

*Zycron – Certain Measures Related to Electric Vehicles Charging Points and Infrastructure
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Maria Anna Corvaglia
Birmingham Law School (UK)

Rodrigo Polanco Lazo
World Trade Institute – University of Bern / University of Luzern (Switzerland)

1 BACKGROUND

1.1. This dispute arises from a challenge brought by Avilion, a developed country which is a founding Member of the Trade Organization ('WTO') and a signatory to the revised Government Procurement Agreement ('GPA'), against certain measures adopted by Zycron, another developed country and founding Member of the WTO, which acceded to the revised GPA on 6 April 2015. These measures relate to electric vehicles ('EVs') charging points and related infrastructure.

1.2. Zycron is located in the Matte Peninsula. The region hosts the world's largest reserves of 'Solaris', a metal discovered decades ago and until recently only used for construction purposes. In 2010, scientists discovered that Solaris was able to conduct electricity five times more rapidly than Silver. At the same time, Solaris' batteries have the benefit of not losing their capacity as quickly as Lithium batteries, and they have the additional benefit that the Solaris material can also be easily reused. Since the discovery of the new uses of Solaris, it has been used in different products and infrastructure that are powered by solar energy, like batteries for EVs and charging points, but also for long-range missiles. The 'Solaris rush' and the rapid process of extraction of this metal increased concerns about its environmental and social impact. The extraction of Solaris has been traditionally associated with the extensive use of unskilled workers, coupled with poor safety and health conditions. Because of the hazardous nature of the mining sector, the International Labour Organization (ILO) has made considerable efforts to ensure the respect of decent working conditions in the mining sectors by promoting adherence to the Hours of Work (Coal Mines) Convention (No. 31) adopted in 1931 to the Safety and Health in Mines Convention (No.176), which was adopted in 1995 (collectively, the 'ILO Conventions').

1.3. Besides Zycron, the Matte Peninsula comprises two neighbouring countries, Uqbar and Tlön. Uqbar is a developing country and a WTO Member. It has limited reserves of Solaris, and exports the bulk of its production to Zycron. Tlön is a least-developed country that is not a member of the WTO, but has Observer Status. It has the world's largest reserves of Solaris, but does not yet have the capacity to fully exploit them. Instead, the large majority

of companies extracting Solaris in Tlön are owned or controlled by Zycronian nationals. The metal is exported raw, with no additional processing done to it after being extracted from the mines. Therefore, foreign investment in Tlön has been limited to mining operations and further processing takes place in Zycron. Zycron, Tlön and Uqbar charge a 4% *ad valorem* tariff for exports of Solaris and Solaris products to other countries.

1.4. Avilion is the only country located outside the Matte Peninsula with Solaris mines. The bulk of the extraction in the country is devoted to the manufacture of EV batteries and charging points. For years, the global EV battery and charging point market has been dominated by a very limited number of manufacturers, led by 'Charging Queen', the major exporter of EV batteries and charging points in the world, incorporated in Avilion. However, 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. Although Avilion is not currently producing Solaris' powered long-range missiles, it allows the export of Solaris to other 'allied' countries for that purpose.

1.5. Even though Avilion has ratified the ILO Conventions, its domestic EV industry has a poor record of compliance with ILO minimum labour standards. In December 2017, Charging Queen was involved in a 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. 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.

2 THE "ORBIS TERTIUS AGREEMENT" (OTA)

2.1. 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. 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. The Agreement was signed in the city of Orbis Tertius and is thus known as the Orbis Tertius Agreement (OTA).

2.2. 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. To guarantee the peaceful development and

use of Solaris throughout the world, the OTA is also open to other countries to enter the agreement. Uqbar started negotiations to accede to the OTA on 30 July 2018.

2.3. The OTA stipulates that for the export of Solaris, exporting countries (Tlön, Zycron, and any other acceding members) 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.

2.4. In addition, 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:

‘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;

(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.

2.5. On 5 February 2018, Zycron and Tlön both 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 submit an electronic self-declaration.

2.6. 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. 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.

2.7. 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 in 1 July 2018, and is also open to other OTA acceding countries.

3 THE 'GOING ELECTRIC ACT' (GEA)

3.1. In May 2015, the charismatic leader of Zycron's Green Party, Maxima Madrugada, won the general election in Zycron by a very small margin. Her platform during the campaign contained promises of measures to combat air pollution and climate change while, at the same time, generating employment and inclusive, sustainable economic growth. In Madrugada's words, 'adding a social and environmental dimension to trade and investment is no longer a choice – it is a matter of minimum public morals'.

3.2. The establishment of a long-term plan of transport electrification represented a core pillar of Madrugada's campaign. On 1 October 2016, the Madrugada government announced the 'Going Electric Plan' (GEP), with the goal of reducing air pollution and transport-related CO₂ emissions in Zycron through electrifying road transport. In a televised interview, Madrugada stated that the GEP is also a vehicle for economic growth and 'green jobs' creation.

3.3. The first step for the implementation of the GEP was the adoption of the 'Going Electric Act' (GEA), enacted on 15 December 2016. The GEA contains several provisions

designed to increase investment in EV charging points as a necessary infrastructure to increase the use of EVs in Zycron. The preamble of the GEA frames the development of electric transport infrastructures as a pillar of Zycron's support for the UN Sustainable Development Goals (SDGs) of 25 September 2015 (*Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1). The GEA explicitly cites Goal 3 (Ensure healthy lives and promote well-being for all at all ages), Goal 8 (Promote sustained, inclusive and sustainable economic growth), Goal 9 (Build resilient infrastructure, promote inclusive and sustainable industrialization) and Goal 13 (Take urgent action to combat climate change and its impacts).

3.4. As shown in surveys conducted across Zycron in 2016, one of the main concerns of electric car buyers and drivers in Zycron is the availability of charging points and the distance that can be travelled on one charge. To ensure easy access to the electricity network for more drivers, the government of Zycron in the 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. The GEA stipulates that charging stations will remain state-owned and that charging stations' private operators will obtain an 'official unitary fee' (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.

3.5. Since the enactment of the GEA in December 2016, the sale of EVs in Zycron has increased exponentially. The local industry is not able to cope with the increasing demand for EVs, and large foreign manufacturers have made important sales in Zycron. Zycron's local production of Solaris is not enough for the increasing requirements of the domestic and foreign EV industry.

4 THE 'MADE IN ZYCRON' INITIATIVE

4.1. In seeking to achieve the objectives set out in the GEA, the Madrugada government is progressively establishing the public infrastructure necessary for an increased use of EVs in Zycron. Zycron's Ministry of Infrastructure and Electric Transport (MIET) is the government department responsible for 'all matters regarding the EV sector'. MIET decided to begin the development of public charging infrastructures and to procure the construction of energy-efficient charging points, exclusively using Solaris.

4.2. In this context, the Madrugada government radically reformed the regulation of public procurement and public purchasing activities. By an Executive Order of 21 January 2017, the government of Zycron launched the 'Made in Zycron' Initiative, with the following objectives stated in its preamble: 'a) increase manufacturing sector growth as an engine of

economic growth; b) increase the rate of job creation in strategic manufacturing sectors; c) enhance global competitiveness of Zycron manufacturing through appropriate policy support in strategic sectors; and d) ensure sustainability of growth, particularly with regard to the environment, including optimal utilization of natural resources and restoration of damaged/degraded eco-systems, specially due to the extraction of Solaris’.

4.3. The ‘Made in Zycron’ Initiative applies to all ‘Made in Zycron’ laws. According to Executive Order of 21 January 2017:

4.4. *Section 1 “Definitions”*

‘Made in Zycron’ laws means all statutes, regulations, rules, and executive orders relating to public procurement or grants that require, or provide a preference for, the purchase or acquisition of goods, materials, or services produced or supplied in Zycron.

4.5. *Sec. 2. “Policy”*

In order to stimulate economic growth, create jobs in industries of strategic significance, explore the emerging technologies in the green economy, and support Zycron’s manufacturing, it shall be the policy of all governmental bodies to maximize, consistent with national and international law, the purchase of goods, services, and materials produced or extracted in Zycron.

4.6. 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, published on 1 April 2018 in the Zycron Register. The framework agreement aims to construct EV charging points every 3 kilometres along all highways, and every 50 km on busy provincial roads by 2038, as established in the GEA. The procurement technical specifications under the framework agreement require: 1) a feasibility study to assess the viability of locations of charging points and the viability for costs and financial options; 2) the provision of solar power charging points, to include all the Solaris chargers, the cables and the component required; 3) installation of the charging points; and 4) their management. In the procurement document, it is clarified that these will remain state-owned charging points and the winning bidder will operate these infrastructures in partnership with MIET, offering free charging to Zycronian EV owners. The successful bidder will be awarded a contract valid for a 10-year period, renewable for additional 10 years. Charging points’ operators will obtain an OUF, paid weekly by the government, which is calculated considering an average of cars using the charging stations daily and the amount of electricity charged in each vehicle. The government guarantees a minimum weekly fee, even if no cars have used the charging stations in a week. The OUF allows

Zycron companies to produce charging points cheaper and therefore compete with international producers, including Charging Queen's imports.

4.7. 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. Annex 4 of Appendix I of Zycron's GPA Schedules includes maintenance and repair services, architectural services, engineering services and integrated engineering services. However, General Notes Annex 7 to the 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'*

4.8. The entities receiving funding from MIET must comply with all applicable laws and regulations, which include (among others) the 'Made in Zycron' laws, Zycron's Procurement Directives and the MIET's internal implementation guidelines.

4.9. 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, MIET issued the Procurement Directive n.12-2018/2019 '2018 EV Charging Points Procurement Directive' (Directive n.12) specifying that all contracts awarded by MIET to implement the GEA must include a requirement that any product using Solaris should be produced or manufactured in Zycron. According to Directive n.12, to be eligible to participate in the bidding of projects funded by MIET, the competing domestic and foreign suppliers should use only products made of Solaris or other metals sourced in Zycron.

4.10. Subject to the provision of Directive n.12, exceptions are provided for projects for which Solaris is not produced in sufficient quantity in Zycron. If the quantities of Solaris inputs cannot be met using domestic sources, preference will be given to the use of Solaris products of a satisfactory quality produced in a foreign country linked to Zycron by an international economic integration agreement.

4.11. In the case of OTA parties, each manufacturer shall furnish to the procuring authority a mandatory self-declaration that Solaris is domestically sourced or sourced in the territory of the OTA party according to what is prescribed in Directive n.12. At the time of the

tender, the supplier shall be required to provide this self-certification and shall give details of the location of the extraction inside the territory of the OTA parties.

4.12. Following the public outrage in Zycron, triggered by the tragic collapse of Solaris mines in Avilion, MIET circulated throughout the Ministry 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’. 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’.

4.13. MIET effectively excluded Charging Queen from the procurement competition for the instalment and the management of EV charging points in Zycron, justifying its decision on the base of the application of Directive n. 12, read in conjunction with the March 2018 Guideline.

4.14. The ‘Made in Zycron’ Initiative has proven popular among the Zycronian population, as air pollution has considerably diminished in cities with more EVs and charging points. In the meantime, since the launching of the Made in Zycron’ Initiative, the volume of exports of EV batteries and charging points by Charging Queen to Zycron drastically dropped to 20% of its exports before the Initiative was implemented.

5 CLAIMS OF WTO INCONSISTENCY IN AVILION’S PANEL REQUEST TO THE DSB

5.1. To the government of Avilion, the framework established by the ‘Made in Zycron’ initiative, in conjunction with the GEA and the OTA, is not genuinely driven by environmental or labour considerations, but it is an aggressive industrial policy of Zycron to establish itself as a leader in the global EVs charging points market. Furthermore, Avilion claims that the OTA and the trade restrictions imposed for a ‘peaceful’ use of Solaris are incompatible with GATT. For Avilion, the OTA 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.

5.2. Zycron has publicly stated that its procurement practices are not inconsistent with Article III:4 of the GATT 1994 as covered by the derogation under Article III:8(a) of GATT 1994, and that its laws, regulations and policies are covered and in complete compliance with the GPA. Zycron has also rejected the claim that the measures established in the GEA and pursuant to the OTA are subsidies, and are only the consequence of the effective implementation of the GEA and OTA's provisions. Finally, Zycron also vehemently rejects

the allegations about the alleged motives behind the OTA. President Madrugada has declared that OTA is a 'real' peace agreement, dedicated to the peaceful, inclusive and sustainable development of all parties. Avilion decided to initiate consultations with Zycron under Article 4 of the WTO Dispute Settlement Understanding (DSU), Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM), and Article XX of the GPA.

5.3. After unsuccessful consultations, Avilion requested the Dispute Settlement Body (DSB) to establish a panel pursuant to Article 6 of the DSU, and Article 4 of the SCM. The panel request sets out the following claims of inconsistency with WTO obligations:

1. The procurement requirements established in the 'Made in Zycron' initiative, in Directive n.12 and the March 2018 Guideline, are inconsistent with Zycron's obligations under Article I and Article III:4 of the GATT 1994, and Articles IV:1-2 of the GPA.
2. 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 of the SCM Agreement, and are in violation of Article 3.1(b) of the SCM Agreement.
3. 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 and Article XI:1 of the GATT 1994 and Article 2(b) and (c) of the Agreement on Rules of Origin.

5.4. In its panel request, Avilion also alleged that the derogations under Article III:8(a) of the GATT 1994, as well as the exceptions under Articles XX, and Article III.2 of the GPA, are not applicable to the measures at issue.

6 NOTE FROM THE CASE-AUTHORS

Claims, defences and arguments relating to Security Exceptions, including those under the GATT Article XXI, shall not to be raised or developed by the participants in their written or oral submissions.

7 ANNEX 1 TIMETABLE

21 September 2012 – Signing of the Orbis Tertius Agreement (OTA) Tlön - Zycron

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
- 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
- 1 April 2018 – MIET issues a competitive call for EV Charging Points
- 1 July 2018 – OTA Protocol enters into force
- 30 July 2018 – Uqbar initiate negotiations to accede to the OTA

8 ILLUSTRATIVE JURISPRUDENCE

GATT Reports

GATT Panel Report, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R (May 13, 1992)

WTO Reports

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Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, (*Turkey – Textiles*) WT/DS34/AB/R, adopted 19 November 1999.

Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000.

Panel Report, *US – Textiles Rules of Origin for Textile and Apparel Products*, WT/DS243/8, adopted 28 July 2003.

Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII.

Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/20, adopted 23 January 2013

Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013.

Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.

Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014.

Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, WT/DS457/AB/R and Add.1, adopted 31 July 2015.

Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016.

Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Panel)*, WT/DS456/AB/R, adopted 16 September 2016.

Panel Report, *United States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Recourse to Article 21.5 of the DSU by the European Union, WT/DS353/RW, circulated 9 June 2017.

Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, WT/DS472/10 WT/DS497/8, circulated 30 August 2017.

Appellate Body Report, *United States - Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R, adopted 22 September 2017.

Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, Recourse to Article 21.5 of the DSU by the United States, WT/DS316/AB/RW, adopted 28 May 2018.

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WTO, *United States – Measures Affecting Government Procurement—Communication from the Chairman of the Panel*, WT/DS88/5 (Feb. 12, 1999); WT/DS95/5 (Feb. 12, 1999).

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