

JHJMCC 2018-2019

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Team: 012C

**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 COMPLAINANT**

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LAFTA	Latin American Free Trade Association, Conclusions adopted, BISD 9S/21, 10 June 1960.



**LIST OF ABBREVIATION**

\$	US dollar
%	Percent
2018 Guideline	The 23 March 2018 Guideline
ABR	Appellate Body Report
AORs	The “accumulation of origin” rules within OTA
ARO	The Agreement on Rules of Origin
Art./Arts.	Article/Articles
CPC	Central Product Classification
Directive n.12	Procurement Directive n.12-2018/2019 (“2018 EV Charging Points Procurement Directive”)
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EFTA	European Free Trade Association
ESL laws	Environmental, social, and labour laws
EV	Electric vehicles
Fn.	Footnote
FTA(s)	Free Trade Area(s)
FTA interim agreement	The interim agreement leading to the formation of an FTA
GATT	General Agreement on Tariffs and Trade 1994
GEA	The Going Electric Act
GEP	The Going Electric Plan
GPA	Revised Government Procurement Agreement
GSP	Generalized System of Preferences
HS	Harmonized Commodity Description and Coding System
i.e.	<i>id est</i> , that is
IEIA	International economic integration agreement
ILO	International Labour Organization
ILO Conventions	The Hours of Work (Coal Mines) Convention (No. 31), 1931, and the Safety and Health in Mines Convention (No.176), 1995

IPA	International peace agreement
LAFTA	Latin American Free Trade Association
LDC(s)	Least Developed Country (Countries)
Members	WTO Members
MFN	The Most-favoured-nation Treatment
MIET	The Zycron's Ministry of Infrastructure and Electric Transport
MoD	The Ministry of Defence
NAFTA	The North American Free Trade Agreement
NT	The National Treatment
OTA	The Orbis Tertius Agreement
OUF	The Official Unitary Fee
Para.	Paragraph
PPM(s)	Processes and Production Method(s)
PR	Panel Report
Regulation No. 50	Zycron Customs Regulation No. 50
SCM	Agreement on Subsidies and Countervailing Measures
SDG(s)	The UN Sustainable Development Goals (s) of 25 September 2015 (Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/1)
Solaris Products	Not including EV Charging points
UN	United Nations
US	United States of America
WTO	World Trade Organization

**SUMMARY****I. DIRECTIVE N.12 IS INCONSISTENT WITH GATT ARTS. I:1, III:4 AND GPA ART. IV:1-2.**

- The measure is inconsistent with GATT Art. III:4 since (i) it is not covered by the derogation in Art. III:8 because it discriminates Solaris products which are not the products procured by MIET; (ii) it is a requirement affecting the internal use of Solaris products; (iii) imported and domestic Solaris products are like products because the measure distinguishes them solely on the basis of origin; and (iv) it accords less favourable treatment to imported Solaris products by *de jure* discriminating against them.
- The measure is inconsistent with GATT Art. I:1 since (i) it falls within GATT Art. I:1; (ii) Solaris products from IEIA countries and those from other Members are like products because the measure distinguishes them solely on the basis of origin; and (iii) it fails to extend the advantage accorded to Solaris products from IEIA countries unconditionally to other Members by *de jure* favouring IEIA countries.
- The measure is not justified under GATT XXIV since (i) OTA Protocol is not an FTA interim agreement because it involves a non-Member Tlön and it fails to eliminate the trade barriers on substantially all the trade within OTA; (ii) the regulation of commerce maintained in OTA is more restrictive than that before the adoption of OTA Protocol because Zycron also favours other IEIA countries; and (iii) barring Directive n.12 would not prevent the adoption of OTA Protocol.
- The measure is inconsistent with GPA Art. IV:1-2(b) because (i) GPA applies to MIET's procurement specifically because the procurement was awarded under Zycron's domestic laws instead of OTA; and (ii) Directive n.12 is inconsistent with GPA Art. IV:1 and IV:2(b) for similar reasons as analyzed under GATT Arts. III:4 and I:1.

**II. 2018 GUIDELINE IS INCONSISTENT WITH GATT ARTS. I:1, III:4, AND GPA ART. IV:1-2.**

- The measure is inconsistent with GATT Art. III:4 since (i) it falls within GATT Art. III:4, (ii) Avilion's and Zycron's Solaris are like products because their only difference lies in the production manner which does not affect their competitive relationship; and (iii) it accords less favourable treatment to Avilion's Solaris *vis-à-vis* Zycron's Solaris by specifically targeting at Charging Queen's Solaris from Avilion.
- The measure is inconsistent with GATT Art. I:1 since (i) it falls within GATT Art. I:1; (ii) Avilion's and other Members' Solaris are like products; and (iii) it fails to extend unconditionally the advantage accorded to Solaris from other Members to Avilion for similar reasons as analyzed under GATT Art. III:4.
- The measure cannot be justified under GATT Art. XX(a), (b), and (d) since (i) it is not

necessary because Zycron can instead consider the observance of ESL laws in selecting the procurement supplier and assign it a significant weight proportionate to its importance instead of adopting the observance as an eligibility requirement; and (ii) it results in discrimination between countries with equally poor miner working conditions and the discrimination is arbitrary or unjustifiable in character.

- The measure is inconsistent with GPA Art. IV:1-2(b) for the similar reasons as analyzed under Directive n.12. It cannot be justified under Article III:2(a) of GPA for the similar reasons as analyzed under GATT Art. XX(a) and chapeau.

### **III. OUF IS INCONSISTENT WITH SCM ART 3.1(B).**

- The measure is inconsistent with SCM Art. 3.1(b) since (i) it is a government purchase of goods under SCM Art. 1.1(a)(iii) because MIET uses it to purchase Solaris electricity; (ii) it confers benefits to suppliers under SCM Art. 1.1(b) by paying a guaranteed minimum fee that goes beyond the suppliers cost plus a reasonable profit; and (iii) it is contingent upon the use of domestic over imported goods because it requires the use of domestic Solaris products as a condition for suppliers to receive OUF.

### **IV. AORS AND REGULATION NO. 50 ARE INCONSISTENT WITH GATT ARTS. I:1 AND XI:1 AND ARO ART. 2(B), (C).**

- The measures are inconsistent with GATT Art. I:1 since (i) they fall within GATT Art. I:1; (ii) Solaris to Tlön and that to Avilion are like products because they are only different in destination; and (iii) the measures fail to extend the advantage of electronic self-declaration accorded to Solaris destined for Tlön to that destined for Avilion.
- The measures are inconsistent with GATT Art. XI:1 since it requires validation of the exports to non-OTA parties and such validation is subject to delays and is thus on a discretionary and non-automatic basis.
- The measures are not justified under GATT Art. XX(a) since they are not necessary because Zycron can assign the validation to its custom authorities instead of MoD.
- The measures are not justified under GATT Art. XXIV since OTA Protocol is not an FTA interim agreement and barring the measures will not prevent its adoption.
- The measures are inconsistent with ARO Art. 2(b) and (c) since (i) they are rules of origin within ARO Art. 1.1; (ii) Zycron uses them as instruments to pursue the trade objective of favouring OTA parties; (iii) they have a distorting effect which favours imports from OTA parties; and (iv) they include the condition of joining OTA as a prerequisite for the conferral of origin, which is unrelated to the manufacturing or processing of products.

### STATEMENT OF FACTS

Avilion and Zycron are both developed WTO Members. Zycron is located in the Matte Peninsula which holds large reserves of Solaris, a metal which can be used in products powered by solar energy. Tlön is a least-developed non-WTO Member in the Peninsula which has the largest reserves of Solaris. Zycronian nationals own or control the large majority of companies extracting Solaris in Tlön. Avilion is the only country located outside the Matte Peninsula with Solaris mines. Charging Queen, incorporated in Avilion and with subsidiaries in Zycron, is the major exporter of EV batteries and charging points in the world.

On 21 September 2012, Zycron and Tlön signed OTA, stipulating that OTA parties exporting Solaris shall require an official certification from the end-user and validate it. In Zycron, however, only the Solaris exports to Avilion importers (including Charging Queen) suffered continuous delays in an average of 3 and 4 months in this validation process. On 15 February 2018, Zycron and Tlön signed OTA Protocol and commit to reach zero tariffs in 2025, covering 90% of all HS tariff lines and 85% of all trade between OTA parties.

On 21 January 2017, Zycronian government launched the Made in Zycron Initiative to develop public charging infrastructures using Solaris. To implement this Initiative, MIET issued Directive n.12 on 17 March 2018 and 2018 Guideline on 23 March 2018. On 1 April 2018, MIET issued an open competitive call for a framework purchasing agreement for installing and managing public Solaris EV charging points in Zycron. The procurement specifies that the winning supplier shall provide solar power charging points to be owned by MIET and offer free charging to Zycronian EV owners. The supplier will obtain, among others, an OUF for its operation of the charging points, under which MIET guarantees a minimum weekly fee even if no cars have used the charging stations in a week.

The procurement contract was awarded under Zycron's domestic laws. Based on Directive n.12 and 2018 Guideline, MIET excluded Charging Queen from the procurement competition, and the contract was awarded to Taggart Mobility, Zycron's biggest name in electric vehicle EV charging solutions. OUF, especially the guaranteed minimum fee, further allows Zycron's suppliers to produce charging points cheaper and therefore compete with international producers, including Charging Queen. Since the launching of the Made in Zycron Initiative, the volume of exports of Solaris products by Charging Queen to Zycron drastically dropped to 20% of its exports before the Initiative was implemented.

After unsuccessful consultations, Avilion brought the case to the DSB asserting that Zycron violates its WTO obligations under GATT, GPA, SCM, and ARO.

### IDENTIFICATION OF THE MEASURES AT ISSUE

**Directive n.12:** A procurement directive issued by MIET on 17 March 2018, requiring that, to be eligible to participate in the bidding of MIET’s projects, suppliers shall use Zycron’s Solaris products or, when their quantity is insufficient, Solaris products from IEIA countries.

**2018 Guideline:** A guideline circulated by MIET on 23 March 2018, requiring Zycron’s contracting authorities to consider the supplier’s observance of ESL laws at the relevant stages of procurement when determining whether to award contracts to a supplier.

**OUF:** A fee stipulated in the GEA to be paid to the operators of EV charging stations, which guarantees a minimum weekly fee even if no cars have used the charging stations in a week.

**AORs:** An accumulation of origin rule in OTA Arts. 3.1 and 3.2 stipulating that Solaris and Solaris products obtained or produced within the territories of OTA Parties shall be treated as domestic products in the importing OTA Party.

**Regulation No. 50:** A regulation adopted on 5 February 2018, stipulating that an importer may submit an electronic self-declaration instead of going through the official certification and validation process to qualify under AORs.

### LEGAL PLEADINGS

#### **I. DIRECTIVE N.12 VIOLATES GATT ARTS. III:4 AND I:1 AND GPA ART. IV:1-2.**

##### **1. Directive n.12 is inconsistent with GATT Art. III:4.**

Directive n.12 is inconsistent with GATT Art. III:4 because (i) it is not covered by the derogation in GATT Art. III:8; (ii) it is a requirement affecting the internal use of Solaris products; (iii) imported and domestic Solaris products are like products; and (iv) it accords less favourable treatment to imported Solaris products.

##### **A. Directive n.12 is not covered by the derogation in GATT Art. III:8.**

GATT Art. III:8(a) only applies when the discriminated products are in a competitive relationship with the product purchased by the procurement.<sup>1</sup> In this case, by excluding the suppliers which do not use Solaris products from Zycron or other IEIA countries, Directive n.12 discriminates Solaris products, such as Solaris batteries. The product purchased by MIET procurement, however, is the EV charging points. By their nature, Solaris products are inputs to EV charging points, and these two products are not in a competitive relationship. Hence, GATT Art. III:8(a) does not apply in this case.

##### **B. Directive n.12 is a requirement affecting the internal use of Solaris products.**

A requirement under GATT Art. III:4 includes a measure which an enterprise voluntarily

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<sup>1</sup> ABR, India–Solar Cells, [5.24, 5.25].

accepts to obtain an advantage from the government.<sup>2</sup> Directive n.12 is a requirement since complying with which is a precondition for suppliers to obtain certain advantage, that is, to be eligible for MIET's procurement competition.

In addition, a measure "affects" the internal use of a product if it creates incentives or disincentives with respect to the use of that product.<sup>3</sup> In this case, by requiring the suppliers to use Zycron's Solaris products in priority, Directive n.12 creates a disincentive on suppliers from using imported Solaris products. This affects the internal use of Solaris products.

**C. Imported and domestic Solaris products are like products.**

Like products under GATT Art. III:4 can be established when a measure distinguishes products *solely based on origin*.<sup>4</sup> In this case, Directive n.12 distinguishes Zycron's Solaris products from other Members' solely based on their origin without other considerations. Hence, the two Solaris products are like products.

**D. Directive n.12 accords less favourable treatment to imported Solaris products.**

*De jure* discrimination can be found when a measure, in its form, discriminates products solely based on their origin.<sup>5</sup> In this case, Directive n.12 *explicitly* requires all suppliers to use Zycron's Solaris products before they run out of the sufficient quantity, whose favour is solely based on the product origin. Therefore, Directive n.12 imposes *de jure* discrimination against, and thus accords less favourable treatment to, imported Solaris products.

**To conclude**, Directive n.12 is inconsistent with GATT Art. III:4.

**2. Directive n.12 is inconsistent with GATT Art. I:1.**

Directive n.12 is inconsistent with GATT Art. I:1 because (i) it falls within GATT Art. I:1; (ii) Solaris products from IEIA countries and those from other Members are like products; and (iii) it fails to extend the advantage accorded to the former immediately and unconditionally to the latter.

**A. Directive n.12 falls within GATT Art. I:1.**

GATT Art. I:1 applies to all matters referred to in GATT Art. III:4. As elaborated in I.1, Directive n.12 is a requirement affecting the internal use of Solaris products and falls within GATT Art. III:4. Hence, it also falls within GATT Art. I:1.

**B. Solaris products from IEIA countries and from other Members are like products.**

Like products under GATT Art. I:1 can be established when a measure distinguishes

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<sup>2</sup> PR, India–Autos, [7.190-91]; PR, Argentina–Import Measures, [6.280].

<sup>3</sup> PR, EC–Bananas III, [7.175]; PR, India–Autos, [7.196-97]; PR, China–Publications and Audiovisual Products, [7.1450].

<sup>4</sup> ABR, Argentina–Financial Services, [6.36]; PR, Brazil–Taxation, [7.124-125].

<sup>5</sup> ABR, Argentina–Financial Services, [6.36].

products solely based on their origin.<sup>6</sup> In this case, by distinguishing Solaris products from IEIA countries and those from other Members and exceptionally permitting the use of the former, Directive n.12 distinguishes Solaris products solely based on their origin. Hence, the two Solaris products are like products.

**C. Directive n.12 fails to extend the advantage accorded to Solaris products from IEIA countries immediately and unconditionally to other Members.**

An advantage creates more favourable competitive opportunities between products of different origins.<sup>7</sup> In this case, by permitting suppliers an exception to use Solaris products from IEIA countries, Directive n.12 confers a more favourable competitive opportunity to Solaris products from IEIA countries *vis-à-vis* other Members. Hence, it fails to extend this advantage immediately and unconditionally to products from all Members.

**To conclude**, Directive n.12 is inconsistent with GATT Art. I.

**3. Directive n.12 cannot be justified under GATT Art. XXIV.**

Zycon might defend that OTA Protocol is an FTA interim agreement and raise GATT Art. XXIV to justify Directive n.12. This defence, however, shall be rejected because (i) OTA Protocol is not an FTA interim agreement within GATT Art. XXIV; (ii) the regulation of commerce maintained in OTA is more restrictive than that before the adoption of OTA Protocol; and (iii) barring Directive n.12 would not prevent the adoption of OTA Protocol.

**A. OTA Protocol is not an FTA interim agreement within GATT Art. XXIV.**

Pursuant to its chapeau, GATT Art. XXIV:5 only covers the FTAs *between the territories of contracting parties*. Thus, FTAs involving non-Members do not fall within it.<sup>8</sup> Zycon might argue otherwise by invoking EFTA or LAFTA, etc.<sup>9</sup> Such argument, however, shall be rejected because neither the Working Party nor Members reached any conclusion on this issue.<sup>10</sup> In this case, since one of the parties to OTA Protocol is Tlön, a non-Member, OTA Protocol is not an FTA interim agreement within GATT Art. XXIV:5.

In addition, pursuant to GATT Art. XXIV:8(b), an FTA interim agreement must lead to the elimination of the duties and other restrictive regulations on “substantially all the trade” within that area. A reference case indicative of this requirement is *US–Line Pipe: NAFTA*, recognized by the Panel as meeting this requirement, eliminated all duties on 97% of the

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<sup>6</sup> ABR, Canada–Periodicals, p.12; PR, US–Poultry (China), [7.427-29]; PR, China–Publications and Audiovisual Products, [7.1446].

<sup>7</sup> PR, EC–Bananas III, [7.239].

<sup>8</sup> GATT PR, EEC–Bananas II, [163].

<sup>9</sup> GATT PR, EC–Citrus Products, [49].

<sup>10</sup> EFTA Conclusions adopted, [58]; WPR, LAFTA, [31].



parties' tariff lines, representing 99% of the trade volume among them.<sup>11</sup> In this case, OTA Protocol covers only 90% of all HS tariff lines and 85% of the trade volume.<sup>12</sup> Considering the significance of this 7% minus in tariff lines and 14% minus in trade volume to NAFTA, Zycron fails to establish a *prima facie* case that OTA Protocol will lead to the elimination of the duties on substantially all the trade in the area.

**B. The regulation of commerce maintained in OTA is more restrictive than that prior to the adoption of OTA Protocol.**

Pursuant to GATT Art. XXIV:5(b), the regulations of commerce maintained in each of the constituent territories against other Members shall not be more restrictive than that prior to the adoption of an FTA interim agreement. The *Canada–Autos* Panel further found a breach of this requirement when Canada accorded a favourable duty treatment to products from some non-FTA WTO Members.<sup>13</sup> This case is similar. Directive n.12 offers a favourable exception to not only Solaris products from OTA parties but also those from other IEIA countries. Hence, Directive n.12 fails to maintain less restrictive regulation.

**C. Barring Directive n.12 will not prevent the adoption of OTA Protocol.**

Pursuant to GATT Art. XXIV:5 chapeau, the invoking party must demonstrate that barring the measure will make impossible the adoption of FTA interim agreement.<sup>14</sup> In this case, even if assuming that OTA Protocol is an FTA interim agreement, barring Directive n.12 will not prevent its adoption. As elaborated above, Directive n.12 restricts the use of imported Solaris products; even those from OTA countries are only the second priority. OTA Protocol, in contrast, was never adopted on conditions that Zycron introduces said restrictions. Hence, barring Directive n.12 will not prevent the adoption of OTA Protocol.

**To conclude**, Directive n.12 is not justified under GATT Art. XXIV.

**4. Directive n.12 is inconsistent with GPA Art. IV:1-2(b).**

Directive n.12 violates GPA Art. IV:1-2(b) because (i) MIET's procurement is a covered procurement within GPA Art. II:2; and (ii) Directive n.12 violates GPA Art. IV:1-2(b).

**A. MIET's procurement is a covered procurement within GPA Art. II.**

MIET's procurement is a covered procurement within GPA Art. II:2, rendering GPA applicable to Directive n.12, for the following reasons:

First, MIET procures goods and services for governmental purposes within GPA Art. II:2(a). To begin with, it procures the goods and services specified in Zycron's GPA

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<sup>11</sup> PR, US–Line Pipe, [7.142].

<sup>12</sup> Case, [2.7].

<sup>13</sup> PR, Canada–Autos, [10.55-10.56].

<sup>14</sup> ABR, Turkey–Textiles, [45].

Schedules: The Schedule's Appendix I Annex 4 specifies that Zycron's commitment covers "all goods",<sup>15</sup> which includes the EV charging points to be procured by MIET. The Schedule's Appendix I Annex 5 also specifies that Zycron's commitment covers engineering services, including the engineering services during the installation phase,<sup>16</sup> which cover the installation and management services procured by MIET.<sup>17</sup> In addition, the procurement is for governmental purposes. MIET procures these goods and services to offer free charging to Zycronian EV owners.<sup>18</sup> Since the charging is for free, the procurement is not with a view to commercial sale or resale and is thus for governmental purposes.

Second, MIET makes the procurement in the form of a long-term framework purchasing agreement, which is a contractual means of purchase within GPA Art. II:2(b).

Third, the value of MIET's procurement contract is above the threshold identified in Zycron's GPA Schedules of Commitments,<sup>19</sup> which satisfies GPA Art. II:2(c).

Fourth, MIET is included in the government bodies listed in Zycron's GPA Schedules of Commitments, Annex 1;<sup>20</sup> thus, it is a procuring entity within GPA Art. I(o) and II:2(d).

Fifth, MIET's procurement is not excluded from coverage in Annex 7 to Zycron's GPA Schedules of Commitments. Zycron might argue that MIET's procurement is excluded because it was awarded under OTA which is an IEIA or IPA within said Annex. To be awarded "under" OTA, however, MIET's procurement must be awarded "in accordance with" or "governed by" OTA.<sup>21</sup> This is not the case. OTA does not contain any provisions that govern the procurement of EV charging points. Instead, MEIT's procurement was awarded under Zycron's administrative laws, a domestic law.<sup>22</sup> Hence, it is not excluded.

#### **B. Directive n.12 is inconsistent with GPA Art. IV:1.**

GPA Art. IV:1 embodies MFN and NT principles in GATT Arts. I:1 and III:4 and apply them to goods involved in measures regarding covered procurement.<sup>23</sup> In this case, as elaborated in I.1 and I.2, Directive n.12 accords less favourable treatment to Solaris products from non-IEIA countries *vis-à-vis* those from Zycron and IEIA countries. Hence, it is inconsistent with GPA Art. IV:1.

#### **C. MIET's procurement is inconsistent with GPA Art. IV:2(b).**

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<sup>15</sup> Corrections, [A].

<sup>16</sup> CPC Category 12, Reference No. 86727.

<sup>17</sup> Case, [4.6].

<sup>18</sup> Case, [4.6].

<sup>19</sup> Case, [4.7].

<sup>20</sup> Case, [4.7].

<sup>21</sup> Oxford Online Dictionary, <https://en.oxforddictionaries.com/definition/under> (last visited January 9th, 2019).

<sup>22</sup> Clarification, [15].

<sup>23</sup> Sue Arrowsmith (2003), pp.160-161.

GPA Art. IV:2(b) prohibits Members from discriminating against a locally established supplier on the basis that the supplier offers goods of a specific Party. In this case, Charging Queen is a locally established supplier since it has a subsidiary incorporated in Zycron.<sup>24</sup> MIET, however, invoked Directive n.12 and excluded Charging Queen because Charging Queen offers Solaris products from Avilion. This is inconsistent with GPA Art. IV:2(b).

**To conclude**, Directive n.12 is inconsistent with GPA Art. IV:2(b).

## **II. 2018 GUIDELINE VIOLATES GATT ARTS. III:4 AND I:1 AND GPA ART. IV:1-2(B).**

### **1. 2018 Guideline is inconsistent with GATT Art. III:4.**

2018 Guideline is inconsistent with GATT Art. III:4 because (i) it is not covered by the derogation in Art. III:8; (ii) it is a requirement affecting the internal use of Solaris; (iii) Avilion's and Zycron's Solaris are like products; and (iv) it accords less favourable treatment to Avilion's Solaris *vis-à-vis* Zycron's Solaris.

#### **A. 2018 Guideline is not covered by the derogation in Art. III:8.**

As elaborated in I.1.A, to apply GATT Art. III:8(a), the discriminated products must be in a competitive relationship with the product purchased by the procurement. In this case, as will be addressed below in II.1.D, by excluding the suppliers which do not observe the ESL laws from the procurement competition, 2018 Guideline discriminates Charging Queen's Solaris from Avilion. The product purchased by MIET, however, is the EV charging points. By their nature, Solaris is an input to EV charging points, and these two products are not in a competitive relationship. Hence, GATT Art. III:8(a) does not apply in this case.

#### **B. 2018 Guideline is a requirement affecting the internal use of Solaris.**

2018 Guideline is a requirement because complying with which is a condition for suppliers to obtain the advantage of participating in MIET's procurement competition. It affects the use of Solaris because it creates a disincentive on suppliers from using Charging Queen's Solaris from Avilion. Hence, 2018 Guideline falls within GATT Art. III:4.

#### **C. Avilion's and Zycron's Solaris are like products.**

Two products are like products under GATT Art. III:4 if they are in a competitive relationship.<sup>25</sup> To examine the likeness between products, WTO jurisprudence develops the four criteria test, namely (i) properties, nature and quality, (ii) end-uses, (iii) consumers' tastes and habits, and (iv) tariff classifications.<sup>26</sup> In this case, Avilion's and Zycron's Solaris are identical in all these criteria. They contain identical metal compositions, serve the same end-

<sup>24</sup> Clarification, [26].

<sup>25</sup> ABR, EC–Asbestos, [99].

<sup>26</sup> ABR, Japan–Alcoholic Beverages II, p. 20; ABR, Canada–Periodicals, pp. 21-22; ABR, EC–Asbestos, [101].

use of producing Solaris products, share the same consumers' perception, and fall under the same tariff classification. Their only difference is the production manner: the production of Charging Queen's Solaris involves a mining scandal. WTO jurisprudence, however, has confirmed that likeness under GATT is determined by the comparison between those *as a product, not their production manner*.<sup>27</sup>

Zycron might argue that this different production manner leads to different consumers' tastes and habits. This argument, however, is groundless. The consumers' tastes and habits test examines whether consumers perceive two products as alternative means of performing particular functions to satisfy a particular demand.<sup>28</sup> In this case, the consumers of Solaris are EV charging points suppliers. Since they are businesses which pursue profits, they typically less concern the production process unless the process affects the quality or cost of Solaris. No evidence, however, suggests that Charging Queen's scandal affects the quality or cost of its Solaris or that suppliers have a special concern about the scandal. Hence, Avilion's and Zycron's Solaris do not appear to possess different consumers' tastes and habits.

#### **D. 2018 Guideline accords less favourable treatment to Avilion's Solaris.**

2018 Guideline constitutes a *de facto* discrimination against Avilion's Solaris *vis-à-vis* Zycron's ones for the following reasons:

First, 2018 Guideline targets specifically at Charging Queen's Solaris from Avilion. As the Appellate Body confirmed, the examination of *de facto* discrimination may consider the expected operation of the measure at issue.<sup>29</sup> In this case, MIET circulated 2018 Guideline to respond specifically to the public outrage in Zycron triggered by Charging Queen's mining collapse in Avilion.<sup>30</sup> In light of this history, it is expectable that 2018 Guideline will be operated in a manner that disfavors the suppliers using Charging Queen's Solaris from Avilion. This naturally disfavors Avilion's Solaris *vis-a-vis* Zycron's Solaris.

Second, under 2018 Guideline, Avilion's Solaris possesses a higher non-conforming ratio. WTO jurisprudence used to find *de facto* discrimination when a measure in effect restricts the majority of imported products while permitting the majority of domestic products.<sup>31</sup> In this case, no evidence suggests that Zycron's Solaris is non-conforming. In contrast, Charging Queen's Solaris, comprising the vast majority of Avilion's Solaris, is non-compliant. Therefore, 2018 Guideline prevents the use of a majority of Avilion's Solaris,

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<sup>27</sup> GATT PR, US–Tuna I (Mexico), [5.11, 5.15]; PR, EC–Seal Products, [7.139].

<sup>28</sup> ABR, EC–Asbestos, [101]; ABR, US–Clove Cigarettes, [125].

<sup>29</sup> ABR, Thailand–Cigarettes (Philippines), [134].

<sup>30</sup> Case, [4.12].

<sup>31</sup> PR, Mexico–Taxes on Soft Drinks, [8.119-8.121]; PR, EC–Seal Products, [7.153-7.154].

which modifies the competition conditions in favour of Zycron's Solaris.

**To conclude**, 2018 Guideline is inconsistent with GATT Art. III:4.

## **2. 2018 Guideline is inconsistent with GATT Art. I:1.**

2018 Guideline violates GATT Art. I:1 because (i) it falls within GATT Art. I:1; (ii) Avilion's and other Members' Solaris are like products; and (iii) it fails to extend the advantage accorded to other Members' Solaris immediately and unconditionally to Avilion's.

### **A. 2018 Guideline falls within GATT Art. I:1.**

GATT Art. I:1 applies to all GATT Art. III:4 matters. Since 2018 Guideline is a GATT Art. III:4 measure as elaborated in II.1.B, it falls within GATT Art. I:1.

### **B. Avilion's and other Members' Solaris are like products.**

WTO jurisprudence has confirmed that the interpretation of like products under GATT Arts. I:1 and III:4 informs each other.<sup>32</sup> Since Avilion's and other Members' Solaris are alike under GATT Art. III:4 as elaborated in II.1.C, they are also alike under GATT Art. I:1.

### **C. 2018 Guideline fails to extend the advantage accorded to other Members' Solaris immediately and unconditionally to Avilion's.**

2018 Guideline constitutes *de facto* discrimination against Avilion's Solaris *vis-à-vis* other Members' for the similar reasons elaborated in II.1.D. First, it is expected to be operated specifically against Avilion's Solaris produced by Charging Queen. Second, while Avilion's Solaris possesses a high non-conforming ratio under 2018 Guideline due to Charging Queen, no evidence suggests that other Members' Solaris is non-conforming. Due to this *de facto* discrimination, 2018 Guideline fails to extend the advantage accorded to other Members' Solaris immediately and unconditionally to Avilion's.

**To conclude**, 2018 Guideline is inconsistent with GATT Art. I:1.

## **3. 2018 Guideline is not justified under GATT Art. XX.**

### **A. 2018 Guideline is not justified under GATT Art. XX(a).**

Zycron might invoke GATT Art. XX(a) to justify 2018 Guideline. This, however, shall be rejected because 2018 Guideline is not necessary to protect the public morals.

A measure fails the necessity test if other reasonably available alternative that is less trade restrictive yet achieving the objective pursued at an equivalent level exists.<sup>33</sup> In this case, even if the observance of ESL laws by suppliers is a public moral in Zycron, MIET may design the observance as, instead of an eligibility requirement, an item to be considered when selecting the winning supplier. It may even assign the level of observance a weight

<sup>32</sup> PR, US–Tuna II (Mexico), [7.409].

<sup>33</sup> ABR, China–Publications and Audiovisual Products, [239, 242].

proportionate to the level of the public's concern. This alternative is less restrictive because it provides the non-compliant supplier an opportunity to compete with others. It also secures the equivalent level of public morals because the observance remains a crucial element for winning the contract; particularly, by weighing the observance proportionate to the level of the public's concern, it ensures the adequate protection of the public morals. In light of this alternative, 2018 Guideline is not necessary under GATT Art. XX(a).

**B. 2018 Guideline is not justified under GATT Art. XX(b).**

Zycron might argue that 2018 Guideline is necessary to protect the life and health of Solaris mining workers and is thus justified under GATT Art. XX(b). 2018 Guideline, however, is not necessary because Zycron can adopt other alternatives, e.g., the consideration and weigh system as mentioned above, to achieve the said objective.

**C. 2018 Guideline is not justified under GATT Art. XX(d).**

Zycron might argue that 2018 Guideline is necessary to secure the compliance with its obligations under ILO Conventions and is thus justified under GATT Art. XX(d). This defence, however, shall be rejected because (i) ILO Conventions are not the laws under GATT Art. XX(d); and (ii) 2018 Guideline is not necessary to secure such compliance.<sup>34</sup>

First, an international rule is not a “law or regulation” under GATT Art. XX(d) unless it is incorporated into a Member's domestic laws or has direct effect within that domestic legal system.<sup>35</sup> In this case, Zycron has not signed, and thus has no obligation to comply with, ILO Conventions.<sup>36</sup> Furthermore, no evidence suggests that ILO Conventions have been incorporated into Zycron's domestic law or has direct effect in Zycron. Therefore, ILO Conventions do not constitute “laws or regulations” under GATT Art. XX(d).

Second, 2018 Guideline is not necessary to secure the compliance with ILO Conventions because Zycron can adopt other alternatives, e.g., the consideration and weigh system as mentioned in II.3.A, to achieve the same objective.

**D. 2018 Guideline is not justified under GATT Art. XX chapeau.**

A measure is inconsistent with GATT Art. XX chapeau if it is applied in a manner that constitutes arbitrary discrimination between countries where the same conditions prevail.<sup>37</sup> In this case, first, 2018 Guideline results in discrimination between countries where the same conditions prevail. In fact, all extraction of Solaris has been traditionally associated with poor

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<sup>34</sup> ABR, Korea–Various Measures on Beef, [157].

<sup>35</sup> ABR, Mexico–Taxes on Soft Drinks, [69]; ABR, India–Solar Cells, [5.106-5.107, 5.140-5.141].

<sup>36</sup> Case, [1.5].

<sup>37</sup> ABR, US–Gasoline, p.23.

labour safety and health conditions.<sup>38</sup> MIET, however, only excluded Charging Queen from the procurement calls while permitting suppliers from Zycron and other countries to proceed.<sup>39</sup> This amounts to discrimination against Avilion's Solaris.

Second, the discrimination is arbitrary in character. The Appellate Body has established that when the granting of certification lacks transparency or predictability, it amounts to arbitrary discrimination.<sup>40</sup> In this case, by mentioning ESL laws vaguely without specifying exact standards,<sup>41</sup> 2018 Guideline offers no transparency or predictability for MIET's decision. MIET, in effect, may freely determine whether a supplier is eligible for the procurement call. This amounts to an arbitrary discrimination against Avilion's Solaris.

**To conclude**, 2018 Guideline is not justified under GATT Art. XX.

#### **4. 2018 Guideline is inconsistent with GPA Art. IV:1-2(b).**

2018 Guideline is inconsistent with GPA Art. IV:1-2(b) because (i) MIET's procurement is a covered procurement within GPA Art. II:2; (ii) 2018 Guideline is inconsistent with GPA Art. IV:1-2(b); and (iii) it is not justified under GPA Art. III:2(a).

##### **A. MIET's procurement is a covered procurement within GPA Art. II:2.**

For the same reasons as elaborated in I.4.A, MIET's procurement is a covered procurement within GPA Art. II:2, which permits GPA to be applicable to 2018 Guideline.

##### **B. 2018 Guideline is inconsistent with GPA Art. IV:1 and IV:2(b).**

GPA Art. IV:1 applies MFN and NT principles to goods involved in measures regarding covered procurement. In this case, as elaborated in II.1 and II.2, 2018 Guideline accords less favourable treatment to Solaris from Avilion *vis-à-vis* those from Zycron and other Members. Hence, it is also inconsistent with GPA Art. IV:1.

GPA Art. IV:2(b) prohibits Members from discriminating against a locally established supplier on the basis that the supplier offers goods of a specific Party. In this case, Charging Queen is a locally established supplier. MIET, however, as elaborated in II.1 and II.2, invoked 2018 Guideline to exclude it on the basis of *de facto* discrimination against its use of Solaris from Avilion. This is inconsistent with GPA Art. IV:2(b).

##### **C. 2018 Guideline is not justified under GPA Art. III:2(a).**

Zycron might argue that 2018 Guideline is necessary to protect its public morals or safety and invoke GPA Art. III:2(a) to justify it. For the similar reasons as elaborated in II.3, however, such defence shall be rejected because: First, it is not necessary under GPA Art.

<sup>38</sup> Case, [1.2]; Clarification, [31].

<sup>39</sup> Clarification, [28].

<sup>40</sup> ABR, US-Shrimp, [180-181].

<sup>41</sup> Case, [4.12].

III:2(a) because a qualified alternative exists, i.e. the consideration and weigh system as articulated above in II.3.A. Second, by excluding only the Charging Queen without a transparent and predictable standard, 2018 Guideline constitutes arbitrary discrimination which is inconsistent with GPA Art. III chapeau.

**To conclude**, 2018 Guideline is inconsistent with GPA Art. IV:1-2(b).

### **III. OUF IS INCONSISTENT WITH SCM ART. 3.1(B).**

OUF is inconsistent with SCM Art.3.1(b) because it is (i) a subsidy under SCM Art. 1 and (ii) contingent upon the use of domestic over imported goods.

#### **1. OUF is a subsidy under SCM Art. 1.1.**

OUF is a subsidy because (i) it is a financial contribution by a government in the form of government purchase of goods under SCM Art. 1.1(a)(1)(iii); (ii) it confers a benefit under SCM Art. 1.1(b); and (iii) it is specific under SCM Art. 2.3.

##### **A. The OUF is a financial contribution by a government.**

Pursuant to SCM Art. 1.1(a)(1)(iii), financial contribution by a government within SCM Art. 1.1(a)(1) includes government purchase of goods, that is, the recipient provides goods and receives consideration in return.<sup>42</sup> In this case, MIET, a government agency, pays the supplier in the form of OUF. In return, the supplier generates electricity into the EV charging points owned by MIET<sup>43</sup> to offer charging to EV owners. This electricity purchase relationship can be further observed by OUF's design which calculates the fees based on the amount of electricity charged.<sup>44</sup> Hence, OUF is a government purchase of goods.

##### **B. OUF confers benefits.**

A financial contribution confers benefits if it makes the recipient better off than it would have been absent the contribution.<sup>45</sup> In government purchase of goods, panels typically compare the actual purchase price with a market benchmark.<sup>46</sup> In this case, however, the market price for the electricity produced by Solaris charging points is unavailable because no other public charging points exist in Zycron.<sup>47</sup>

When a market benchmark is not available, panels may instead use the production cost for the goods purchased plus a reasonable profit margin as a benchmark to determine whether

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<sup>42</sup> ABR, US–Large Civil Aircraft (2nd complaint), [619]; ABR, Canada–Renewable Energy, [5.119].

<sup>43</sup> Case, [4.6]; Clarification, [22].

<sup>44</sup> Case, [4.6]; Clarification, [41].

<sup>45</sup> ABR, Canada–Aircraft, [157]; US–Large Civil Aircraft (2nd complaint), [639, 662]; ABR, Canada–Renewable Energy, [5.163].

<sup>46</sup> ABR, Canada–Renewable Energy, [5.225].

<sup>47</sup> Clarification, [17].



the purchase price confers a benefit.<sup>48</sup> In this case, OUF's guaranteed minimum fee is more favourable than this alternative benchmark for the following reasons.

First, the said fee is not cost-based. Even if no cars used the charging station, that is, no cost for generating the electricity was incurred and no profits was accrued, MIET pays a minimum amount of fee.<sup>49</sup> This necessarily exceeds the cost plus a reasonable profit margin.

Second, MIET set the said fee in the absence of any objective basis. While it claims that this fee is based on a reasonable profit, the determination of this profit margin is solely at MIET's discretion without any further information about the calculation basis.<sup>50</sup>

Third, the said fee enables the winning suppliers to produce charging points cheaper and compete with international producers.<sup>51</sup> This indicates that it makes the recipient better off.

### **C. OUF is specific.**

Pursuant to SCM Art. 2.3, SCM Art. 3 subsidies are deemed specific.<sup>52</sup> As will be explained below in III.2, OUF is an import substitution subsidy within SCM Art.3.1(b). Therefore, it is deemed specific.

### **2. OUF is contingent upon the use of domestic over imported goods.**

#### **A. OUF is *de jure* contingent upon the use of domestic over imported goods.**

A subsidy is *de jure* contingent upon the use of domestic over imported goods when the words of its legal instrument require the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy.<sup>53</sup> In this case, to receive OUF's guaranteed minimum fee, suppliers must participate in the procurement calls and win the competition. To participate in the calls, the words of Directive n.12 require suppliers to use only Zycron's Solaris products.<sup>54</sup> Even though suppliers may exceptionally use products from other IEIA countries, this is permitted only when Zycron's products are of insufficient quantity. In other words, OUF requires suppliers to use Zycron's Solaris products as the first priority, which *de jure* requires the use of domestic goods in preference to imported ones as a condition for the subsidy. Hence, OUF is a *de jure* import substitution subsidy.

#### **B. OUF is *de facto* contingent upon the use of domestic over imported goods.**

Zycron might argue that Directive n.12 merely requires suppliers to produce Solaris products in Zycron, which is a production requirement instead of an import substitution

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<sup>48</sup> ABR, Canada–Renewable Energy, [5.175].

<sup>49</sup> Case, [4.6].

<sup>50</sup> Clarification, [36, 41].

<sup>51</sup> Clarification, [37].

<sup>52</sup> PR, US–Upland Cotton, [7.1153]; PR, Canada–Autos, [10.172].

<sup>53</sup> ABR, US–Tax Incentives, [5.12, 5.14]; ABR, Brazil–Taxation, [5.243, 5.245].

<sup>54</sup> Case, [4.9].

requirement. Avilion disagrees with this interpretation of Directive n.12. Even if that is the case, OUF is at least *de facto* contingent upon the use of domestic over imported goods.

*De facto* contingency may be inferred from Modalities of operation of the subsidy.<sup>55</sup> In this case, Directive n.12 requires the production of Solaris charging points in Zycron. This necessarily involves incorporating Solaris batteries into charging points, which is an act of using Solaris batteries.<sup>56</sup> Directive n.12 then requires Solaris batteries being produced in Zycron.<sup>57</sup> Combining the two requirements, Directive n.12 effectively requires suppliers to use Solaris batteries produced in Zycron to produce Solaris charging points. Under this modality of operation, Directive n.12 requires not merely the production location but the use of domestically produced goods, rendering OUF a *de facto* import substitution subsidy.

**To conclude**, OUF is inconsistent with SCM Art. 3.1(b).

#### **IV. AORS AND REGULATION NO. 50 ARE INCONSISTENT WITH GATT ARTS. I:1 AND XI:1 AND ARO ART. 2(B) AND (C).**

##### **1. AORs and Regulation No. 50 are inconsistent with GATT Art. I:1.**

AORs and Regulation No. 50 are inconsistent with GATT Art. I:1 because (i) they fall within GATT Art. I:1; (ii) Solaris to Tlön and that to Avilion are like products; and (iii) the measures fail to extend the advantage accorded to Solaris to Tlön immediately and unconditionally to that to Avilion.

##### **A. AORs and Regulation No. 50 fall within GATT Art. I:1.**

GATT Art. I:1 applies to all rules, such as regulations,<sup>58</sup> in connection with exportation. In this case, since Regulation No. 50, which implements AORs, is a regulation, and it regulates the Zycron's exports of Solaris, it is a rule in connection with exportation.

##### **B. Solaris to Tlön and that to Avilion are like products.**

Like products under GATT Art. I:1 can be established when a measure distinguishes products solely based on their origin.<sup>59</sup> Following the same rationale, the likeness can also be established when a measure distinguishes products solely based on their destination. In this case, Zycron distinguishes the Solaris destined for Tlön from that for Avilion solely based on their destination. Therefore, these two Solaris are like products.

##### **C. The measures fail to extend the advantage accorded to Solaris to Tlön immediately and unconditionally to that to Avilion.**

<sup>55</sup> ABR, Brazil–Taxation, [5.248]; ABR, US–Tax Incentives, [5.18].

<sup>56</sup> ABR, Brazil–Taxation, [5.242]; ABR, US–Tax Incentives, [5.8].

<sup>57</sup> Case, [4.9]; Clarification, [12].

<sup>58</sup> PR, Argentina–Financial Services, [7.981].

<sup>59</sup> PR, US–Poultry (China), [7.427-7.429].

Advantages under GATT Art. I:1 include the benefit of being exempted from filing some import declarations.<sup>60</sup> Following the same rationale, an exemption from submitting the *export* certification is also an advantage. In this case, by permitting Tlön's importers to submit an electronic self-declaration instead of filing an official certification for MoD's validation, the measures save Tlön's importers from the lengthy process of validation.<sup>61</sup> Hence, the measures accord an advantage to Solaris to Tlön.

In addition, such advantage is not extended to Solaris to other Members unconditionally. "Unconditionally" under GATT Art. I:1 requires an advantage extended to all Members subject to no conditions *regarding the conduct of the Member*.<sup>62</sup> In this case, to be eligible to the self-declaration advantage, other Members must join OTA, which is a condition regarding the conduct of a Member. This fails the "unconditionally" requirement.

**To conclude**, the measures are inconsistent with GATT Art. I:1.

## **2. AORs and Regulation No. 50 are inconsistent with GATT Art. XI:1.**

Pursuant to GATT Art. XI:1, Members shall not adopt export restrictions, such as export licenses.<sup>63</sup> A measure is an export license if it requires permission for exportation<sup>64</sup> on a discretionary or non-automatic basis; only a licensing system which grants each applicant the license upon application is permitted.<sup>65</sup> In this case, the measures establish a certification system, under which Solaris exports must be validated by Zycron's MoD. Moreover, such validation is not automatic; in fact, Zycron's MoD did not validate Avilion's end-users upon application but rather delayed it for 3 to 4 months.<sup>66</sup> This is a non-automatic permission requirement and is thus an export license inconsistent with GATT Art. XI:1.

## **3. AORs and Regulation No. 50 are not justified under GATT Art. XX(a).**

Zycron might defend that the measures are necessary to protect the public moral, that is, the peaceful use of Solaris. This defence, however, shall be rejected for the following reasons.

First, the measures are not necessary because other qualified alternatives exist. The validation can be made by custom authorities, instead of MoD, based on the list of military providers or contractors provided by MoD. This is less trade-restrictive because it saves custom authorities from passing the documents to MoD and streamlines the validation process. It secures the peaceful use of Solaris at an equivalent level because the custom

<sup>60</sup> PR, Colombia–Ports of Entry, [7.352].

<sup>61</sup> Case, [2.3, 2.5].

<sup>62</sup> PR, Canada–Autos, [10.23]; PR, Indonesia–Autos, [14.143-14.144].

<sup>63</sup> PR, China–Raw Materials, [7.893]; PR, India–Quantitative Restrictions, [5.130].

<sup>64</sup> PR, Indonesia–Chicken, fn. 203.

<sup>65</sup> PR, China–Raw Materials, [7.916].

<sup>66</sup> Clarification, [45].

authorities follow exactly the same process as currently adopted by MoD, namely, using a checklist to confirm whether the importer is a military provider or contractor.<sup>67</sup> The failure for Zycron to adopt this alternative renders the measures unnecessary.

Second, the measures constitute arbitrary discrimination under GATT Art. XX chapeau. An arbitrary discrimination treats countries with the same prevailing conditions differently<sup>68</sup> on grounds bearing no rational relationship with the objective pursued under the applicable GATT Art. XX subparagraphs.<sup>69</sup> In this case, the measures treat Avilion and Tlön differently by requiring validation for Solaris exports to Avilion while permitting self-declaration for those to Tlön. Tlön's end-users, however, are also likely to use Solaris for military purposes considering that Tlön was at war with Zycron over the past decades.<sup>70</sup> Zycron treats Tlön differently simply because Tlön is an OTA party, but this reason has no rational relationship with the measures' alleged objective to ensure the peaceful use of Solaris. Hence, the measures are inconsistent with GATT Art. XX chapeau.

#### **4. AORs and Regulation No. 50 are not justified under GATT Art. XXIV.**

Zycron's attempt to raise GATT Art. XXIV to justify the measures shall be rejected because: First, as elaborated in I.3.A, OTA Protocol is not an FTA interim agreement because it involves Tlön, a non-WTO Member, and it fails to eliminate the duties and other restrictive regulations on substantially all the trade within OTA. Second, barring the measures will not prevent the adoption of OTA Protocol. In fact, OTA requires validation to prevent the military use of Solaris and makes no exception for OTA parties.<sup>71</sup> Hence, removing the self-declaration exception for OTA parties and restoring the validation requirement will not prevent the adoption of OTA Protocol but rather reinforce it.

#### **5. AORs and Regulation No. 50 are inconsistent with ARO Art. 2(b) and (c).**

##### **A. AORs and Regulation No. 50 are rules of origin within ARO Art. 1.**

Pursuant to ARO Art. 1.1, ARO applies to (i) any regulations of general application which (ii) determine the country of origin of goods and (iii) not related to contractual or autonomous trade regimes leading to the tariff preferences going beyond GATT Art. I:1. The measures satisfy all these conditions because: First, Zycron's Regulation No. 50 is a regulation of general application. Second, it establishes AOR which determines the origin country of Solaris. Third, while it is related to OTA, OTA does not lead to any tariff

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<sup>67</sup> Case, [2.3].

<sup>68</sup> ABR, EC–Seal Products, [5.303]; ABR, US–Shrimp, [165].

<sup>69</sup> ABR, EC–Seal Products, [5.299-300]; ABR, Brazil–Retreaded Tyres, [227].

<sup>70</sup> Case, [2.1].

<sup>71</sup> Case, [2.3].

preferences going beyond GATT Art. I:1. Specifically, as elaborated in I.3.A, it is not an FTA under GATT Art. XXIV that may exempt Zycron's GATT Art. I:1 obligations.

**B. The measures are inconsistent with ARO Art. 2(b).**

ARO Art. 2(b) prohibits Members from using rules of origin as instruments to pursue trade objectives, such as to pursue the objective of favouring some Member's imports over others'.<sup>72</sup> In this case, AORs specifically apply to OTA parties, so that Solaris and Solaris products from OTA parties are treated as domestic products<sup>73</sup> while those from other Members are not. This clearly favours some Members' imports over others'. In addition, as made clear in OTA, the measures pursue the objective of "further the integration of the Solaris industry in the Matte Peninsula," which manifests a geography-focused, and thus Members-restricted, objective. Therefore, Zycron indeed uses the measures as instruments to pursue trade objectives of favouring OTA parties.

**C. The measures are inconsistent with ARO Art. 2(c) first sentence.**

ARO Art. 2(c) prohibits rules of origin themselves from creating *distorting effect* on international trade. WTO jurisprudence further suggested that if a rule of origin favours goods of export interest to some Members over those to others, and these two goods are in a competitive relationship, such rule is likely to create distorting effect.<sup>74</sup>

In this case, first, Solaris and Solaris products from OTA parties and from non-OTA parties are in competitive relationship considering that they are like products as elaborated in I.2.B and II.2.B. Second, the measures treat products from OTA parties as domestic products, which accordingly exempt them from all import-related regulations. This is obviously a favour to OTA parties over all other non-OTA parties. Hence, the measures create distorting effect on international trade and are inconsistent with ARO Art. 2(c) first sentence.

**D. The measures are inconsistent with ARO Art. 2(c) second sentence.**

ARO Art. 2(c) second sentence prohibits rules of origin from including a certain condition unrelated to manufacturing or processing as a prerequisite for the conferral of the country of origin.<sup>75</sup> Under OTA's origin rules, for imported Solaris or Solaris products to be determined as domestic products, their origin country must fulfill a condition, that is, joining OTA. Such condition, however, is unrelated to the manufacturing or processing of Solaris or Solaris products. Hence, the measures are inconsistent with ARO Art. 2(c) second sentence.

**To conclude**, the measures are inconsistent with ARO Art. 2(b) and (c).

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<sup>72</sup> PR, US-Textiles Rules of Origin, [6.44].

<sup>73</sup> Case, [2.4]; Clarification, [60].

<sup>74</sup> PR, US-Textiles Rules of Origin, [6.172].

<sup>75</sup> PR, US-Textiles Rules of Origin, [6.208].

**REQUEST FOR FINDINGS**

Avilion respectfully requests this Panel to find that:

1. Directive n.12 and 2018 Guideline are inconsistent with GATT Arts. III:4 and Art. I:1 and GPA Art. IV:1-2(b).
2. OUF is inconsistent with SCM Art. 3.1(b).
3. AORs and Regulation No. 50 are inconsistent with GATT Arts. I:1 and XI:1 and ARO Art. 2(b) and (c).

Avilion, thus, respectfully requests this Panel to recommend to the DSB that Zycron brings its measures into conformity with the obligations under GATT, GPA, SCM, and ARO.