6.7. On 5 February 2018, both Zycron and Tlön adopted customs regulations to implement Articles 3.1 and 3.2 of the OTA. Under Zycron Customs Regulation No. 50, to qualify under the accumulation of origin rule in the OTA an importer must merely submit an electronic self-declaration to benefit of the 0% tariff. In contrast, exports of Solaris and Solaris products from Zycron (and Tlön) to Avilion are still charged with a 4% *ad valorem* tariff.

6.8. Avilion should claim that the 0% tariff for Solaris and Solaris products fulfil the four-tier of consistency with the MFN treatment obligation:

- a. The measure at issue is covered by Art. I:1 – foregone tariffs or duties exemptions are under the scope of this provision.⁷¹
- b. The measure grants an advantage - because Avilion's local extraction of Solaris is not enough for the increasing requirements of its EV industry, and it imports large quantities of the metal from Tlön and Uqbar, as well as from Zycron.
- c. The products concerned are 'like products' – are in fact the same products: Solaris and Solaris products.

6.9. The advantage at issue is not accorded immediately and unconditionally to all like products concerned, irrespective of their origin or destination. Accumulation of origin cannot be used here – from the plain reading of Articles 3.1 and 3.2 and OTA it is clear that this rule is for products that are processed, and not for raw materials. As mentioned in Section 1.3 of the case, Solaris is exported raw, with no additional processing done to it after being extracted from the mines. Furthermore, the large

⁷¹ It is important to note that export tariffs are covered, as per Appellate Body Report, *China – Raw Materials*, paras 320-322.

majority of companies extracting Solaris in Tlön are owned or controlled by Zycronian nationals, and foreign investment in Tlön has been limited to mining operations and further processing takes place in Zycron. A key issue in our case is to determine if the foregone import tariffs on Solaris or Solaris products due to the implementation of the OTA, are an “advantage”. In *EC – Bananas III*, the Panel considered that “advantages” in the sense of Article I:1 are those that create “more favourable import opportunities” or affect the commercial relationship between products of different origins.⁷²

6.10. In *Canada – Autos*, the Appellate Body found that Canada's import duty exemption accorded to motor vehicles originating in some countries in which affiliates of certain designated manufacturers were present, was inconsistent with Article I:1. The Appellate Body noted that:

“Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.' The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product'; and not to like products from some other Members, but to like products originating in or destined for 'all other' Members.⁷³

6.11. In *Indonesia – Autos*, the Panel found that the exemption of import duties and sales taxes to automobiles which met certain origin-neutral requirements was inconsistent with Article I:1, because of the existence of a number of conditions, that allowed another Member's like product to be subject to much higher duties and sales taxes than those imposed on National Cars, depending on whether a national company has made a ‘deal’ with that exporting company to produce a national car :

In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.⁷⁴

6.12. Finally, Avilion could claim that in any case Articles 3.1 and 3.2 of the OTA are not applicable, as the Solaris metal is exported raw, with no additional processing done to it after being extracted from the mines. Foreign investment in Tlön has been limited to mining operations and further processing takes place in Zycron. In fact, the large majority of companies extracting Solaris in Tlön are owned or controlled by Zycronian nationals.

6.13. In essence, Zycron's actions in Tlön are giving to its finished goods manufacturers of Solaris and Solaris products, an advantage over their foreign competition by lowering the cost of their material inputs.

⁷² Panel Report, *EC – Bananas III*, para. 7.239.

⁷³ Appellate Body Report, *Canada – Autos*, para. 79.

⁷⁴ Panel Report, *Indonesia – Autos*, para. 14.145.

6.1.4 Possible Arguments for Zycron

6.14. Zycron should note that regularly charges a 4% ad valorem tariff for exports of Solaris and Solaris products to other countries, as they to too, the other two largest producers of Solaris too (Tlön and Uqbar).

6.15. Zycron could explain that it has adopted this general policy is strictly in line with the promotion of a specific industries within the country, relating to electric vehicles ('EVs') charging points and related infrastructure, as the natural resources that are substantial for the future development of that industries, are currently in high demand in the international market. In the absence of such policy, the finished goods manufacturers that the country is trying to develop would have to pay a high price for Solaris and Solaris product unless the government made it more expensive for the domestic producers to export the product than sell it to a manufacturer inside the country.

6.16. The need for Solaris has even created military disputes. As mentioned in the facts of the case, Zycron and Tlön were at war during decades throughout the second half of the 20th century and one of the main reasons for the conflict was the control over natural resources in particular Solaris mines. Zycron should explain that this was the reason lead to the conclusion of the Orbis Tertius Agreement in 2012. The object and purpose of that agreement was not to introduce discriminations on exports tariff of Solaris and Solaris products to other countries, but to guarantee peace in the Matte Peninsula.

6.17. The OTA includes a plan to completely integrate the Solaris industry in the two countries to ensure that both countries will benefit from the development of Solaris and will no longer have a need to fight for control over it. The Agreement also seeks to prevent the use of Solaris for military purposes as a means of ensuring that there will be no further conflicts over access to Solaris, stipulating, that each party shall suspend the export of Solaris to countries that allow its military use.

6.18. Zycron should explain that to further the integration of the Solaris industry in the Matte Peninsula the OTA establishes an 'accumulation of origin' rule, in Articles 3.1 and 3.2. According to this rule, raw Solaris metal and processed products containing Solaris metal originating from an OTA party shall be treated as a domestic product in the importing OTA party and thus be subject to zero tariffs.

6.19. On 15 February 2018, Zycron and Tlön signed an additional protocol to the OTA, leading to the formation of a free trade area between the two countries. According to the Protocol, OTA members shall reduce tariffs progressively each year, reaching to zero tariffs in all goods in 2025 (except for Solaris and Solaris Products which already benefit from the accumulation of origin' rule). The Protocol covers 90 per cent of all Harmonized System (HS) tariff lines at the 6-digit level, around 85 per cent of all existing trade between the members. The OTA Protocol entered into force on 1 July 2018, and is also open to other OTA acceding countries.

6.2 Defence under Article XXIV of the GATT 1994

6.20. In the even that Zycron uses Article XXIV GATT:5 as a defence, claiming that the OTA is a free-trade area. (FTA), or an interim agreement leading to the formation of a free-trade area, Avilion will most likely claim that the Orbis Tertius Agreement (OTA) is not an FTA, but a comprehensive peace agreement. Furthermore, the government of Avilion even doubts of the peaceful purpose of the OTA, holding that the agreement is not about preventing conflict over Solaris between neighbouring

countries, but rather Zycron's ensuring its ability to plunder Tlön natural resources after decades of war (See Case, para. 5.1).

6.21. Although Article I GATT is considered a cornerstone of WTO law,⁷⁵ Article XXIV GATT allows WTO Members to depart from the MFN rule to grant more favourable treatment to their trading partners within a customs union or a free trade area (hereinafter 'regional trade agreements' or RTA) without extending such treatment to all WTO Members, subject to certain requirements.

6.2.1 Legal Standard

6.22. For the purpose of our case, it is important to note that Article XXIV:8(b) GATT defines free-trade area as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.⁷⁶

6.23. Article XXIV:5 GATT reads in its relevant part that the provisions of that Agreement shall not prevent, the formation of a free-trade area between the territories of contracting parties, provided that the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.

6.24. The Understanding on the Interpretation of Article XXIV GATT states that "(...) the evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. (...) It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required".

6.25. Article XXIV:4 GATT adds that a customs union, free trade area or an interim agreement should aim to facilitate trade between the constituent territories and not to raise barriers to the trade of third parties.

6.26. For the purposes of this case, the language contained in the abovementioned provisions of Article XXIV sets out two main requirements that the parties to an FTA have to meet in order for their agreement to benefit from the MFN derogation:

⁷⁵ Appellate Body Report, *EC – Seal Products*, para. 5.86 (quoting Appellate Body Report, *EC – Tariff Preferences*, para. 101).

⁷⁶ There is no agreement as to what it is required by the parties to an RTA in order to fulfil the conditions set out in Article XXIV:8. Disagreement persists on the precise meaning of "substantially all the trade" (SAT) and on what constitutes "other restrictive regulations of commerce" since neither Article XXIV nor the Understanding define these concepts. With respect to the latter it is clear that the RTA must eliminate restrictive trade regulations on intra-party trade, however, disagreement persists among Members on whether this list of bracketed exceptions is exhaustive or merely illustrative.

- a. An internal requirement relating to what is expected from the parties with respect to intra-trade liberalization. Apart from a few exceptions permitted under certain other Articles of the GATT, the **duties and other restrictive regulations of commerce are to be eliminated with respect to substantially all the trade** between the parties of an FTA or at least with respect to substantially all the trade in products originating in such territories (Article XXIV:8 GATT); and,
- b. An external requirement relating to the **avoidance of negative effects to third parties**, meaning not to raise trade barriers or impose higher or more restrictive duties, as a result of the formation of the FTA.

6.2.2 Relevant Jurisprudence

6.27. The Appellate Body in *Turkey – Textiles*, held regarding Article XXIV of the GATT that: “...the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency...”⁷⁷

6.28. However, this exception is subject to several important conditions. In order to be justified under Article XXIV of the GATT, the RTA in question must satisfy the two-tier test established by the AB in *Turkey- Textiles*.⁷⁸

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.

6.29. There is no existing WTO jurisprudence that deals with the issue of formation of an FTA, as opposed to a customs union, however the parties could seek to apply *Turkey – Textiles* by analogy. Therefore, in the current Moot case, the two-tier test to determine whether an otherwise GATT-inconsistent measure taken pursuant to the OTA be justified under Article XXIV of the GATT involves an analysis as to whether:

- a. the OTA complies with the requirements of the relevant paragraphs of GATT Article XXIV including paragraphs 4 (deemed to be only a principle that does not include enforceable obligations), 5 and 8;
- b. whether the measure was introduced upon the formation of the OTA; and
- c. whether the measure was necessary for the formation of the OTA, i.e. whether the formation of the FTA would have been prevented if the introduction of the measure concerned had not been allowed.

⁷⁷ Appellate Body Report, *Turkey – Textiles*, para.45.

⁷⁸ Appellate Body Report, *Turkey – Textiles*, para.58, Appellate Body Report, *Argentina- Footwear (EC)*, para.109.

However, one could make the argument that the necessity test does not apply to an FTA by analogy, especially if *Turkey-Textiles* is related to the formation of a customs union.

6.30. While assessing the WTO consistency of certain measures taken pursuant to the FTA at issue, it might also become relevant to assess the 'trade restrictiveness' of those measures. As mentioned, Article XXIV:5(b) of the GATT provides for an assessment of the 'trade restrictiveness' of a free trade area respectively in relation to third countries, i.e. non-FTA parties.

6.31. On the issue of increase of barriers vis-à-vis third parties, the Panel in the *Turkey-Textiles* found that:

What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies and that paragraph 5(a) provided for an 'economic test' for assessing compatibility.⁷⁹

6.32. In the same case, the AB agreed with the Panel that the test for assessing trade restrictiveness under paragraph 5(a) is an economic one.⁸⁰

We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the Understanding on Article XXIV, provide: '... that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.' and we also agree that this is: 'an "economic" test for assessing whether a specific customs union is compatible with Article XXIV.

6.33. It is important to note that **the participants are not expected to provide any economic assessment under Article XXIV:5(b) since they were not provided with any data.** They should nonetheless know the legal test under such provision.

6.34. Article XXIV:4 of the GATT provides that the formation of a customs union or a free trade area should not raise barriers to the trade of other WTO Members which are not party to the FTA subsequent to which duty-free treatment has been provided to products originating in parties to an FTA. The AB in *Turkey-Textiles* noted:

According to paragraph 4, the purpose of a customs union is 'to facilitate trade' between the constituent members and 'not to raise barriers to the trade' with third countries. This objective demands that the constituent members of a customs union strike a balance. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.⁸¹

6.35. After having demonstrated that the FTA is consistent with Article XXIV:5 and 8 (without any need to demonstrate that the FTA covers substantially all the trade or the economic impact of the FTA pursuant to article XXIV:5) the respondent must demonstrate that the specific WTO-inconsistent measure was introduced upon the formation of the FTA and that such measure was necessary for the

⁷⁹ Panel Report, *Turkey – Textiles*, para. 9.121

⁸⁰ Appellate Body Report, *Turkey – Textiles*, para. 55

⁸¹ Appellate Body Report, *Turkey – Textiles*, para. 57

formation of the FTA, i.e. the formation of the FTA would be prevented (made impossible), if the measure concerned would not have been allowed.

6.36. Jurisprudence is not very developed and does not seem to envisage the situation of measures that would be introduced during the life of the FTA, i.e. after its initial formation. In our case, when the OTA was initially signed in 2012, the treaty was basically a peace agreement with only one set of trade provisions, particularly over the extraction, processing, uses and trade of Solaris. Only recently, Zycron and Tlön signed an additional protocol to the OTA, leading to the formation of a free trade area between the two countries. In fact, the customs regulations implementing the accumulation of origin rule in the OTA – and therefore the tariff exemption – were signed before the conclusion of the additional protocol to the OTA.

6.37. The Panel in *Canada – Autos* rejected Canada's defence that a Canadian import duty exemption was a permitted exception under Article XXIV because, on the one hand, Canada was not granting the import duty exemption to all NAFTA manufacturers and because, on the other hand, manufacturers from countries other than the United States and Mexico were being provided duty-free treatment. As this finding of the Panel was not appealed, the Appellate Body concluded:

The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994. Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994. The object and purpose of Article I:1 supports our interpretation. That object and purpose is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.⁸²

6.2.3 Possible Arguments for Avilion

6.38. As it is likely that Zycron will invoke Article XXIV:5 GATT as defence to an Article I:1 violation, Avilion can argue that the OTA is not a regional trade agreement for the purposes of Article XXIV GATT, but merely a peace agreement designed to bring peace and end conflict on the Matte Peninsula and in particular over the extraction, processing, uses and trade of Solaris. As explained in the facts of the case, Zycron and Tlön were at war during decades throughout the second half of the 20th century. One of the main reasons for the conflict was the control over natural resources in particular Solaris mines.

6.39. In this view, OTA would be somehow similar to the 1918 Treaty of Versailles after World War I, which in Article 168 limited Germany's manufacturing capacity for arms and munitions and letting the Allied Powers set restrictions; in Article 170 prohibited Germany's importation or export of arms, munitions and war material of any kind; and in Article 171 did the same for chemical weapons, armoured cars, and tanks. In fact, President Madrugada has declared that OTA is a 'real' peace agreement, dedicated to the peaceful, inclusive and sustainable development of all parties (see case

⁸² Appellate Body Report, *Canada – Autos*, paras. 83-84.

para. 5.2) We note that the original inspiration for the European Coal and Steel initiative after World War II, which eventually led to the EU, but was not in its inception an RTA or a broader trade agreement

6.40. Avilion could argue that Article XXIV:5 GATT cannot be invoked as a defence, because the additional protocol to the OTA, leading to the formation of a free trade area between Zycron and Tlön was signed only on 15 February 2018, and the custom regulations implementing the accumulation of origin rule (Articles 3.1 and 3.2 of the OTA), were signed 10 days before, on 5 February 2018, so it was not measure was introduced upon the formation of the FTA or necessary for the formation of the FTA.

6.41. Finally, Avilion could claim that in any case Articles 3.1 and 3.2 of the OTA are not applicable, as the Solaris metal is exported raw, with no additional processing done to it after being extracted from the mines. Foreign investment in Tlön has been limited to mining operations and further processing takes place in Zycron. In fact, the large majority of companies extracting Solaris in Tlön are owned or controlled by Zycronian nationals.

6.2.4 Possible Arguments for Zycron

6.42. Zycron could submit that the OTA meets all Article XXIV requirements in order for their agreement to benefit from the MFN derogation:

- a. There is intra-trade liberalization. Starting with the 2012 agreement and deepened with the 2018 Protocol, the duties and other restrictive regulations of commerce are to be eliminated with respect to substantially all the trade between the parties of OTA or at least with respect to substantially all the trade in products originating in such territories;
- b. There are no negative effects to third parties, as trade barriers have not been raised, or higher or more restrictive duties have been imposed, as a result of the formation of the OTA. In fact, the export tariff on Solaris and Solaris products to Avilion, remains exactly the same than before the formation of the OTA.

6.43. Furthermore, Zycron could point out that to guarantee the peaceful development and use of Solaris throughout the world, the OTA is also open to other countries to enter the agreement. In fact, Uqbar started negotiations to accede to the OTA on 30 July 2018. Zycron could argue that Avilion, could accede to the OTA with no problems. They just need to commit not to export Solaris for military purposes. Although Avilion is not currently producing Solaris' powered long-range missiles, it allows the export of Solaris to other 'allied' countries for that purpose (see case para. 1.4). Although the Solaris metal has a dual use (military and non-military) it is not possible to determine its end use without knowing what the final product will be.

6.44. Finally, Zycron could argue that this claim is not relevant for Avilion, as that country gets most of its imports of Solaris and Solaris products from Tlön – a country that is not a WTO member – and therefore cannot be a party to this dispute. It is important to note that Article XI:1 of the GATT covers advantages to non-WTO Members as well.

6.3 Violation of Article XI:1 of the GATT 1994

6.45. Avilion claims that the implementation of the accumulation of origin rule in the OTA is inconsistent with Zycron's obligations under Article XI:1 of the GATT 1994, imposing an unjustified restriction on the export of Solaris and Solaris products, through the mechanism of "official certification".

6.3.1 Legal Standard

6.46. GATT Article XI:1 provides in its relevant part:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product imported in any form necessary to the enforcement of government measures which operate:

to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no domestic production of the like product, for which the imported product can be directly substituted; or

to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

6.3.2 Relevant Jurisprudence

6.47. In *India – Quantitative Restrictions*, the Panel set out the scope of the concept of "restriction":

[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'.

As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges'.

The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.⁸³

6.48. In the case at hand, what it is relevant is to determine if the mechanism of "official certification" implemented by Zycron, constitutes a *de jure* or *de facto* restriction for the purposes of Article XI.

6.49. The Panel in *Dominican Republic – Import and Sale of Cigarettes* found that:

(...) not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself." Examining a bonding requirement, that Panel was not convinced that "the requirement is a condition for the importation of cigarettes, that is, that importation would not be allowed unless the bond requirement had been complied with. The Panel therefore does not consider that there is evidence that the bond requirement operates as a restriction on the importation of cigarettes, in a manner inconsistent with Article XI:1 of the GATT 1994.⁸⁴

6.50. In *Argentina – Hides and Leather*, the European Communities argued that Argentina's measure violated Article XI:1 by authorizing the presence of domestic tanners' representatives in the customs inspection procedures for hides destined for export operations, and thus, imposing *de facto* restrictions on exports of hides. The Panel noted:

There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature. It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of 'other measures'.⁸⁵

6.51. In *China – Raw Materials*, the Appellate Body examined the concepts of "prohibition" and "restriction" and concluded that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported:

Both Article XI:1 and Article XI:2(a) of the GATT 1994 refer to 'prohibitions or restrictions'. The term "prohibition" is defined as a 'legal ban on the trade or importation of a specified commodity'. The second component of the phrase '[e]xport prohibitions or restrictions' is the noun 'restriction', which is defined as '[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation', and thus refers generally to something that has a limiting effect.

⁸³ Panel Report, *India – Quantitative Restrictions*, para. 5.129

⁸⁴ Panel Report, *Dominican Republic – Cigarettes*, para. 7.265. Finding not appealed.

⁸⁵ Panel Report, *Argentina – Hides and Leather*, para. 11.17

In addition, we note that Article XI of the GATT 1994 is entitled 'General Elimination of Quantitative Restrictions'. The Panel found that this title suggests that Article XI governs the elimination of 'quantitative restrictions' generally. We have previously referred to the title of a provision when interpreting the requirements within the provision. In the present case, we consider that the use of the word 'quantitative' in the title of the provision informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.

6.3.3 Possible Arguments for Avilion

6.52. Avilion could argue that although OTA formally seeks to prevent the use of Solaris for military purposes as a means of ensuring that there will be no further conflicts over access to Solaris, in fact, it creates both a *de jure* and *de facto* restriction.

6.53. *De jure* restriction is that the OTA stipulates that each party shall suspend the export of Solaris to countries that allow its military use. However, this point should not be discussed further, in the case of Avilion, as the country does not use Solaris or Solaris products for military purposes.

6.54. Avilion could argue that the OTA creates a further *de facto* restriction, when stipulating that for the export of Solaris shall require an 'official certification' from the end-user that the metal will only be used for peaceful purposes. This requires that the end-user fills out an appropriate affidavit before a public Notary, declaring the intended use of Solaris, as well as a declaration that the end-user is not a producer of military equipment or arms. The concerned Ministries of Defence of the exporting OTA party should then 'validate' this certification, confirming that the importer is not listed as a military provider or contractor.

6.55. This cumbersome certification process has led Avilion end-users to complain government that they have suffered continuous delays and increased costs in the importation process of Solaris from Zycron, due to their inability to obtain the validation of end-user certificates. The delays in the official certification process of Avilion importers are due to the lengthy bureaucracy that has been implemented in Zycron's Ministry of Defence, in order to verify that Solaris is not exported to countries that allow its military use. Avilion end-users have also reported delays in the importation of Solaris from Tlön, as most of its production it is exported from mining companies owned or controlled by Zycronian nationals.

6.56. In contrast, according to the customs regulations to implement Articles 3.1 and 3.2 of the OTA adopted by Zycron and Tlön, to qualify under the accumulation of origin rule in the OTA an importer must merely submit an electronic self-declaration.

6.57. Finally, this mechanism is not justified under Art. XI:2(a), as is not an export restriction temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to Zycron.

6.3.4 Possible Arguments for Zycron

6.58. Zycron could argue that the 'official certification' process is not designed nor has the effect to restrict the export of Solaris and Solaris products. It merely implements the provisions of the OTA in order to guarantee that Solaris will be used only for peaceful purposes. In the case of Avilion, although that country is not currently producing Solaris' powered long-range missiles, it allows the export of Solaris to other 'allied' countries for that purpose (see case para. 1.4). As the Solaris metal has a dual use (military and non-military) it is not possible to determine its end use without knowing what the final product will be.

6.59. Zycron could also point out that the OTA is open to other countries to enter the agreement, and to have access to it and its self-declaration certification process, Avilion just need to commit not to export Solaris for military purposes.

6.60. However, Zycron could eventually argue that the official certification mechanism is justified under Article XX(a) as necessary to protect public morals and/or under Article XX(b) as necessary to protect human health, animal health and/or the environment and/or under Article XX(g) as relating to the conservation of exhaustible natural resources and/or under Article XX(j) as essential to the acquisition or distribution of products in general or local short supply. These exceptions have been examined in Section III.3 of this Bench Memo, regarding the procurement claims.

6.4 Article 2(b) and (c) of the Agreement on Rules of Origin

6.61. Avilion claims that the implementation of the accumulation of origin rule in the OTA is inconsistent with Zycron's obligations under Article 2(b) and (c) of the Agreement on Rules of Origin, creating a restrictive effect on international trade, through the mechanism of "official certification" on the export of Solaris and Solaris products, being directly used as instrument to pursue trade objectives.

6.4.1 Legal Standard

6.62. Article 2 of the Agreement on Rules of Origin provides in its relevant part:

Disciplines During the Transition Period

Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that:

(a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:

(i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;

(ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin;

(iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the good concerned shall be precisely specified;

(b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;

(c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose **unduly strict requirements** or **require the fulfilment of a certain condition not related to manufacturing or processing**, as a prerequisite for the determination of the country of origin.

However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a).

6.4.2 Relevant Jurisprudence

6.63. With respect to the provisions prescribed by Article 2 of the Agreement on Rules of Origin, the Panel in *US – Textiles Rules of Origin* explained that subparagraphs (b) through (d) lay down a negative set of disciplines that apply during the transition period (until the work programme set out in Part IV is completed). During the transition period members enjoy "considerable discretion in designing and applying their rules of origin":

With regard to the provisions of Article 2 at issue in this case – subparagraphs (b) through (d) – we note that they set out what rules of origin should not do: rules of origin should not pursue trade objectives directly or indirectly; they should not themselves create restrictive, distorting or disruptive effects on international trade; they should not pose unduly strict requirements or require the fulfilment of a condition unrelated to manufacturing or processing; and they should not discriminate between other Members. These provisions do not prescribe what a Member must do. By setting out what Members cannot do, these provisions leave for Members themselves discretion to decide what, within those bounds, they can do. In this regard, it is common ground between the parties that Article 2 does not prevent Members from determining the criteria which confer origin, changing those criteria over time, or applying different criteria to different goods.

Accordingly, in assessing whether the relevant United States rules of origin are inconsistent with the provisions of Article 2, we will bear in mind that, while during the post-harmonization period Members will be constrained by the result of the harmonization work programme, during the transition period, Members retain considerable discretion in designing and applying their rules of origin.⁸⁶

6.64. The Panel in *US – Textiles Rules of Origin* explained that Article 2(b) is intended to preclude Members from using rules of origin "to substitute for, or to supplement, the intended effect of trade policy instruments":

⁸⁶ Panel Report, *US – Textiles Rules of Origin*, paras. 6.23-6.25.

In our view, Article 2(b) is intended to ensure that rules of origin are used to implement and support trade policy instruments, rather than to substitute for, or to supplement, the intended effect of trade policy instruments. Allowing Members to use rules of origin to pursue the objectives of 'protecting the domestic industry against import competition' or 'favouring imports from one Member over imports from another' would be to substitute for, or supplement, the intended effect of a trade policy instrument and, hence, be contrary to the objective of Article 2(b).⁸⁷

6.65. In the same case, the Panel, examining a claim under Article 2(b), found that the two key issues in applying this provision were how to assess the purpose for which rules of origin are being used, and how to interpret the "trade objectives" that may not be pursued via rules of origin:

The Panel agrees with the parties that the operative part of Article 2(b) is the phrase 'rules of origin are not [to be] used as instruments to pursue trade objectives directly or indirectly'. It is clear from this phrase that in order to establish a violation of Article 2(b), a Member needs to demonstrate that another Member is using rules of origin for a specified purpose, viz., to pursue trade objectives. ...this interpretation of Article 2(b), which is not in dispute, confronts the Panel with the following two issues.

First, how is the Panel to determine whether a Member's rules of origin are used for the purpose specified in Article 2(b)? And second, what are 'trade objectives'?⁸⁸

6.66. The Panel in *US – Textiles Rules of Origin* explained that the prohibited "restrictive, distorting or disruptive effects" listed in the first sentence of Article 2(c) form "alternative bases" for a claim:

Turning to the prohibited effects – i.e., 'restrictive, distorting, or disruptive effects' – the Panel notes that these effects constitute alternative bases for a claim under the first sentence of Article 2(c), as is confirmed by the use of the disjunctive 'or'. Accordingly, independent meaning and effect should be given to the concepts of 'restriction', 'distortion' and 'disruption'. In this regard, we note that the ordinary meaning of the term 'restrict' is to 'limit, bound, confine'; that of the term 'distort' is to 'alter to an unnatural shape by twisting'; and that of the term to 'disrupt' is to 'interrupt the normal continuity of'. Thus, the first sentence of Article 2(c) prohibits rules of origin which create the effect of limiting the level of international trade ('restrictive' effects); of interfering with the natural pattern of international trade ('distorting' effects); or of interrupting the normal continuity of international trade ('disruptive' effects).⁸⁹

6.67. The essential question is how far the discretion identified by the Panel in *US – Textiles* goes. This is what the discussion should be focused on.

6.4.3 Possible Arguments for Avilion

6.68. Avilion could claim that the implementation of the accumulation of origin rule in the OTA through Zycron Customs Regulation No. 50, is inconsistent with Zycron's obligations under Article 2(b)

⁸⁷ Panel Report, *US – Textiles Rules of Origin*, para. 6.43; see also para. 6.84.

⁸⁸ Panel Report, *US – Textiles Rules of Origin*, para. 6.36.

⁸⁹ Panel Report, *US – Textiles Rules of Origin*, para. 6.140.

and (c) of the Agreement on Rules of Origin, because the mechanism of “official certification” on the export of Solaris and Solaris products:

- a. It is directly used as instrument to pursue trade objectives: Using the Panel Report, in *US – Textiles Rules of Origin*, Avilion could argue that the customs regulations to implement Articles 3.1 and 3.2 of the OTA, have been used to pursue the objectives of 'protecting the domestic industry against import competition' or 'favouring imports from one Member over imports from another'. This would be to substitute for, or supplement the intended effect of a trade policy instrument and, hence, be contrary to the objective of Article 2(b).
- b. Creates a new restrictive, distorting or disruptive effect on international trade: because exporting Solaris and Solaris products to non-OTA countries is extremely cumbersome, including unduly strict requirements not related to manufacturing or processing. As described, the process of ‘official certification’ requires that the end-user fills out an appropriate affidavit before a public Notary, declaring the intended use of Solaris, as well as a declaration that the end-user is not a producer of military equipment or arms. The concerned Ministries of Defence of the exporting OTA party should then ‘validate’ this certification, confirming that the importer is not listed as a military provider or contractor. It would be useful to highlight that this mechanism introduces a “new” restriction, because the OTA was signed in 2012 and these rules came into effect only in February 2018.

6.69. Avilion end-users have complained to their government that they have suffered continuous delays and increased costs in the importation process of Solaris from Zycron, due to their inability to obtain the validation of end-user certificates. The delays in the official certification process of Avilion importers are due to the lengthy bureaucracy that has been implemented in Zycron’s Ministry of Defence, in order to verify that Solaris is not exported to countries that allow its military use. Avilion end-users have also reported delays in the importation of Solaris from Tlön, as most of its production it is exported from mining companies owned or controlled by Zycronian nationals. In contrast, OTA parties only need to submit an electronic self-declaration. This would be contrary to the objective of Article 2(c).

6.4.4 Possible Arguments for Zycron

6.70. Zycron could argue as a defence that Zycron Customs Regulation No. 50 to implement Articles 3.1 and 3.2 of the OTA, it is not used as an instrument to pursue trade objectives, and does not create a restrictive effect on international trade.

- a. It is not as an instrument to pursue trade objectives: Zycron could argue that the customs regulations to implement Articles 3.1 and 3.2 of the OTA, have been used to ‘official certification’ process is not designed to pursue other trade objectives, like the protection of the domestic industry, or favouring imports from one Member over imports from another. It is merely a way of implementing the provisions of the OTA to guarantee that Solaris will be used only for peaceful purposes. As the Solaris metal has a dual use (military and non-military) it is not possible to determine its end use without knowing what the final product will be.

- b. It does not create a restrictive, distorting or disruptive effect on international trade: According to the Panel in *US – Textiles Rules of Origin*, “the ordinary meaning of the term 'restrict' is to 'limit, bound, confine'; that of the term 'distort' is to 'alter to an unnatural shape by twisting'; and that of the term to 'disrupt' is to 'interrupt the normal continuity of’”. None of these effects are created by the implementation of the “official certification”, as exports of Solaris and Solaris products to Avilion still take place.

6.71. Zycron could also point out that the OTA is open to other countries to enter the agreement, and to have access to it and its self-declaration certification process, Avilion just need to commit not to export Solaris for military purposes. In the case of Avilion, although that country is not currently producing Solaris’ powered long-range missiles; it allows the export of Solaris to other ‘allied’ countries for that purpose (see case para. 1.4).

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