

2018-2019

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Team: 003R

JOHN H. JACKSON MOOT COURT COMPETITION  
**2018-2019**

**Zycron – Certain Measures Related to  
Electric Vehicles Charging Points and  
Infrastructure**

*Avilion*  
(Complainant)

VS

*Zycron*  
(Respondent)

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**SUBMISSION OF THE RESPONDENT**

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**LIST OF REFERENCES****I. AGREEMENTS AND TREATIES**

<b>SHORT TITLE</b>	<b>FULL CITATION AND CITATION</b>
ARO	Agreement on Rules of Origin (15 April 1994) LT/UR/A-1A/7 <a href="http://docsonline.wto.org">http://docsonline.wto.org</a> .
GATS	General Agreement on Trade in Services (15 April 1994)LT/UR/A1B/S/1 <a href="http://docsonline.wto.org">http://docsonline.wto.org</a> .
GATT	General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/1/GATT/1 <a href="http://docsonline.wto.org">http://docsonline.wto.org</a> .
GPA	Agreement on Government Procurement, LT/UR/A-4/PLURI/2 (15 April 1994) <a href="http://docsonline.wto.org">http://docsonline.wto.org</a> .
SCM	Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 <a href="http://docsonline.wto.org">http://docsonline.wto.org</a> .
VCLT	Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

**II. WTO APPELLATE BODY REPORTS**

<b>SHORT TITLE</b>	<b>FULL TITLE AND CITATION</b>
Brazil – Tyres (AB Report)	<i>Brazil – Measures Affecting Imports of Retreaded Tyres- Report of the Appellate Body</i> (17 December 2007) WT/DS332/AB/R.
Canada – Aircrafts (AB Report)	<i>Canada – Measures Affecting the Export of Civilian Aircraft- Report of the Appellate Body</i> (20 August 1999) WT/DS70/AB/R.
Canada – Autos (AB Report)	<i>Canada – Certain Measures Affecting the Automotive Industry- Report of the Appellate Body</i> (19 June 2000) WT/DS139/AB/R, WT/DS142/AB/R.
Canada – Autos (AB Report)	<i>Canada – Certain Measures Affecting the Automotive Industry- Report of the Appellate Body</i> (19 June 2000) WT/DS139/AB/R, WT/DS142/AB/R.
China – Rare Earth (AB Report)	<i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum- Appellate Body Report</i> (29 August 2014) WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R.
Columbia – Port of Entry (Panel Report)	<i>Colombia – Indicative Prices and Restrictions on Ports of Entry Report of the Appellate Body</i> (20 May 2009) WT/DS366/R and Corr.1.
Columbia – Textiles (AB Report)	<i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear- Report of the Appellate Body</i> (22 June 2016) WT/DS461/AB/R and Add.1.
EC – Asbestos (AB Report)	<i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products- Report of the Appellate Body</i> (5 April 2001) WT/DS135/AB/R.

**B. Substantive****Zycron (Respondent)**

EC – Seal Products (AB Report)	<i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products- Report of the Appellate Body (18 June 2014) WT/DS400/AB/R / WT/DS401/AB/R.</i>
EC – Tariff Preferences (Panel Report)	<i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries- Report of the Panel (20 April 2004) WT/DS246/R.</i>
EC and certain member States – Large Civil Aircraft (Article 21.5 – US) (AB Report)	<i>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- Report of the Appellate Body (28 May 2018) WT/DS316/AB/RW and Add.1.</i>
India – Solar Panel (AB Report)	<i>India – Certain Measures Relating to Solar Cells and Solar Modules Report of the Appellate Body (14 October 2016) WT/DS456/AB/R and Add.1.</i>
Korea – Dairy (AB Report)	<i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products- Report of the Appellate Body (12 January 2000) WT/DS98/AB/R.</i>
Turkey – Textiles (AB Report)	<i>Turkey – Restrictions on Imports of Textile and Clothing Products- Report of the Appellate Body (19 November 1999) WT/DS34/AB/R.</i>
US – Antidumping and Countervailing Measures (China) (AB Report)	<i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China- Report of the Appellate Body (22 July 2014) WT/DS449/AB/R.</i>
US – FSC (AB Report)	<i>United States – Tax Treatment for "Foreign Sales Corporations"- Report of the Appellate Body (20 March 2000) WT/DS108/AB/R.</i>
US – Gasoline (AB Report)	<i>United States – Standards for Reformulated and Conventional Gasoline- Report of the Appellate Body (20 May 1996) WT/DS2/AB/R.</i>
US – Large Civil Aircraft (AB Report)	<i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)- Report of the Appellate Body (23 March 2012) WT/DS353/AB/R.</i>
US – Shrimp (AB Report)	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products- Report of the Appellate Body (6 November 1998) WT/DS58/AB/R.</i>
US – Softwood Lumber IV (AB Report)	<i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada- Report of the Appellate Body (17 February 2004) WT/DS257/AB/R.</i>
US – Tax Incentives (AB Report)	<i>United States – Conditional Tax Incentives for Large Civil Aircraft- Report of the Appellate Body (22 September 2017) WT/DS487/AB/R.</i>
US – Tax Incentives (AB Report)	<i>United States – Conditional Tax Incentives for Large Civil Aircraft- Report of the Appellate Body (22 September 2017) WT/DS487/AB/R and Add.1.</i>
US – Tuna II (AB Report)	<i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products- Report of the Appellate Body (13 June 2012) WT/DS381/AB/R.</i>

## III. WTO PANEL REPORTS

SHORT TITLE	FULL TITLE AND CITATION
Argentina – Hides and Leather (Panel Report)	<i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather- Report of the Panel</i> (16 February 2001) WT/DS155/R and Corr.1.
Argentina – Import Measures (Panel Report)	<i>Argentina – Measures Affecting the Importation of Goods- Report of the Panel</i> (26 January 2015) WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1.
China – Autos (Panel Report)	<i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States- Report of the Panel</i> (18 June 2014) WT/DS440/R and Add.1.
China – Publications and Audiovisual Entertainment Products (Panel Report)	<i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products- Report of the Panel</i> (19 January 2010) WT/DS363/R .
China – Raw Materials (Panel Report)	<i>China – Measures Related to the Exportation of Various Raw Materials- Report of the Panel</i> (22 February 2012), WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1.
EC – Bananas III (Panel Report)	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas- Report of the Panel</i> (25 September 1997), WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US).
India – Quantitative Restrictions (Panel Report)	<i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products- Report of the Panel</i> (22 September 1999) WT/DS90/R, WT/DS90/AB/R.
Indonesia – Autos (Panel Report)	<i>Indonesia – Certain Measures Affecting the Automobile Industry- Report of the Panel</i> (23 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R.
US – Exports Restraints (Panel Report)	<i>United States – Measures Treating Exports Restraints as Subsidies- Report of the Panel</i> (23 August 2001) WT/DS194/R.
US – Textiles (Panel Report)	<i>United States – Rules of Origin for Textiles and Apparel Products- Report of the Panel</i> (23 July 2003) WT/DS243/R.
<i>US-Sonar Mapping (GATT Panel Report)</i>	<i>United States – Procurement of a Sonar Mapping System</i> (23 April 1992) GPR.DS1/R.

## IV. GATT PANEL REPORT

SHORT TITLE	FULL TITLE AND CITATION
<i>US-Sonar Mapping (GATT Panel Report)</i>	<i>United States – Procurement of a Sonar Mapping System</i> (23 April 1992) GPR.DS1/R.
<i>Norway- Trondheim Toll (GATT Panel Report)</i>	<i>Norway – Procurement of Toll Collection Equipment for the City of Trondheim</i> (1992) GATT BISD 26S/216

## V. SECONDARY SOURCES INCLUDING ARTICLES AND WORKS OF PUBLICISTS ARTICLES

## A) ARTICLES

SHORT TITLE	FULL TITLE AND CITATION
Rubini (2015)	Rubini L, 'Aint Wastin Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15 Journal of International Economic Law 525.
Corvaglia (2016)	Corvaglia M., 'Public Procurement and Private standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement' (2016) 19 JIEL.
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Perry, Fernandez & Puyana (2015)	Perry, Fernandez & Puyana, 'The Right to Life in Peace: An essential condition for realizing the Right to Health' (2015) Health and Human Rights Journal.
Dischendorfer (2001)	Dischendorfer M., 'The Existence and the Framework of the WTO' (2000) PP Law Review 1-38.
Marceau & Trachtman (2002).	Marceau G. and Trachtman J.P., 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade' (2002) JWT 36.
SHORT TITLE	LONG TITLE AND CITATIONS

## B) BOOKS

SHORT TITLE	LONG TITLE AND CITATION
Arrowsmith (2003)	Arrowsmith S, <i>Government Procurement in the WTO</i> (Kluwer Law International 2003).
Corvaglia (2017)	Corvaglia MA, <i>Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation</i> (1 <sup>st</sup> edn, Hart Publishing 2017).

Arrowsmith, Linarelli & Wallace (2000)	Arrowsmith SL, Linarelli J and Wallace D, <i>Regulating Public Procurement: National and International Perspectives</i> (Kluwer Law International 2000).
Krajewsky (2015)	Krajewski M, <i>Services of General Interest Beyond the Single Market: External and International Law Dimensions</i> (TMC Asser Press 2015).
Singh (2018)	Singh Gurwinder, <i>Subsidies in the Context of The WTOS Free Trade Services: A Legal and Economic Analysis</i> (Springer 2018).
Davies (2011)	Arwel Davies, “The National Treatment and Exceptions Provision of the Agreement on Government Procurement and the Pursuit of Horizontal Policies” in Arrowsmith S. and Anderson R. (eds.), <i>The WTO Regime on Government Procurement : Challenge and Reform</i> (CUP 2011).
Hestermeyer & Grotto (2010).	Hestermeyer and Grotto, “Preamble GATT”, in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger Hestermeyer (eds), <i>WTO-Trade in Goods</i> (Nijhoff 2010).
Wenzel (2010)	Wenzel, “Article XX. Lit. A”, in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger Hestermeyer (eds), <i>WTO-Trade in Goods</i> (Nijhoff 2010).
Stoll and Strack	Stoll and Strack, “Article XX. Lit. B”, in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger Hestermeyer (eds), <i>WTO-Trade in Goods</i> (Nijhoff 2010).
Anderson & Arrowsmith (2011)	Anderson and Arrowsmith, “The WTO Regime on Government Procurement: Past, Present and Future Arrowsmith S. and Anderson R. (eds.), <i>The WTO Regime on Government Procurement : Challenge and Reform</i> (CUP 2011).
Bossche & Zdouc (2005)	Bossche and Zdouc, <i>The Law and Policy of World Trade Organisation: Text, Cases and Materials</i> (CUP 2005).
Lester, Mercurio & Davies (2012)	Lester S., Mercurio B. and Davies A, <i>World Trade Law: Text, Materials and Commentary</i> , 2nd ed. (Hart Publishing, 2012).
Adamantopoulus (2008)	Adamantopoulus, “Agreement on Subsidies and Countervailing Measures (SCM)”, in Rüdiger Wolfrum, Peter-Tobias Stoll, Holger Hestermeyer and Micheal Kobele (eds), <i>Trade In Goods</i> (Nojhoff 2008).

## V. OTHER INTERNATIONAL MATERIALS

SHORT TITLE	FULL TITLE AND CITATION
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Concessions, BOT & DBO (2019).	Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate Projects (DBO) < <a href="https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos">https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos</a> > accessed 11 January 2019.
Anderson & Müller (2017)	Anderson RD and Müller AC, “The Revised WTO Agreement on Government Procurement (GPA)” (2017) WTO Working Paper ERSD 2017-04, < <a href="https://www.wto.org/english/res_e/reser_e/ersd201704_e.pdf">https://www.wto.org/english/res_e/reser_e/ersd201704_e.pdf</a> > accessed 11 January 2019.
Work Programme (2012)	Decision of the Committee on Government Procurement on Adoption of Work Programme (30 March 2012) < <a href="https://www.wto.org/english/tratop_e/gproc_e/annexb_e.pdf">https://www.wto.org/english/tratop_e/gproc_e/annexb_e.pdf</a> > accessed 11 January 2019.



**LIST OF ABBREVIATIONS**

<b>ABBREVIATION</b>	<b>FULL FORM</b>
AB Report	Appellate Body Report
Annex	Annexure
EJIL	European Journal of International Law
AOR	Accumulation of Origin Rule
BISD	Basic Instruments and Selected Documents
CR 50	Custom Regulation No. 50
DSB	Dispute Settlement Board
DSU	Dispute Settlement Understanding
EV	Electric Vehicles
FTA	Free Trade Agreement
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GEA	Going Electric Act
GEP	Going Electric Program
GPA	Government Procurement Agreement
MFN	Most Favored Nation
MIET	Ministry of Infrastructure and Electric Transport
OC	Official Certification
OTA	Orbis Tertius Agreement
OUF	Official Unitary Fee
YJIL	Yale Journal of International Law
JIEL	Journal of International Economic Law
PTA	Preferential Trade Agreement
QR	Quantitative Restrictions
RoO(s)	Rules of Origin
SCM	Subsidies and Countervailing Measures
UN	United Nations
WTO	World Trade Organization

**STATEMENT OF FACTS**

1. Avilion and Zycron are Members of the World Trade Organization (WTO) and Parties to the revised Government Procurement Agreement (GPA). They are also members of the United Nations (UN) and the International Labour Organisation (ILO).
2. ‘Solaris’ metal conducts electricity and is used in products powered by solar energy; like EV charging points and long-range missiles. Matte Peninsula and Avilion are the only regions with Solaris mines. Tlon (WTO-Observer) has the largest reserves of Solaris. Global EV charging points market is dominated by Charging Queen of Avilion. Recently, it was involved in a scandal relating to collapse of Solaris mines.
3. Avilion’s local extraction of Solaris is not enough and it imports large quantities from Matte. Zycron’s local production is also not enough to meet the demands of EV Industry.
4. To bring peace and end conflict over Solaris in Matte, the OTA was signed by Zycron and Tlon. Under this, to export Solaris, OTA Parties require an ‘OC’ from end-users that Solaris would be used for peaceful purposes. OTA Parties have to ‘validate’ them. OTA established an ‘Accumulation of Origin Rule’ (AOR) to further integrate Solaris. CR 50 was adopted to implement this. Avilion end-users have complained delays and increased costs due to inability to obtain validation of end-user certificates.
5. Zycron enacted GEA to increase investment in EV Infrastructure. This was aimed at reducing air pollution. In this regard, Zycron decided to procure installation and management of Solaris EV charging points. The successful bidder would receive the value of the contract for manufacturing and an official unitary fee (OUF) for operating. OUF is paid based on the average number of cars and electricity charged in each vehicle. A minimum weekly OUF is guaranteed even if no cars use the charging station.
6. The Initiative was launched to regulate public procurements. A Procurement Directive n.12 (Directive n.12) was issued to clarify and specify procurement requirements. A March 2018 Guideline (the Guideline) prescribing procurement award criteria was also circulated. Charging Queen was excluded from the procurement competition due to the requirements.
7. Avilion requested the DSB to establish a Panel pursuant to Article 6 of the DSU and Article 4 of the SCM as it found Zycron’s policies to be inconsistent with WTO obligations.

SUMMARY OF ARGUMENTS

**1. The procurement requirements in the Initiative, Directive n.12 and the Guideline are consistent with Articles III:4 and I:1 of GATT and Article IV:1-2 of Revised GPA.**

- The Measures are not within the scope of Article III:4 of GATT as they are covered under Article III:8(a). Hence, Article III:4 is not applicable to the Measures.
- Directive n.12 exception is exempt from the Article I:1 of GATT as it is a requirement governing procurement. In any case, Directive n.12 exception is consistent with Article I:1 of GATT as the advantage of preference granted to Tlon has been granted immediately and unconditionally to all countries that accede to the OTA.
- In any event, Measures are justified under Article XX of GATT.
- The procurement is for award of a concession contract, which is not covered within the existing framework of GPA. In any case, the measures are consistent with GPA obligations.
- The Measures do not accord less favourable treatment to foreign suppliers and products and hence is consistent with Article IV:1(b) of GPA.
- Directive n.12 is consistent with Article IV:1(b) as the Article does not preclude more favourable treatment from being accorded to non-GPA parties. In any case, contract awarded to Tlon falls outside GPA-coverage. Hence, it is consistent.
- The Measures are consistent with Article IV:2(b) of GPA as they do not accord less favourable treatment to locally established suppliers on the basis that the products offered by them are products of another Party.
- In any event, measures are justified under Article III.2 of GPA.

**2. The implementations of OUF, as well as of the AOR, are not subsidies within the meaning of Article 1.1 of SCM, and are not in violation of Article 3.1(b) of SCM**

- The OUF is not a subsidy within the meaning of Article 1.1 of SCM as it is a purchase of service for the benefit of the government, and in any event, is not a financial contribution
- In any event, the OUF is not in violation of Article 3.1(b) of SCM as the grant of OUF is not contingent upon use of domestic goods.
- AOR is not a subsidy within the meaning of Article 1.1 of SCM as there is no defined recipient for it.

- In any event, AOR is not in violation of Article 3.1(b) of SCM as goods that qualify for the preferential tariffs are in fact imported goods.
- In any event, the Measures can be justified under Article XX of GATT.
- 3. The implementation of the AOR and CR 50, is consistent with Article I:1 and Article XI:1 of GATT, and Article 2(b) and (c) of the RO Agreement**
- CR 50 is consistent with Article I:1 of GATT as the OTA does not confer any advantage in a non-discriminatory way. The OTA is an open agreement for all other countries to enter.
- CR 50 is consistent with Article XI:1 of GATT as the ‘OC’ requirement does not have a prohibitive or restrictive effect.
- CR 50 is justified under Article XXIV of GATT as the formation of an FTA would be prevented without the ‘official certification’ requirement in the OTA.
- In any event, CR 50 is justified under Article XX(a) and XX(b) of GATT. The AOR implemented by CR 50 is justified under XX(j).
- The CR 50 meets the chapeau of Article XX.
- If the Panel accepts Article XXIV as a justification for CR 50, Part II of the RO Agreement does not apply to the AOR as it would be related to a contractual or autonomous trade regime granting tariff preferences, i.e., the OTA.
- In any event, the AOR is consistent with Articles 2(b) and (c) of the RO Agreement.

**IDENTIFICATION OF MEASURES AT ISSUE**

**Measure 1:** The Initiative launched on 21 January 2017 under the GEA

**Measure 2:** Procurement Directive n.12 issued on 17 March 2018

**Measure 3:** MIET's implementation Guideline dated 23 March 2018 (The Guideline)

**Measure 4:** implementation of the OUF under the GEA

**Measure 5:** CR 50 adopted on 5 February 2018 which implements the AOR and the end-user 'OC' requirement in the OTA.

**Measure 6:** AOR established by Articles 3.1 and 3.2 of OTA.

**LEGAL PLEADINGS**

**I. The procurement requirements established by the Initiative, Directive n. 12 and the Guideline are consistent with Articles I:1 and III:4 of GATT, and Articles IV:1-2 of GPA**

**A. The Measures are consistent with Articles III:4 and I:1 of GATT**

**a. Measures are not within the scope of Article III:4 as they are covered by Article III:8(a)**

1. A measure must fall within the scope of Article III for III:4 to be applicable. The Panel in *Canada – Renewable Energy*, characterized Article III:8(a) as a scope provision rather than as an exception and stated that a measure covered by Article III:8(a) is not within the scope of Article III.<sup>1</sup> A measure is covered by Article III:8(a) when: it is a law, regulation or requirement *governing* the procurement of products by governmental agencies; the product is purchased for governmental purpose; and, the product is not for commercial resale.<sup>2</sup>
2. The AB in *Canada-Renewable Energy* laid down a test that the 'products purchased' in Article III:8(a) must be competitive with 'products' in Article III.<sup>3</sup> There is no settled position on whether requirements governing inputs and processes related to those 'products' are within Article III:8(a).<sup>4</sup> However, the competitive relationship test cannot be understood to exclude *inputs* or *process* as it is illusory to claim that such requirements do not *govern* the product procurement. The consequence of narrowly interpreting Article III.8(a) such that Article III:4 is made applicable to domestic content requirements applied in the context of

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<sup>1</sup> Canada Renewable Energy/Canada Feed-in-Tariff Program (Panel Report), [7.113].

<sup>2</sup> Canada Renewable Energy/Canada Feed-in-Tariff Program (AB Report), [5.44].

<sup>3</sup> Canada Renewable Energy/Canada Feed-in-Tariff Program (Panel Report), [5.63].

<sup>4</sup> Canada Renewable Energy/Canada Feed-in-Tariff Program (AB Report), [5.63]; India – Solar Cells (AB Report), [5.38].

government procurement, is that the obligations which only some WTO Members have acceded to under the plurilateral agreement GPA are consequentially multilateralized.<sup>5</sup>

3. This Panel has the legal-capacity to apply Article III:8(a) to inputs and processes as the issue is undecided. If the competitive relationship test is inferred to exclude such requirements, this Panel can depart from it for *cogent reason*.<sup>6</sup> Cogent reasons include a demonstration that prior legal interpretation is unworkable in certain circumstances.<sup>7</sup> Narrow Interpretation of Article III:8(a) is at odds with commercial reality and hence unworkable. Further, the interpretation leads to conflict with non-discriminatory provisions under GPA which operate differently than GATT provisions. This understanding is in line with the Panel's interpretation of the word 'governing' in *Canada-Renewable Energy*. It held that a law *governing* means a law or regulation that controls or determines the procurement, and not just those laws that directly affect the *product* subject to procurement.<sup>8</sup>

4. The Initiative and Directive n.12 impose a requirement that the product must be made in Zycron. This requirement governs the procurement of products, EV charging points. The products are for discharging a public function, i.e., creation of a public EV charging infrastructure. The charging stations remain state-owned, indicating that the procurement is not for commercial resale. These Measures also impose a domestic content requirement governing the inputs of the product. The Guideline is a law governing the production-process of the product purchased. Thus, all the Measures are covered under Article III:8(a).

**b. Directive n. 12 exception is consistent with Article I:1 of GATT.**

5. Measures concerning government procurement are generally exempted from Article I:1.<sup>9</sup> In any event, Article I:1 requires an advantage conferred upon a product originating in or destined for another country to be extended unconditionally and immediately to all like products of WTO Members. However, it does not prohibit attaching *any* conditions to the grant of advantage. Instead, it prohibits only those conditions that have a detrimental impact on the competitive opportunities for like products. Article I:1 permits regulatory distinctions to be drawn between like imported products, provided such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.<sup>10</sup> The PR in *Canada-Autos* stated that making an advantage conditional on criteria

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<sup>5</sup> Davies (2011) 549.

<sup>6</sup> US – Antidumping (Panel Report), [7.317]; US – Mexico (AB Report), [160]; India – Solar Cells (AB Report), [5.39].

<sup>7</sup> US – Antidumping (Panel Report), [7.317].

<sup>8</sup> Canada Renewable Energy/Canada Feed-in-Tariff Program (Panel Report), [7.124]-[128].

<sup>9</sup> Anderson & Arrowsmith (2010) 6; Arrowsmith (2003) 61-63; Dischendorfer (2000) 15-17.

<sup>10</sup> EC – Seal Products (AB Report), [5.88].

not related to the imported product itself is not *per se* inconsistent with Article I:1.<sup>11</sup> Directive n.12 exception does not grant any favour on the basis of origin of products. The advantage of preference to Tlon has been accorded in a non-discriminatory way as this is granted immediately and unconditionally to all countries that accede to the OTA, as is the case with Tlon.

**c. In any event, the Measures are justified under Article XX of GATT**

6. Article XX GATT 1994 contains a two-tiered test to determine if an inconsistent measure can be justified. Under this test, a measure is justifiable if: (i) it is justified under one of the subparagraphs of Article XX GATT 1994; and, (ii) it meets the requirements of the *chapeau*.<sup>12</sup>

i. Subparagraphs of Article XX are applicable

- *The Measures are justified under XX(g)*

7. Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such measures work together with restrictions on domestic production, which operate so as to conserve an exhaustible natural resource.<sup>13</sup> XX(g) is a requirement of even-handedness, which means that the trade restrictions must operate jointly with restrictions on domestic production.<sup>14</sup> Policy to protect clean air falls within this exception, as clean air is an exhaustible resource.<sup>15</sup>

8. The Initiative and Directive n.12 impose requirements aimed at reducing air pollution. The design of the measure reveals support for UN SDGs (2015) as it calls for creation of green jobs through EV charging services and EV charging infrastructure.<sup>16</sup> The Measures are also made effective in conjunction with restrictions on domestic production by mandating that Solaris and Solaris products be sourced domestically in a sustainable manner. Further, the Guideline, which requires compliance with international environmental standards at all stages of the procurement. Similarly, the Guideline relates to conservation of clean air and accompanies the Initiative and Directive n.12. It corresponds UN SDGs (2015) which call for sustainability at all stages of production of an EV.<sup>17</sup> Thus, the Measures satisfy the test of even-handedness.

- *The Measures are justified under XX(b)*

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<sup>11</sup> Canada – Autos (Panel Report), [25].

<sup>12</sup> EC – Seal Products (AB Reports), [5.169].

<sup>13</sup> China – Raw Materials (AB Reports), [360].

<sup>14</sup> China – Raw Earth (AB Report), [1258].

<sup>15</sup> US – Gasoline (AB Report), [18].

<sup>16</sup> ICTSD Information Note (2018) 2.

<sup>17</sup> ICTSD Information Note (2018) 2.

9. For Article XX(b), the measure must be designed to protect the life or health of humans, animals or plants, and it must be necessary to achieve the said objective.<sup>18</sup> To determine necessity, panel must assess the measure's contribution to the achievement of the objective and its trade restrictiveness, in light of the importance of the values at stake. It would not be considered necessary if less trade-restrictive alternatives are available.<sup>19</sup> A policy to reduce air pollution is within XX(b).<sup>20</sup> The more vital the common interests or values pursued, the easier it would be to accept a measure as necessary, such as when the objective pursued is the preservation of human life and health.<sup>21</sup>

10. The Initiative and Directive n.12 aim at reducing air pollution. The measures are necessary as they sufficiently contribute to the objective as air pollution has considerably diminished in Zycron. The Guideline calls for compliance with environmental, social and labour obligations at relevant stages of procurement process. Ensuring healthy working conditions in Solaris mines is an important public health issue for Zycron, and it can determine the level of health protection it considers appropriate<sup>22</sup>. Hence, the Guideline is justified under XX(b). There are no other reasonably available alternatives to these measures. In any case, the onus to suggest alternatives lies on the Complainant.

- *The Guideline is justified under XX(a)*

11. A measure is justifiable under Article XX(a) when it is designed to protect public morals, and it is necessary to protect such morals.<sup>23</sup> The test of necessity is same as under XX(b).<sup>24</sup> The content of public morals can be characterized by a degree of variation, and Members should be given freedom to define and apply for themselves the concept of public morals according to their own systems and scales of values.<sup>25</sup> Public moral encompasses human rights and social standards.<sup>26</sup> If the standard of conduct common to the member invoking the exception and the targeted member form the basis of the trade restrictive measure, the protection of Article XX(a) is enhanced.<sup>27</sup>

12. The Guideline calls for observance of Zycron's social and labour standards which are aimed to be aligned with ILO standards. Avilion has also ratified ILO Conventions. Hence,

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<sup>18</sup> EC – Tariff Preferences (Panel Report), [7.198]-[7.199].

<sup>19</sup> Brazil – Retreaded Tyres (AB Report), [156]; EC – Asbestos (AB Report), [170]-[172].

<sup>20</sup> Stoll & Strack (2010) 507.

<sup>21</sup> EC – Asbestos (AB Report), [174].

<sup>22</sup> EC – Asbestos (AB Report), [174].

<sup>23</sup> Korea – Beef (AB Report), [180].

<sup>24</sup> Brazil – Retreaded Tyres (AB Report), [144]; EC – Seal Products (AB Report), [5.169].

<sup>25</sup> EC – Seal Products (AB Report,) [5.199]; China – Publications and Audiovisuals (Panel Report), [7.763].

<sup>26</sup> Wenzel (2010) 483.

<sup>27</sup> Wenzel (2010) 483.



Avilion and Zycron adhere to the same international environmental, social and labour standards. Further, the Measure is least trade restrictive as it requires compliance with objective international standards.

- *Directive n.12 exception is justified under XX(j)*

13. To invoke XX(j), the measure must be essential to the acquisition or distribution of a product in general or local short supply. ‘General or local short supply’ refers to a situation of short supply in the invoking member’s territory.<sup>28</sup> The AB in *India-Solar Cells* agreed that an increase in domestic manufacturing capacity would lead to an increase in supply.<sup>29</sup> It also agreed that there are inherent risks involved in continued dependence on imports and this would be a relevant consideration to determine whether a ‘short supply’ exists.<sup>30</sup>

14. Zycron is facing a short supply of Solaris-based EV charging points. Therefore, it is essential to incentivize the domestic industry of EV charging points in Zycron to ensure a steady supply. Solaris-based charging points are increasingly expensive due to the Solaris deficiency.<sup>31</sup> Since, Avilion is facing a Solaris deficiency itself, Zycron cannot rely solely on its imports to meet the increasing demand of its EV industry. Thus, the preference given to Tlon is essential for the acquisition of Solaris and Solaris products which would help build a domestic capacity to produce Solaris-based EV Charging Points.

ii. The Measures meet the requirements of the *chapeau* of Article XX

15. A measure can be justified under the *chapeau* if its application does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and if it does not constitute a disguised restriction on international trade.<sup>32</sup>

- *The Initiative and Directive n.12 are not disguised restrictions on trade*

16. Disguised restriction means concealed discrimination in international trade.<sup>33</sup> It must be examined whether the measure pursues protectionist objectives,<sup>34</sup> considering the design of the measures.<sup>35</sup> The design of the Initiative and Directive n.12 reveals that it is aimed at exploring green technologies and increasing EV-related manufacturing capacity to combat risks of air pollution and climate change. The Measures transparently sets out the requirements for procurement in advance. Hence, the measures are not disguised restrictions.

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<sup>28</sup> India – Solar Cells (AB Report), [5.67].

<sup>29</sup> India – Solar Cells (AB Report), [5.74].

<sup>30</sup> India – Solar Cells (AB Report), [5.76].

<sup>31</sup> Corrections & Clarifications, 18.

<sup>32</sup> EC – Seal Products (AB Report), [5.299].

<sup>33</sup> US – Gasoline (AB Report).

<sup>34</sup> EC – Asbestos, (Panel Report), [8.236].

<sup>35</sup> Adamantoupoulus (2008) 478.

- *Application of the Guideline and Directive n.12 exception does not constitute a means of arbitrary and unjustifiable discrimination*

17. Discrimination is arbitrary or unjustifiable when it is not rationally related to the policy objectives invoked under the subparagraphs of Article XX.<sup>36</sup> The Guideline calls for compliance with sustainability considerations. The design of the Guideline reveals that it rationally relates to the policy objective as the Guideline seeks compliance with domestic suppliers alike. It relies on international standards and this can provide a de facto assumption of good faith as required by Article XX.<sup>37</sup>

18. Directive n.12 exception is essential to meet demand of the domestic EV industry, if short supply exists. Thus, it rationally related to the policy objective, and does not constitute a means of arbitrary or unjustifiable discrimination.

**B. If the Panel finds that the procurement is covered under GPA, the Measures are consistent with Articles IV:1-2 of the Revised GPA**

**a. The procurement is not covered under GPA**

19. The GPA rules apply only to ‘covered’ procurements.<sup>38</sup> The procurement of construction of EV charging points is for awarding a concession contract. Concessions and variants of public private partnerships<sup>39</sup> are not covered by GPA as the state purchases fulfillment of governmental tasks as opposed to an ordinary purchase. The definition of *procurement* under Article II.2 also pleads against their coverage. As per the Article, only procurements which are not with a view to commercial resale or use for commercial sale are covered under GPA. In concessions, because the concessionaire is given the right to charge fees and make reasonable profit, the purchase of the product can viewed as one for commercial resale.<sup>40</sup>

20. Further, the GPA parties have made commitments to examine the public-private partnerships in a future work program.<sup>41</sup> Future work programs set out subject areas for negotiations in the future<sup>42</sup> and this indicates their non-coverage within the existing framework. One such variant is a design-build-operate project, where the public sector owns and finances the construction of assets. The supplier is paid a sum for the infrastructure and fee for operating.<sup>43</sup> The procurement in Zycron aims to construct EV charging points and

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<sup>36</sup> US – Tuna II (Mexico) Art. 21.5 (AB Report), [7.316].

<sup>37</sup> Marceau & Trachtman (2002) 811, 842.

<sup>38</sup> Anderson & Muller (2017) 18.

<sup>39</sup> Arrowsmith, Linarelli & Wallace (2000) 341.

<sup>40</sup> Krajewsky (2015) 71.

<sup>41</sup> Work Program (2012).

<sup>42</sup> Anderson & Muller (2017) 22.

<sup>43</sup> Concessions, BOT & DBO (2019).

secure its operation by the supplier. The supplier receives value of the procurement for manufacturing charging points and an OUF for operating them. Thus, the procurement is not covered by GPA as it is a concessions contract.

21. In *Norway- Trondheim*, the panel stated that *what* is being procured (the output) is the only relevant consideration and not the input.<sup>44</sup> The output of this procurement is the construction of EV infrastructure and its operation, and not mere EV charging points. Hence, the procurement in its entirety is not covered by GPA.

22. In any event, should the panel apply the GPA to the Measures, they are consistent with the Articles invoked.

**b. The Measures are consistent with Article IV:1(a) of GPA**

23. A measure is inconsistent with Article IV:1(a) when it is a law, requirement or procedure *regarding* covered procurement; and, it accords less favorable treatment to foreign suppliers and products as against domestic products. Less favorable treatment is interpreted more liberally under the GPA than GATT owing to absence of likeness test and the presence of transparency provisions under GPA.<sup>45</sup> Transparency provisions provide the operational implementation of non-discriminatory principles. Thus, establishing compliance with them indicates that treatment no less favorable has been accorded.<sup>46</sup> The transparency provisions stipulate that only requirements which are essential to ensure suppliers' ability to fulfill the contract must be imposed.<sup>47</sup> Solaris-based EV charging points made outside the Matte region are getting increasingly expensive.<sup>48</sup> They entail high cost risks due the need to import Solaris from Matte. To exercise cost control in light of the 'best value of money principle'<sup>49</sup> and ensure that the supplier has continued access to Solaris, it is required that the product is made and Solaris inputs are sourced in Zycron. These requirements imposed by the Initiative and Directive n.12 are to ensure that the supplier has the ability to fulfill the contract. The Measures comply with transparency principles indicating no less favorable treatment has been accorded to foreign products and suppliers, and are hence consistent with Article IV:1(a).

24. The Guideline lays down non-economic concerns to be considered in the evaluation of the bid in a transparent manner. The revised GPA allows for inclusion of non-economic

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<sup>44</sup> Norway- Trondheim Toll (GATT Panel Report), [4.8].

<sup>45</sup> Corvaglia (2016) 15.

<sup>46</sup> Corvaglia (2016) 15; Lester, Mercurio & Davies (2012) 714.

<sup>47</sup> GPA, art. VIII(1).

<sup>48</sup> Corrections & Clarification, 18.

<sup>49</sup> Overview.

concerns as award criteria.<sup>50</sup> Further, *lack of likeness test* under GPA provides flexibility for imposition of NPR-PPM measures for regulatory purposes.<sup>51</sup> Transparent and neutral inclusion of the non-economic concerns is not discriminatory.<sup>52</sup> Further, based on the role that international standards have in avoiding discrimination in WTO context, inclusion of ILO standards should not be interpreted as discriminatory.<sup>53</sup> Thus, the Measure is consistent with Article IV:1(a).

**c. Directive n.12 exception is consistent with Article IV:1(b) of GPA**

30. A measure is inconsistent with Article IV:1(b) when it is a law regarding a *covered* government procurement, and the treatment accorded to supplier or product of a GPA Party is less favorable than that accorded to that of another GPA Party. Article IV:1(b) does not preclude more favourable treatment from being accorded to non-parties.<sup>54</sup> Thus, the advantage of preference given to products of Tlon does not attract this provision, as Tlon is not a party to GPA. In any case, contract awarded to Tlon fall outside GPA-coverage due to the application of Annex 7. Annex 7 of parties' coverage schedules provide a list of procurements specifically exempted from GPA. Zycron has exempted contracts awarded to OTA parties under its Annex 7. Hence, the measure is consistent with Article IV:1(b).

**d. The Initiative and Directive n.12 are consistent with Article IV:2(b) of GPA**

31. A measure is inconsistent with Article IV:2(b) when there is discriminatory treatment between locally established suppliers offering foreign and domestic goods or services.<sup>55</sup> It has been established that these Measures comply with transparency provisions indicating non-discriminatory treatment.<sup>56</sup> The Measure is thus consistent with Article IV:2(b)

**e. The Measures can be justified under Article III:2 of GPA**

32. GPA Article III:2 is similar to GATT Article XX. Given the similarity, interpretations of GATT Article XX are relevant to GPA.<sup>57</sup> Articles III.2(a) and Article III.2(b), to the extent they refer to public morals and human, animal or plant life, are identical to Article XX(a) and XX(b) respectively. Hence, the arguments under Article XX of GATT shall apply here. Article III.2(a) additionally states that a GPA-inconsistency can be justified if the measure is

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<sup>50</sup> Corvaglia (2016) 18.

<sup>51</sup> Corvaglia (2016) 15; Davies (2011) 429–43.

<sup>52</sup> Corvaglia (2017) 139.

<sup>53</sup> Corvaglia (2017) 143

<sup>54</sup> Arrowsmith (2003)166.

<sup>55</sup> Arrowsmith (2003) 158.

<sup>56</sup> Lester, Mercurio & Davies (2012) 714; Corvaglia (2016) 15.

<sup>57</sup> Arrowsmith (2003) 144-145, Hoekman (1998).

necessary for protection of ‘public order and safety’. ‘Public order’ covers labor rights justifications.<sup>58</sup> Thus, the policy objective of the Guideline can be justified under the public order exception. Test of ‘necessity’ required by III:2(a) has been fulfilled because of reasons elaborated under XX(a).

**II. The implementations of OUF, as well as of the AOR, are not subsidies within the meaning of Article 1.1 of SCM, and are not in violation of Article 3.1(b) of SCM**

**A. OUF is not a prohibited subsidy under Article 3.1 (b) of SCM**

**i. OUF is not a subsidy within the meaning of Article 1.1 of SCM**

**i. Purchase of services is not covered by SCM**

33. A purchase of services is excluded from the definition of ‘financial contribution’ in Article 1.1(a).<sup>59</sup> A transaction would be characterized as a purchase of service if the work performed is for the benefit of the service provider, and not for the benefit of the entity funding the purchase (or the government).<sup>60</sup> For this examination, factors like the legislation authorizing the purchase, the allocation of ownership under the contracts, and whether there are typical elements of a purchase of service such as a *fee* or a *profit* are considered.<sup>61</sup>

34. OUF covers the costs *only* for the *operation* of the charging stations. It is not related to the procurement of those charging stations. Hence, the OUF is not paid for goods procured. The nature of work is for the benefit of the government as it contributes to the objective of establishing a public infrastructure for increased use of EVs. It also comprises typical elements of a purchase of service, i.e., a fee and reasonable profit.

**ii. In any event, OUF is not a subsidy under Article 1.1**

35. A subsidy exists when there is a financial contribution that confers a benefit.<sup>62</sup> A financial contribution by way of a grant would confer a benefit only where money is given to a recipient without any reciprocal obligations.<sup>63</sup> OUF is not a fixed amount being transferred without any reciprocity. An operator has obligations to maintain and operate the charging station, which is why OUF covers only costs of operation and reasonable profits. It fluctuates on the basis of how an operator’s charging station is *performing*, i.e., it is calculated on the basis of the number of EVs using the charging stations daily.

**b. In any event, OUF is not in violation of Article 3.1(b) of SCM**

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<sup>58</sup> Corvaglia (2012).

<sup>59</sup> US – Large Civil Aircraft (2nd complaint) (AB Report), [620]; P. 426, trade remedies- Planck.

<sup>60</sup> US – Measures Affecting Trade in Large Civil Aircrafts (Panel Report), [7.79].

<sup>61</sup> US – Large Civil Aircrafts (AB Report), [7.979]-[7.1026].

<sup>62</sup> US – Exports Restraints, (Panel Report), [8.20].

<sup>63</sup> US – Large Civil Aircraft, (AB Report), [616].

36. Even if OUF is considered a subsidy under Article 1.1, it does not violate Article 3.1(b). Article 3.1(b) of the SCM Agreement prohibits granting of subsidies ‘contingent’ upon the use of domestic over imported goods, and not the subsidization of domestic production per se.<sup>64</sup> ‘Contingent’ means conditional or dependent for existence on something else.<sup>65</sup> It is demonstrated on the basis of the words or context of the relevant measure.<sup>66</sup>

37. The process of procurement qualification is independent from the grant of OUF. While on a prima facie basis it might seem like the OUF is contingent upon the use of domestic goods because of Directive n.12, the Directive is simply a precondition to qualify as an operator. Therefore, it is not related to grant of OUF. OUF, by itself, is not based on any assessment of the origin of the good. Thus, grant of OUF is not contingent upon use of domestic goods.

**B. AOR is not a prohibited subsidy under Article 3.1(b) of SCM**

**a. AOR is not a subsidy within the meaning of Article 1.1 of SCM**

38. A ‘benefit’ under Article 1.1 does not exist in the abstract, but must be received and enjoyed by a *beneficiary* or a *recipient*. The term ‘benefit’, therefore, implies that there must be a recipient. The focus of inquiry under Article 1.1(b) should be the recipient and not the granting authority,<sup>67</sup> i.e., persons and not their productive operations.<sup>68</sup>

39. The zero tariffs in AOR cannot be considered a contribution that confers a ‘benefit’ because the identity of recipient is undefined. OTA is open to all countries, and any country that accedes would benefit from zero tariffs.

**b. In any event, AOR is not in violation of Article 3.1(b) of SCM**

40. Even if it is considered a subsidy under Article 1.1, AOR does not violate Article 3.1(b). The legal standard under Article 3.1(b) is not whether conditions for eligibility and access to subsidy *may* result in the use of more domestic and fewer imported goods, but whether the measure *reflects* a condition requiring the use of domestic over imported goods.<sup>69</sup> Domestic goods originate within the Member's territory and imported goods *cross the border* into that Member's territory.<sup>70</sup> The term ‘use’ may refer to incorporating a component into a separate good, or serving as a tool in the production of a good.

41. Even if OTA products are considered ‘domestic’, subsidies that relate to domestic production are not, for that reason alone, prohibited under Article 3 of the SCM

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<sup>64</sup> US – Tax Incentives (AB Report), [5.15].

<sup>65</sup> EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US) (Panel Report), [6.778].

<sup>66</sup> Canada – Autos (AB Report), [123].

<sup>67</sup> Canada – Civilian Aircraft (AB Report), [154].

<sup>68</sup> US – Countervailing Measures on Certain EC Products (AB Report), [110].

<sup>69</sup> EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US) (AB Report), [5.65].

<sup>70</sup> US – Tax Incentives (AB Report), [5.10].

Agreement.<sup>71</sup> They may foster the use of subsidized domestic goods and result in displacement of imported goods. However, such effects by themselves, do not demonstrate the existence of a requirement to use domestic over imported goods.<sup>72</sup>

42. Products of countries that qualify for import duty exemption under AOR would always be imported products for Zycron because they *cross the border* into its territory. Foregoing import duties would in fact encourage imports. Hence, this financial contribution can never be considered as contingent on *use* of domestic over imported goods. Further, Solaris and Solaris products imported from an OTA Party qualify for the preferential tariffs the moment they enter Zycron's territory without any condition on how these imported products or domestic products are *used*.

### **C. In any event, the Measures can be justified under Article XX of GATT**

43. Renewable energy subsidies, inconsistent with the SCM Agreement can be justified on environmental protection grounds under GATT Article XX. Simply excluding subsidies from WTO compatibility because they have environmental goals is unrealistic.<sup>73</sup> The OUF and AOR encourage the use of Solaris, a metal that is environment friendly, hence, they can be justified under Article XX(g) and XX(b) of GATT. A contribution like OUF would create compliance-incentives for the operators which would reduce the cost of electricity produced and encourage a switch from conventional energy sources to renewable energy, eventually curbing vehicular emissions. Hence there is a genuine relationship between the subsidy and prevention of air pollution. AOR would ensure easy access to Solaris and Solaris Charging Points using Solaris.

## **III. The implementation of the AOR and CR 50, is consistent with Article I:1 and Article XI:1 of GATT, and Article 2(b) and (c) of the RO Agreement**

### **A. CR 50 is consistent with Article I:1 and XI:1 of GATT**

#### **a. CR 50 is consistent with Article I:1 of GATT**

44. As stated above, making an advantage conditional on criteria not related to the imported product itself is not *per se* inconsistent with Article I:1. The OTA is an open agreement for all other countries to enter. Hence, the advantage of preferential tariffs conferred by the OTA has been accorded in a non-discriminatory way as it is granted immediately and unconditionally to all countries that accede to the OTA.

#### **b. CR 50 is consistent with Article XI:1 of GATT**

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<sup>71</sup> US – Tax Incentives (AB Report), [5.15].

<sup>72</sup> EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US) (AB Report), [5.65].

<sup>73</sup> Rubini (2015) 568.

45. Article XI:1 provides that prohibitions and restrictions on import and export whether made effective through quotas, licenses or other measures, shall not be maintained by any Contracting Party. Hence, the text of Article XI:1 makes it clear that it does not prohibit export licenses *per se*, but only those licensing systems that have a prohibitive or restrictive effect on imports or exports.

46. An automatic licensing system does not constitute a restriction prohibited under Article XI:1 and is an example of permitted licensing as it operates on an MFN basis.<sup>74</sup> Licenses that implement a measure that is justified pursuant to another provision of GATT, may be consistent with Article XI:1, so long as the license does not have a limiting effect.<sup>75</sup>

47. The process of validation of end-user certificates under CR 50 is operating in an automatic and MFN way, as all certifications complying with the requirement have been validated till now, including those requested by Avilion's importers.

**c. CR 50 is justified under Article XXIV of GATT**

48. AB has recognized that Art. XXIV constitutes an exception that provides a justification for measures which may be found inconsistent with GATT.<sup>76</sup> There is a two-tier test to determine whether a measure, otherwise inconsistent with GATT is justified under Art XXIV: (i) the measure is introduced upon the formation of an FTA that meets all the requirements set out in WTO law (Article XXIV); and, (ii) the formation of the free trade area would be impossible if the introduction of the measure were not allowed.<sup>77</sup>

49. CR 50 implements the OTA, which is an FTA that meets the conditions of Article XXIV.

**i. OTA meets the requirements of Article XXIV**

50. First, as per XXIV:8(b), an FTA must liberalize *substantially* all the trade between constituent territories. This is something considerably more than merely *some* of the trade.<sup>78</sup> The Additional Protocol to the OTA covers around 85% of all the existing trade between OTA Parties, hence this condition is satisfied.

51. Second, as per XXIV:5(b), an FTA must not impose duties or other regulations of commerce higher or more restrictive than what existed prior to its formation, for trade with non-FTA Members. To determine if a regulation of commerce is 'higher' one needs to find out the restrictive level of 'before.' The GATT cannot be read in isolation from public

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<sup>74</sup> India – Quantitative Restrictions (Panel Report), [5.129]-[5.130]; EEC- Imports from Hong Kong (Panel Report), [31].

<sup>75</sup> China – Raw Materials (Panel Reports), [7.957]-[7.958].

<sup>76</sup> Turkey – Textiles (AB Report), [46]; Korea – Dairy (AB Report), [77]; Lockhart & Mitchell (2005) 81-113.

<sup>77</sup> Turkey – Textiles (AB Report), [58].

<sup>78</sup> Turkey – Textiles (AB Report), [48].



international law,<sup>79</sup> and a Member's international obligations should be taken into account while interpreting WTO Agreements.<sup>80</sup> The principal means through which the WTO promotes regulatory convergence is by encouraging members to use international standards.<sup>81</sup> Non-proliferation of WMDs and export controls for the same are obligations that countries already have, as indicated by UNSC Resolutions, international treaties and customary international law.<sup>82</sup> These obligations were always applicable to both, Avilion and Zycron, under customary international law in general, and as members of the UN in particular. The 'OC' requirement restricts exports of Solaris to producers of military equipment and arms. Hence, it does not create any regulations of commerce higher or over and above the legal obligation that the countries already had.

52. Further, RoOs cannot be considered as 'other regulations of commerce' for practical reasons. *Before* the creation of an RTA, there are no RoOs for the preferential trade tariffs of that agreement, because those preferential tariffs do not yet exist.<sup>83</sup> If RoOs were 'regulations of commerce', it could mean that no RoO for *any product* could be higher or more restrictive under the FTA than before.<sup>84</sup> However, in the case of an FTA, restrictive RoO deserve to be in place to prevent circumvention by non-parties.<sup>85</sup> Hence, the AOR is not an 'other regulation of commerce' under Article XXIV.

ii. The formation of an FTA would be prevented without the 'OC' requirement in the OTA

53. The term 'substantially all trade' means that no major sector of a national economy can be excluded.<sup>86</sup> Solaris industry is a major sector of national economies in the Matte region. Hence, it could not have been excluded from the FTA. Throughout the 2<sup>nd</sup> half of the 20<sup>th</sup> century, Zycron and Tlon were at war over control of Solaris mines. It is in this context that the OTA seeks to prevent the use of Solaris for military purposes. Without a condition stipulating that parties shall suspend the export of Solaris for military use, the parties would not have agreed to free trade of the metal, and a GATT-consistent FTA would not have been formed. Given the unique facts pertaining to the Solaris industry in the region, the formation of the OTA would have been impossible without the 'OC' requirement.

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<sup>79</sup> US – Gasoline (AB Report), [17]; DSU, 3.2; Korea – Procurement (Panel Report), [Para 7.96].

<sup>80</sup> EC and Certain member States – Large Civil Aircraft (AB Report), [843].

<sup>81</sup> Polanco & Sauve (2018) 581.9.

<sup>82</sup> UNSC Res. 1540 (2004); ARO, 3(d); Luo (2007) 447.

<sup>83</sup> Hudec & Southwick (1999) 57-58.

<sup>84</sup> Hudec & Southwick (1999) 59.

<sup>85</sup> Choi (2003) 60-61.

<sup>86</sup> Matsushita, Mavroidis & Hahn (2015) 519.

**d. In any event, CR 50 is justified under Article XX of GATT**

54. As already laid down, the two-tiered test of Article XX involves: (i) provisional justification of the measure under any subpara; and, (ii) compliance with the *chapeau*.

i. Subparagraphs of Article XX are applicable

- *The official certification requirement of CR 50 is justified under XX(a) and XX(b)*

55. A Measure must be designed to protect public morals or human life, and must be necessary to achieve this protection. The existence of an international obligation is a strong indicator of the importance of the values protected by the measure.<sup>87</sup> Public morals encompass human rights and the international community has solemnly proclaimed that there exists a human right to peace.<sup>88</sup> A life in peace is an essential condition for the realization of right to health for which it is essential to prevent armed conflict.<sup>89</sup> The official certification requirement prohibits the use of Solaris for military purposes, and this is the least trade-restrictive measure within Zycron's capacity to protect the integrity of its Solaris in the world market. Further, as a member of the UN, Avilion has accepted these international standards.

- *The AOR implemented by CR 50 is justified under XX(j)*

56. The product in short supply in Zycron is EV charging points, and AOR is essential to secure their supply. The CR 50 implements the OTA which is aimed at regional integration of the Solaris industry in the Matte region. The policy condition in the OTA coupled with tariff restrictions allow Zycron to ensure a steady supply of Solaris charging points and Solaris to meet the increasing requirements of its EV industry. Hence, the restrictions are needed to build domestic manufacturing capacity.

ii. CR 50 meets the chapeau of Article XX

- *The official certification requirement of CR 50 is does not constitute an arbitrary or unjustifiable means of discrimination*

57. Under the chapeau, it is not the measure which is assessed but the manner in which it is applied.<sup>90</sup> A licensing requirement may constitute a means of arbitrary distribution when licensing agencies have an unfettered or undefined discretion to reject a license application.<sup>91</sup> However, the licensing requirement is not being applied in an arbitrary

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<sup>87</sup> Wenzel (2010) 495.

<sup>88</sup> Alston (1980) 319.

<sup>89</sup> Perry, Fernandez & Puyana (2015).

<sup>90</sup> US – Gasoline (AB Report), [16]; US – Shrimp (AB Report), [150].

<sup>91</sup> China – Raw Materials (Panel Report), [7.957]-[7.958].

manner by Zycron as the validation of end-user certification is granted in all cases where the requirement is met.

- *The AOR is not a disguised restriction on international trade*

58. AOR is not a disguised restriction on international trade as OTA is open for all countries, and it does not limit or restrict the export of Solaris to non-OTA countries.

**B. Exception under Article XXIV of GATT precludes the application of RO Agreement.  
In any event, AOR is consistent with Article 2(b) and (c) of the RO Agreement**

**a. If the Panel accepts Article XXIV as a justification for CR 50, Part II of the  
RO Agreement does not apply to the AOR**

59. If the Panel accepts the OTA as an FTA under Article XXIV of GATT, CR 50 would be considered a preferential instrument of commercial policy, and the RoO in it (the AOR) would be outside the scope of Part II of the RO Agreement. This is because AOR would be considered as a rule related to a contractual or autonomous trade regime granting tariff preferences going beyond the application Article I:1 of GATT as described in Article 1 of the RO Agreement, and hence, outside the scope of Part II. RO Agreement governs only RoOs found in non-preferential instruments of commercial policy.<sup>92</sup>

**b. In any event, the AOR is consistent with Article 2(b) and (c) of the RO Agreement**

i. AOR is consistent with Article 2(b)

60. Article 2(b) prohibits pursuing trade policy objectives through the use of RoOs, notwithstanding the instruments of commercial policy to which they are linked. RoOs, when used to merely implement and support trade policy instruments, would not be considered inconsistent with Article 2(b).<sup>93</sup> During the transition period, Members retain considerable discretion in designing and applying their RoO, and in determining the criteria which confer origin.<sup>94</sup>

61. Even if a RoO has a practical effect of favoring goods imported from one country over another, that effect might be incidental rather than intentional, and by itself, would not justify an inference so as to treat such an effect a trade objective pursued by the RoO.<sup>95</sup> Using rules of origin to maintain the integrity and effectiveness of a trade policy instrument would not constitute an illegitimate objective.<sup>96</sup>

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<sup>92</sup> ARO, art 1(2).

<sup>93</sup> US – Textiles (Panel Report), [6.43], [6.84].

<sup>94</sup> US – Textiles (Panel Report), [6.23]-[6.25].

<sup>95</sup> US – Textiles (Panel Report), [6.117].

<sup>96</sup> US – Textiles (Panel Report), [6.90].

62. It must be respected that during the transition period, Members have considerable discretion in designing and applying their rules. The RoO in CR 50 is only implementing and supporting the trade policy of the OTA. Considering the rule on a *standalone* basis, there is nothing to indicate in its design and structure that the RoO can pursue any trade objectives by *itself* because it applies to any country that is an OTA Party. Any practical consequence of a country's goods being favored over another because of such a rule would be merely incidental. This should be read with Article 2(c) which provides ample clarity. Even if the instrument of commercial policy in which the rule exists is found to pursue trade objectives, the rule by *itself* should not supplement these objectives.

ii. AOR is consistent with Article 2(c)

63. Article 2(c) provides that RoOs shall not *themselves* create restrictive, distorting or disruptive effects on international trade. The term *themselves* is meant to highlight that the RoOs used to implement commercial policy measures must not create any additional restrictive, distorting, or disruptive effects on international trade to what might be created by the instrument itself.<sup>97</sup> While the use of a particular rule of origin may adversely affect the trade of one Member, it may favorably affect the trade of one or more Members. Hence, the mere fact that one Member would lose trade cannot conclusively indicate whether the rule in question creates a restrictive effect on international trade."<sup>98</sup>

64. Further, there is no requirement in Article 2 of the *RO Agreement* to use a particular type of rule. It simply provides broad parameters for the use of rules of origin.<sup>99</sup> There is no requirement in Article 2 that Members need to confer origin on the country where the most significant economic contribution to a final good has been made. The fact that an origin-conferring operation is not the one which reflects the most value added does not necessarily indicate an objective to use the RoO to pursue trade objectives.<sup>100</sup>

65. The mere fact that Avilion may lose trade would not by itself make AOR restrictive. In fact the rule is found in a commercial policy instrument that seeks to create more trade flows between OTA-signatories, and the impugned rule only supports and implements this objective. Article 2 gives enough discretion to Members to design their RoOs on the basis of criteria they deem fit. Hence, AOR is consistent with Article 2(c) of the RO Agreement.

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<sup>97</sup> US – Textiles (Panel Report), [6.136]-[6.137].

<sup>98</sup> US – Textiles (Panel Report), [6.148].

<sup>99</sup> US – Textiles (Panel Report), [6.73].

<sup>100</sup> US – Textiles (Panel Report), [6.75].

**REQUEST FOR FINDINGS**

For the above mentioned reasons, Zycron requests that the Panel finds:

1. That the Initiative, Directive n.12 and the Guideline are consistent with Articles I:1 and III:4 of GATT or, in the alternative, justified under Article XX of GATT.
2. That the Initiative, Directive n.12 and the Guideline are not covered under the GPA. Should the Panel consider these measures within the coverage of the GPA, Zycron requests the finding that the Measures are in compliance with Articles IV:1(a), IV:1(b) and IV:2(b) of the GPA or, in the alternative, justified under Article III.2 of GPA.
3. That the implementation of OUF established in GEA and AOR established by OTA are not subsidies within the meaning of Article 1.1 of the SCM Agreement, or in the alternative, are not prohibited subsidies under Article 3.1(b) of the SCM or, in the alternative, justified under Article XX of GATT.
4. That the implementation of CR 50 is in compliance with Article I:1 and Article XI:1 of GATT, or in the alternative, justified under Article XXIV or Article XX of GATT.
5. That application of exception under Article XXIV precludes the application of RO Agreement. Should the Panel consider the AOR within the scope of Part II of the RO Agreement, Zycron requests a finding that the AOR is consistent with Article 2(b) and (c) of the RO Agreement.