Team: 037

ELSA Moot Court Competition on WTO law 2017-2018

Borginia – Measures Affecting Trade in Textile Products

Syldavia
(Complainant)

vs

Borginia
(Respondent)

SUBMISSION OF THE COMPLAINANT

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List of Abbreviations

Abbreviations	**Full Form**
[ ]	Paragraph(s)
AB	Appellate Body
ABR	Appellate Body Report
Art.(s.)	Article(s)
BTA	Border Tax Adjustment
e.g.	for example
EU	European Union
EU ETS	European Union Emissions Trading System
GATT	General Agreement on Tariffs and Trade 1994
GDP	Gross Domestic Product
GNI	Gross National Income
GHGs	Greenhouse Gases
Gms	Grams
HS	Harmonised System
i.e.	in explanation
ISO	International Organisation for Standardisation
LDC(s)	Least-Developed Country(ies)
NESI	National Environmental and Sustainability Institute
PR	Panel Report
PPM(s)	Processes and Production Method(s)
SCM	Agreement on Subsidies and Countervailing Measures
SOCA	Save Our Climate Act
TBT	(Agreement on) Technical Barriers to Trade
TEPZs	Textile Export Promotion Zones
TTUFS	Textile Technological Upgrade Fund Scheme
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization
VCLT	Vienna Convention on the Law of Treaties

Statement of Facts

1. Borginia and Syldavia are both Members of the World Trade Organization (WTO). In 2015, Borginia adopted measures allegedly aimed at environmental protection, including a decision by its National Environmental and Sustainability Institute (NESI decision) and tax legislation entitled Save Our Climate Act (SOCA tax).

2. The NESI decision stipulates that only 100% handloom cotton fabric can be marketed as 'Cotton Fabric' in Borginia. This requires fabrics to be produced without any electricity in the entire production process and adhere to NESI's closed list of permitted carbon-neutral production practices. By contrast, the ISO 14666, prescribes the appellation '100% cotton fabric' for all fabrics composed 100% of cotton, regardless of whether they are made by hand or machine.

3. The NESI decision is implemented on the basis of self-declarations by foreign and domestic textile producers. However, with respect to Syldavia's textile industry (and that of other key exporting countries) this is reinforced by way of verification visits by NESI staff to ascertain the accuracy of the self-declarations. During these visits, producers are asked to submit unnecessarily detailed reports on the nature and quantum of carbon emissions. By contrast, there are no reports of such visits taking place in Borginia.

4. The SOCA tax is levied on carbon emissions per square metre of fabric in the production process, the information for which is provided by self-declarations by producers. The tax on imported powerloom fabrics is collected at the point of customs clearance alongside other applicable customs duties, and collected at the point of sale for domestic powerloom cotton fabrics. Products labelled 'Cotton Fabric' are exempted from the SOCA tax altogether.

5. The SOCA tax collected by Borginia is pooled into a Textile Technology Upgrade Fund Scheme (TTUFS) from which grants are given exclusively to textile units in the Textile Export Promotion Zones (TEPZs). These textile units have an obligation to export 80% of their production.

6. In the category 'Woven fabrics of cotton, containing 100% by weight of cotton, weighing not more than 200 gm.' (HS 5208.05), Borginia's share in the world trade reached 4% in 2014 and 4.90% in 2015.

7. Borginia's GNP has been calculated by the World Bank as US $1020 for 2012, US $1050 for 2013 and US $1080 for 2014 at constant 1990-dollar terms.

Summary of Arguments

The NESI decision is a 'technical regulation' within the meaning of Annex 1.1 to the *TBT Agreement*

- The NESI decision is a 'technical regulation' within the meaning of Annex 1.1 TBT as it 'applies to an identifiable product', 'lays down product characteristics', and is 'mandatory'.

The NESI decision is inconsistent with Art. 2.1 of the *TBT Agreement*

- The NESI decision is inconsistent with Borginia's national treatment obligation under Art. 2.1 TBT as it treats imported powerloom cotton fabrics less favourably than like domestic handloom cotton fabrics.
- Powerloom cotton fabrics are 'like' handloom cotton fabrics.
- The NESI decision *de facto* modifies the conditions of competition to the detriment of imported cotton fabrics.
- The detrimental impact of the NESI decision does not stem exclusively from a legitimate regulatory distinction.

The NESI decision is inconsistent with Art. 2.2 of the *TBT Agreement*

- The NESI decision does not fulfil a 'legitimate objective'.
- In the alternative, the NESI decision is 'more trade-restrictive than necessary' to fulfil its objective.

The NESI decision is inconsistent with Art. 2.4 of the *TBT Agreement*

- The NESI is not based on the ISO 14666, which is a 'relevant international standard'.
- ISO 14666 would not be an ineffective or inappropriate means for the fulfilment of a 'legitimate objective'.

The NESI decision is inconsistent with Art. III:4 of the GATT 1994

- The NESI is a 'law, regulation, or requirement...' covered by Art. III:4 GATT.
- The treatment accorded to imported powerloom cotton fabrics is *de facto* 'less favourable' than that accorded to 'like' domestic handloom cotton fabrics.

The SOCA tax is inconsistent with Arts. II:1(a), II:1(b), II:2(a) and III:2 of the GATT 1994

- The SOCA tax is a border charge and not an internal charge.
- The SOCA tax is an ODC inconsistent with Art. II:1(b), second sentence, GATT, and thereby also inconsistent with Art.II:1(a) GATT.
- The SOCA tax is not a BTA exempted from the prohibition of Art. II:1(b), second sentence, GATT since it is not a tax on a product covered by Art. II:2(a) GATT and, alternatively, it

is not equivalent to an internal tax 'imposed consistently with' Art. III:2 GATT in respect of a 'like' domestic product.

- In the alternative, the SOCA tax is an internal charge inconsistent with Art. III:2 GATT.

The NESI decision and the SOCA tax cannot be justified under Art. XX of the GATT 1994

- The NESI decision and the SOCA tax cannot be provisionally justified under Art. XX(b) GATT since they are not 'necessary' to protect human, animal and plant life or health.
- The NESI decision and the SOCA tax cannot be provisionally justified under Art. XX(g) GATT since they do not 'relate to' the conservation of an exhaustible natural resource and are not 'made effective in conjunction with restrictions on domestic production or consumption'.
- The NESI decision and the SOCA tax do not meet the requirements of the chapeau of Art. XX GATT since they are applied in a manner constituting a means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', and a 'disguised restriction on international trade'.

The TTUFS is inconsistent with Art. 3.1(a) of the *SCM Agreement*

- The TTUFS is a prohibited export subsidy under Art. 3.1(a) SCM.
- Borginia is no longer covered by the exemption to Art. 3.1(a) SCM provided by Art. 27.2(a) SCM.

The TTUFS is inconsistent with Art. 27.4 of the *SCM Agreement*

- Borginia is subject to the obligation of Art. 27.4 SCM.
- The TTUFS is inconsistent with the obligation to phase-out export subsidies in Art. 27.4 SCM.

The TTUFS is inconsistent with Art. 27.5 of the *SCM Agreement*

- Borginia is subject to the obligation in Art. 27.5 SCM to phase out export subsidies on export competitive products and the introduction of the TTUFS is inconsistent with this obligation.

Identification of Measures at Issue

The first measure at issue is the NESI decision. It stipulates that only 100% handloom cotton fabric can be marketed as 'Cotton Fabric' in Borginia. This requires fabrics to be produced without electricity and adhere to NESI's closed list of permitted carbon-neutral production practices. The second measure at issue is the SOCA tax, which is levied on carbon emissions per square metre fabric in the production process. Products labelled 'Cotton Fabric' are exempted from this tax. The third measure at issue is the TTUFS. This is a fund into which the SOCA tax is pooled and from which grants are given to textile units in the TEPZs.

Legal Pleadings

1 THE NESI DECISION IS INCONSISTENT WITH THE *TBT AGREEMENT* AND THE GATT 1994

1.1 The NESI decision is a 'technical regulation' within the meaning of Annex 1.1 TBT

Syldavia submits that the NESI decision is a technical regulation under Annex 1.1. TBT as it (i) applies to an identifiable product, (ii) lays down product characteristics, and (iii) is mandatory.[1] The NESI decision 'applies to an identifiable product' as it expressly identifies cotton fabrics. Moreover, following the AB's ruling in *EC – Asbestos* that 'product characteristics' can include means of identification, such as labelling,[2] Syldavia argues that the NESI decision 'lays down [a] product characteristic[]' by means of the 'Cotton Fabric' label. Lastly, Syldavia argues that the NESI decision is 'mandatory' since it regulates the labelling of cotton fabrics 'in a binding or compulsory fashion'.[3] Specifically, it prescribes that cotton fabrics can be labelled as 'Cotton Fabric' only if they have been produced 100% by handloom. The fact that the NESI label is not required to market cotton fabrics in Borginia does not preclude it being 'mandatory'.[4] This is supported by *EC – Sardines*, where a very similar measure, laying down conditions for certain species of fish to be sold as 'preserved sardines', was found to be a technical regulation, despite the fact that it allowed products not adhering to its requirements to be marketed, without the appellation 'preserved sardines'.[5] This is also the case with the present measure. Syldavia therefore submits that the NESI decision is a technical regulation and so falls within the scope of Arts. 2.1, 2.2 and 2.4 TBT.

1.2 The NESI decision is inconsistent with Art. 2.1 TBT

Syldavia submits that the NESI decision is inconsistent with Borginia's national treatment

[1] ABR, *EC – Sardines*, [176].
[2] ABR, *EC – Asbestos*, [67].
[3] ABR, *EC – Asbestos*, [68].
[4] ABR, *US – Tuna II (Mexico)*, [196].
[5] ABR, *EC – Sardines*, [171-195].

obligation under Art. 2.1 TBT since (i) the imported and domestic products at issue, namely powerloom and handloom cotton fabrics, are 'like', and (ii) the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products.[6]

1.2.1 Powerloom cotton fabrics and handloom cotton fabrics are 'like' products

Syldavia argues that powerloom cotton fabrics and handloom cotton fabrics are 'like' based on the 'nature and extent of the competitive relationship between them'[7] in Borginia's market. According to well-established case law, this competitive relationship is to be determined using a non-exhaustive list of four criteria: the product's physical characteristics; their end-uses; consumer preferences; and the products' international tariff classification.[8] Syldavia submits that *consumer preferences* in particular indicate a close competitive relationship between the two products. This is shown by the fact that powerloom and handloom cotton fabrics were consumed in similar amounts in Borginia prior to the NESI decision's adoption in 2015. Indeed, in 2013, 18700 and in 2014, 22300 imported and domestic powerloom fabrics were sold in Borginia, as compared to 18100 and 22630 handloom fabrics respectively.[9] Moreover, Syldavia argues that any possible differences in the *physical characteristics* of powerloom and handloom fabrics do not materially affect their competitive relationship as consumers are generally not able to distinguish between them on this basis.[10] Indeed, powerlooms' ability to accurately imitate handloom fabrics at a much lower cost[11] is what underlies the competitiveness of powerloom fabrics *vis-à-vis* handloom fabrics. Syldavia also notes that the two products have the same *end-uses*, being used for producing garments and tapestries,[12] and the same *international tariff classification* as they are both included under HS Code 5208.[13] Syldavia further argues that the differences between the products' PPMs do not have a bearing on their competitive relationship under any of the traditional likeness criteria, unlike the situation in *EC – Asbestos*.[14] Handloom or powerloom production is neither physically detectable in the fabrics nor does it affect consumer preferences, as demonstrated by the above-mentioned sales figures. Syldavia therefore submits that powerloom and handloom cotton fabrics are 'like'.

1.2.2 The treatment accorded to imported cotton fabrics is 'less favourable' than that accorded to like domestic cotton fabrics

Syldavia submits that the NESI decision accords *de facto* 'less favourable treatment' to

[6] ABR, *US – Clove Cigarettes*, [87].
[7] ABR, *US – Clove Cigarettes*, [120].
[8] ABR, *EC – Asbestos*, [101].
[9] EMC[2] Case 2017-2018, Annex 2, Tables A and B.
[10] Ghosh et. al 2015, 87; Sengupta 2015.
[11] Dogra 2016; Sundari 2015; Sinha 2014, 213.
[12] Sinha 2017, 212.
[13] HS Nomenclature 2017, Chapter 52.
[14] ABR, *EC – Asbestos*, [113].

imported cotton fabrics than like domestic cotton fabrics since, following *US – Clove Cigarettes*, (i) it modifies the conditions of competition to the detriment of imported products *vis-à-vis* like domestic products, and (ii) the detrimental impact on imports does not stem exclusively from a legitimate regulatory distinction.[15]

1.2.2.1 The NESI decision modifies the conditions of competition to the detriment of imported products vis-à-vis like domestic products

Although imported and domestic cotton fabrics are given formally identical treatment under the NESI decision, Syldavia claims that the measure *de facto* modifies the conditions of competition to the detriment of imported Syldavian fabrics in two ways. First, the NESI decision excludes powerloom fabrics, which Syldavia primarily produces, from the 'Cotton Fabric' label. This misleadingly suggests to consumers that only handloom fabrics are cotton fabrics, thereby diverting many of those who would otherwise buy powerloom towards – primarily domestically produced – handloom fabrics. This is confirmed by the drop in Syldavia's powerloom cotton fabric exports to Borginia between 2015 and 2016, *i.e.* after the adoption of the NESI decision, and the parallel increase in sales of handloom fabrics.[16] Second, the NESI decision is enforced against Syldavia's textile industry (and that of key exporting countries), by way of verification visits, while the lack of reference to such visits in Borginia in NESI's Annual Reports[17] suggests that the accuracy of Borginian producers' self-declarations is not being ascertained. This gives more favourable competitive opportunities to Borginia's fabrics, which can be marketed as 'Cotton Fabric' relying only on self-declarations, and without necessarily complying with NESI's requirements. The NESI decision's enforcement is also more burdensome for foreign producers, who are required during verification visits to submit detailed reports on the nature and quantum of carbon emissions.[18]

1.2.2.2 The detrimental impact caused by the NESI decision does not stem exclusively from a legitimate regulatory distinction

Syldavia identifies the relevant *regulatory distinction* of the NESI decision to be between cotton fabrics that can be marketed as 'Cotton Fabric' in Borginia and those that cannot. Syldavia argues that this is not a *legitimate* regulatory distinction as it does not pursue a *legitimate* objective and, alternatively, that the detrimental impact of the NESI decision does not stem exclusively from a legitimate regulatory distinction as it is not 'even-handed'.[19]

Syldavia argues that the objectively discernible primary objective of the NESI decision is to

[15] ABR, *US – Clove Cigarettes*, [180 and 182].
[16] EMC[2] Case 2017-2018, Annex 2, Tables A and B.
[17] EMC[2] Case 2017-2018, [2.3].
[18] EMC[2] Case 2017-2018, [2.3].
[19] ABR, *US – Clove Cigarettes*, [180 and 182].

misinform consumers as to the content of fabrics in order to shift their purchasing behaviour towards handloom fabrics. Such deliberate misinformation is not a *legitimate* objective as it is not 'lawful, justifiable or proper'.[20] This interpretation of 'legitimate objective' under Art. 2.2 TBT, following the ruling in *EC – Asbestos*,[21] can also be relied on for the purposes of Art. 2.1 TBT. Should the Panel instead find that the underlying objective of the NESI decision is to reduce carbon emissions, Syldavia submits that this is also not a *legitimate* objective due to the *illegitimacy* of the means used to pursue it. In *US – Tuna II (Mexico)*, the AB did not reject Mexico's reasoning that an objective may not be legitimate for the purposes of Art. 2.2 TBT due to the illegitimacy of the means used to pursue it,[22] thereby implicitly accepting that the means used to achieve an objective may be considered in assessing its legitimacy. Thus, Syldavia argues that the NESI decision does not pursue a legitimate objective as it seeks to reduce carbon emissions by illegitimate means, namely a deceptive label designed to deliberately mislead consumers into buying only handloom cotton fabrics.

Should the Panel disagree, Syldavia argues alternatively that the NESI decision is not *even-handed* for the following reasons. First, Syldavia submits that the NESI decision is designed and applied in a manner that constitutes 'arbitrary or unjustifiable discrimination'[23]. The lack of verification visits in Borginia, as opposed to Syldavia and other key exporting countries, cannot be 'reconciled with', nor is it 'rationally related to', the goals of the NESI decision, thus amounting to *arbitrary or unjustifiable discrimination*.[24] In the absence of verification, it is very likely that at least some of Borginia's cotton fabrics are being incorrectly labelled as 'Cotton Fabric' without in fact adhering to NESI's requirements, thereby undermining the measure's objectives. This is exacerbated by the fact that the self-declarations are bound to be unreliable due to textile producers' financial incentive to declare their use of carbon-neutral production practices to get access to the label.

Syldavia also notes that the depth of information asked of Syldavian producers during verification visits is not needed to verify their self-declarations, as *any* carbon emissions in their fabrics' production would exclude them from the 'Cotton Fabric' label. This additional burden is thus 'disproportionate' to the goals of the NESI decision and thereby *unjustifiable*.[25]

In addition, Syldavia argues that the NESI decision amounts to *unjustifiable* and *arbitrary discrimination* since, by prohibiting the use of *any electricity* in the whole production process,

[20] ABR, *US – Tuna II (Mexico)*, [313].
[21] ABR, *EC – Asbestos*, [89].
[22] ABR, *US – Tuna II (Mexico)*, [338].
[23] ABR, *US – COOL*, [271]; ABR, *US – Tuna II (Article 21.5 – Mexico)*, [7.94].
[24] ABR, *US – Tuna II (Article 21.5 – Mexico)*, [7.92].
[25] ABR, *US – COOL*, [347].

it excludes fabrics produced with renewable energy from the 'Cotton Fabric' label. This is not *rationally related to* the objective of carbon emission reduction as such products entail no carbon emissions. This also supports a finding of *arbitrary discrimination* since NESI's requirement of 100% handloom production is 'rigid and unbending',[26] especially given that use of renewable energy would be comparable in effectiveness. NESI's closed list of permitted carbon-neutral practices[27] further illustrates the measure's *rigidity*. Although the term 'arbitrary' has been interpreted as such in the context of the chapeau of Art. XX GATT, Syldavia recalls the AB's ruling that jurisprudence on the latter is not irrelevant in the analysis of 'less favourable treatment' under Art. 2.1 TBT.[28]

It is also submitted that the adoption of the NESI decision constitutes *unjustifiable discrimination* due to Borginia's failure to engage Syldavia in 'serious, across-the-board negotiations'[29] before implementing this unilateral measure. Borginia's multilateral negotiations in the context of the Paris Agreement do not suffice as this treaty does not specify measures to be taken to achieve carbon reduction targets. Borginia only negotiated on specific instruments to meet its targets with other small island states but did not make 'comparable efforts' to reach an agreement with Syldavia and other WTO Members.[30]

Moreover, Syldavia argues that the NESI decision's application is not *even-handed* since the difference in verification between foreign and domestic textile producers is not 'calibrated' to the risks of carbon emissions arising in these two countries.[31] The likelihood that carbon emissions will result from powerloom fabric production is the same in Syldavia and Borginia, as confirmed by the fact that NESI considered Borginia's powerloom industry a significant emitter of GHGs.[32] Thus, the NESI decision does not equally address the risks of carbon emissions in those two countries.

Finally, Syldavia submits that the NESI decision is not *even-handed* as it constitutes a 'disguised restriction on international trade'.[33] This can be inferred by 'the design, the architecture and the revealing structure'[34] of the measure, which show that it is applied to protect Borginia's domestic textile industry from import competition. In particular, the measure was introduced a year after a significant increase in exports of powerloom fabrics from Syldavia to Borginia in 2014, and has since its implementation caused these to drop

[26] ABR, *US – Shrimp*, [177].
[27] EMC^2 Case 2017-2018, [2.2].
[28] ABR, *US – Tuna II (Article 21.5 – Mexico)*, [7.88].
[29] ABR, *US – Shrimp*, [166]
[30] ABR, *US – Shrimp (Article 21.5 – Malaysia)*, [122].
[31] ABR, *US – Tuna II (Article 21.5 – Mexico)*, [7.157].
[32] EMC^2 Case 2017-2018, [2.1].
[33] TBT Agreement, Recital 6.
[34] PR, *US – Shrimp (Article 21.5 – Malaysia)*, [5.142] referring to ABR, *Japan – Alcoholic Beverages II*, 29.

significantly. [35] The lack of verification visits, or similar measures, against Borginia's domestic industry to enforce the NESI decision further illustrates the measure's *disguised* protectionism.

Syldavia therefore submits that the NESI decision is inconsistent with Art. 2.1 TBT.

1.3 The NESI decision is inconsistent with Art. 2.2 TBT

Syldavia submits that the NESI decision is inconsistent with Art. 2.2 TBT as it does not fulfil a 'legitimate objective', as argued in section 1.2.2.2. Should the Panel disagree and find that the NESI decision pursues the objective of carbon emission reduction, Syldavia argues alternatively that it is 'more trade-restrictive than necessary' to fulfil this objective.

The assessment of whether a technical regulation is 'more trade-restrictive than necessary' involves first a 'relational analysis' of its trade-restrictiveness, the degree of contribution that it makes to the legitimate objective, and the risks non-fulfilment would create.[36] While Syldavia does not contest the seriousness of the risks carbon emissions entail, it argues that the NESI decision is disproportionately *trade-restrictive* in relation to the *contribution* it makes to their reduction. The NESI decision significantly restricts the trade in fabrics not labelled 'Cotton Fabric' as it makes it very difficult or impossible for consumers to identify them as cotton fabrics. At the same time, the measure's contribution to the reduction of carbon emissions is not that significant. Arguably, the NESI label will only deceive consumers in the short term into buying handloom fabrics as they are bound to discover its misleading nature. In addition, the lack of verification of domestic producers' declarations further reduces the NESI decision's contribution as it removes any incentive for these producers to adhere to the requirement of zero carbon emissions in their production. Lastly, the exclusion of cotton fabrics produced with renewable energy from the 'Cotton Fabric' label, as noted in section 1.2.2.2, is 'more trade-restrictive than necessary' as this does not contribute to reducing carbon emissions at all.

The assessment of whether a measure is 'more trade-restrictive than necessary' includes, second, a 'comparative analysis' that considers the existence of less trade-restrictive, equally effective and reasonably available alternatives to the challenged measure.[37] Accordingly, Syldavia points to several alternatives to the NESI decision. First, while allowing all cotton fabrics to be marketed as 'Cotton Fabric', Borginia could use a label that informs consumers about the level of carbon emissions of different cotton fabrics, such as a 'carbon-neutral' label or a label distinguishing between 'hand-made' and 'machine-made' cotton fabrics. These labelling schemes would be *less trade-restrictive* as they would allow powerloom cotton

[35] EMC[2] Case 2017-2018, Annex 2, Table A.
[36] ABR, *US – Tuna II*, [322]; ABR, *US – COOL*, [374].
[37] ABR, *US – Tuna II (Mexico)*, [320-322].

fabrics to be labelled correctly, thereby enabling their identification by consumers. At the same time, they would be at least *equally effective* to the NESI decision as they would stimulate a preference among consumers for carbon-neutral handloom fabrics and, unlike the NESI decision which deceives consumers, they would have long-term effects. Lastly, the alternatives are *reasonably available*, as they can be implemented in the same way as the NESI decision.

Syldavia therefore submits that the NESI decision is inconsistent with Art. 2.2 TBT.

1.4 The NESI decision is inconsistent with Art. 2.4 TBT

Syldavia submits that the NESI decision is inconsistent with Art. 2.4 TBT since ISO 14666, which is a 'relevant' 'international standard', has not been used as its 'basis'. Moreover, ISO 14666 would not be an ineffective or inappropriate means for the fulfilment of a 'legitimate objective' as the NESI decision does not pursue a *legitimate* objective.

1.4.1 ISO 14666 is an 'international standard'

ISO 14666 is an 'international standard' under Art. 2.4 TBT since it was adopted by an international standardising organisation, the ISO, and made available to the public.[38]

Borginia's allegation that ISO 14666 is not based on consensus, due to its own objections to it,[39] is immaterial in view of the AB's ruling in *EC – Sardines* that 'international standards' within the meaning of Art. 2.4 TBT do not require consensus.[40] While the TBT Committee Decision 2000, characterised by the AB in *US – Tuna II (Mexico)* as a 'subsequent agreement' under Art. 31(3)(a) VCLT,[41] sets out consensus as one of the six principles to be observed when international standards are elaborated, this does not override the explicit text of the *TBT Agreement*. The unambiguous, ordinary meaning of the last sentence of the Explanatory Note to Annex 1.2 TBT, namely that international standards not adopted by consensus are covered by the *TBT Agreement*, remains unchanged following the TBT Committee Decision and *US – Tuna II (Mexico)*. Indeed, the 'consensus' principle in the TBT Committee Decision only requires 'consensus procedures' to be established that take into account the views of all parties concerned,[42] not that international standards must have been adopted in the absence of opposition by any Member.

It follows that ISO 14666 is consistent with the consensus principle of the TBT Committee Decision as its adoption by the ISO means that it went through its relevant consensus procedures. The ISO defines consensus as 'general agreement, characterised by the absence of sustained opposition to substantial issues by any *important part of the concerned interests* and

[38] ABR, *US – Tuna II*, [353].
[39] EMC^2 Case 2017-2018, [2.6].
[40] ABR, *EC – Sardines*, [222-225].
[41] ABR, *US – Tuna II (Mexico)*, [372].
[42] TBT Committee Decision 2000, [8].

by a process that involves seeking to take into account the views of all parties concerned' (emphasis added).[43] Thus, in line with the TBT Committee Decision, the ISO *establishes consensus procedures* that take into account the views of all Members, without empowering individual countries to block the adoption of a standard for which consensus exists. This is also desirable from a policy perspective and consistent with the object and purpose of the *TBT Agreement*, which recognises that international standards have an important role in facilitating trade[44] by creating a common benchmark for regulation.[45] However, they would not be able to fulfil this role if single countries could easily block consensus on account of reasons relating to their individual circumstances. Indeed, given the immense challenge of developing standards that are internationally relevant for a diverse group of countries, a strict consensus rule for the adoption of international standards would be unreasonable and undesirable.

1.4.2 ISO 14666 is a 'relevant' international standard

Syldavia argues that ISO is a 'relevant' international standard on which the NESI decision should have been based as it 'bear[s] upon, relate[s] to or [is] pertinent to' the NESI decision.[46] This is since, similarly to the international standard and regulation at issue in *EC – Sardines*,[47] the ISO 14666 and the NESI decision deal with the same product (cotton fabrics) and lay down the conditions under which these can be marketed as 'Cotton Fabric'.

1.4.3 ISO 14666 has not been used as a 'basis' for the NESI decision

Syldavia submits that the ISO 14666 has not been used as a 'basis' for the NESI decision as the two are clearly contradictory.[48] The former excludes from its 'Cotton Fabric' label any fabric produced using electricity or machines, even if made 100% from cotton, while the latter explicitly includes fabrics made by machine, provided that they are 100% composed of cotton.

1.4.4 ISO 14666 is not an ineffective or inappropriate means to fulfil a 'legitimate objective'

Syldavia submits, referring to its arguments in section 1.2.2.2, that the objective pursued by the NESI decision is not a 'legitimate objective' under Art. 2.4 TBT as it is also not 'legitimate' under Arts. 2.1 and 2.2 TBT.[49]

Syldavia therefore submits that the NESI decision is inconsistent with Art 2.4 TBT.

1.5 The NESI decision is inconsistent with Art. III:4 GATT

Syldavia submits that that the NESI decision violates Art. III:4 GATT since (i) the measure is a 'law, regulation, or requirement […]' covered by Art. III:4 GATT, (ii) the imported and

[43] ISO Directives, clause 2.5.6.
[44] TBT Agreement, Recital 3.
[45] Wijkström and McDaniels 2013, 1014.
[46] ABR, *EC – Sardines*, [231].
[47] ABR, *EC – Sardines*, [229].
[48] ABR, *EC – Sardines*, [248].
[49] ABR, *EC – Sardines*, [286].

domestic products at issue are 'like', and (iii) the imported products are accorded 'less favourable treatment' than like domestic products.[50] As argued in section 1.1, the NESI decision is a 'technical regulation' under the *TBT Agreement*. Thus, following *US – Clove Cigarettes*, it is also covered by Art. III:4 GATT.[51] Moreover, referring to its submissions under section 1.2.1, Syldavia argues that since powerloom and handloom cotton fabrics are 'like' under Art. 2.1 TBT, they are also 'like' under Art. III:4 GATT. Although Syldavia recognises that likeness in the covered agreements is like an 'accordion',[52] it argues that it stretches to the same extent under the two aforementioned provisions, given that the AB has consistently relied on the text and interpretation of Art. III:4 GATT to interpret the meaning of 'like' products under Art. 2.1 TBT.[53] Referring to its submissions in section 1.2.2.1, Syldavia argues that the NESI decision accords 'less favourable treatment' to imported cotton fabrics than like domestic cotton fabrics since it modifies the conditions of competition to the detriment of imported cotton fabrics.[54] Syldavia therefore submits that the NESI decision is inconsistent with Art. III:4 GATT.

2 THE SOCA TAX IS INCONSISTENT WITH THE GATT 1994

2.1 The SOCA tax is inconsistent with Arts. II:1(a), II:1(b) and II:2(a) GATT

Syldavia submits that the SOCA tax is inconsistent with Arts. II:1(a) and (b) GATT as it is an ODC prohibited by Art. II:1(b), second sentence, GATT and not a BTA exempted from this prohibition by virtue of Art. II:2(a) GATT.

2.1.1 The SOCA tax is an ODC inconsistent with Art. II:1(b), second sentence, GATT

Syldavia submits that the SOCA tax is a border charge, falling within the scope of Art. II:1(b) GATT, and not an internal charge as the obligation to pay it does not 'accrue due to an *internal* event' (emphasis added).[55] Unlike the tax at issue in *China – Auto Parts*, the SOCA tax is payable due to an *external* event, namely the emission of carbon during the production of imported cotton fabrics taking place abroad.

Syldavia further submits that the SOCA tax is an ODC and not an 'ordinary customs duty' since it is based on an 'underlying scheme or formula',[56] namely the quantum of carbon emitted during the production of cotton fabrics per square metre of fabric. As such, and in light of the *Understanding on the Interpretation of Art. II:1(b)*, it is prohibited under Art. II:1(b), second sentence, GATT since it has not been recorded in Borginia's GATT Schedule.[57]

[50] ABR, *Korea – Various Measures on Beef*, [133].
[51] ABR, *US – Clove Cigarettes*, [100].
[52] ABR, *Japan – Alcoholic Beverages*, 21.
[53] ABR, *US – Clove Cigarettes*, [120].
[54] ABR, *Korea – Various Measures on Beef*, [137].
[55] ABR, *China – Auto Parts*, [162].
[56] ABR, *Chile – Price Band System*, [233].
[57] EMC^2 Case 2017-2018, Table C.

2.1.2 The SOCA tax is not a BTA exempted by Art. II:2(a) GATT

Syldavia submits that the SOCA tax cannot be exempted from the prohibition of Art. II:1(b), second sentence, GATT as it is not a BTA consistent with Art. II:2(a) GATT. This is since it is not a tax on a product and, alternatively, it is not a charge equivalent to an internal tax 'imposed consistently with' Art. III:2 GATT in respect of a 'like' domestic product.

As the language of Arts. II:2(a) and III:2 GATT suggests, a BTA must either be imposed on a product or an input of the product which is physically present therein.[58] Carbon emissions, subject to the SOCA tax, are neither of those but rather constitute an output of the PPM of products.[59] Syldavia therefore argues that the SOCA tax is not a tax on a product as it does not have a sufficient connection with the product at issue, namely cotton fabrics, even 'indirectly', as provided by Art. III:2. In *Mexico – Soft Drinks*, where the Panel held that the qualifying expression 'directly or indirectly' does not eliminate the requirement for such a connection.[60] As the case involved a tax on a final product, which was deemed to be indirectly levied on the product's input, there was a *physical* connection between the two. Similarly, in *Canada – Periodicals*, a tax was found to be an indirect tax on a product as it was levied on advertisements, which were *physically* present in the periodicals at issue.[61] Lastly, in *US – Superfund*, the tax found to be adjustable at the border was on chemicals used as *inputs* during the production of other chemicals. Unlike these cases, carbon emissions are an *output* of the energy used during production, with no *physical* connection between them and the final product. Syldavia, therefore, invites the Panel to find that, as a carbon tax, the SOCA tax is not a tax on products, and therefore not a BTA under Art. II:2(a) GATT.

Should the Panel disagree, Syldavia claims that the SOCA tax is still not covered by Art. II:2(a) GATT as it is not equivalent to an internal tax 'imposed consistently with' Art. III:2 GATT in respect of a 'like' domestic product. This is since the SOCA tax is inconsistent with the first sentence of Art. III:2 GATT, which is the relevant part of the provision for Art. II:2(a) GATT concerning 'like' products,[62] as it is applied on imported powerloom cotton fabrics 'in excess of' 'like' domestic handloom cotton fabrics. Referring to the very close competitive relationship demonstrated in section 1.2.1, Syldavia submits that powerloom and handloom cotton fabrics are 'like', even in the narrow scope of Art. III:2, first sentence, GATT.[63] In addition, powerloom cotton fabrics are clearly taxed 'in excess of' handloom cotton fabrics as

[58] Tamiotti et. al 2009, 104.
[59] Low et. al 2012, 492.
[60] PR, *Mexico – Soft Drinks*, [8.42].
[61] PR, *Canada – Periodicals*, [5.29]; ABR, *Canada – Periodicals*, 18.
[62] ABR, *India – Additional Import Duties*, [166].
[63] ABR, *Japan – Alcoholic Beverages II*, 19.

the latter are exempted from the SOCA tax altogether.

Syldavia therefore submits that the SOCA tax is an ODC prohibited under Art. II:1(b) second sentence GATT as it is not recorded in Borginia's Schedule and is not a BTA falling under Art. II:2(a) GATT, thereby also inconsistent with Art. II:1(a) GATT.

2.2 The SOCA tax is inconsistent with Art. III:2 GATT

Should the Panel find that the SOCA tax is an internal tax, Syldavia submits that it is inconsistent with Art. III:2, first sentence, GATT, as argued in section 2.1.2. Should the Panel disagree, Syldavia argues that the SOCA tax is inconsistent with Art. III:2, second sentence, GATT since (i) powerloom cotton fabrics and handloom cotton fabrics are 'directly competitive and substitutable', (ii) the products are 'not similarly taxed' and (iii) the tax is applied 'so as to afford protection to domestic production'.[64] Syldavia submits, recalling its arguments in section 1.2.1, that powerloom and handloom cotton fabrics are 'directly competitive and substitutable' as they are 'alternative ways of satisfying a particular need or taste'.[65] Syldavia highlights in particular the convergent consumer preferences in relation to the two products prior to the SOCA tax' adoption in 2015, and the products' similar end-uses. Syldavia further submits that powerloom and handloom cotton fabrics are 'not similarly taxed' since the former are considerably taxed based on the carbon they emit per square metre fabric, while the latter are exempted from the tax altogether. Lastly, Syldavia submits the SOCA tax is applied 'so as to afford protection to domestic protection' as demonstrated by 'the design, the architecture and the revealing structure' of the measure.[66] The SOCA tax exempts handloom fabrics, qualifying for the 'Cotton Fabric' label, which Borginia primarily produces. By contrast, the majority of Syldavia's fabrics, being powerloom, are *ab initio* excluded from this label and thus automatically subject to the SOCA tax. Also, due to the NESI decision's unequal enforcement, elaborated in section 1.2.2.1, Borginian fabrics can benefit considerably more from the exemption, given their easier access to the 'Cotton Fabric' label. This further illustrates the SOCA tax's protectionist nature. Therefore, should the Panel find the SOCA tax to be an internal tax, Syldavia submits that it is inconsistent with Art. III:2 GATT.

3 THE NESI DECISION AND THE SOCA TAX ARE NOT JUSTIFIED UNDER ART. XX OF THE GATT 1994

Syldavia submits that the two measures are not justified under Art. XX GATT since they do not satisfy the requirements of Arts. XX(b) or XX(g) GATT and the chapeau of Art. XX GATT.

[64] ABR, *Japan – Alcoholic Beverages II*, 24.
[65] ABR, *Korea – Alcoholic Beverages*, [115].
[66] ABR, *Japan – Alcoholic Beverages II*, 29.

3.1 The NESI decision and the SOCA tax cannot be provisionally justified under Art. XX(b) GATT

For the purposes of Art. XX(b) GATT, Syldavia concedes that the two measures are 'designed to' protect human, animal and plant life or health, however, it submits that they cannot be justified under Art. XX(b) GATT since they are not 'necessary'. According to case law, the necessity requirement involves weighing and balancing a series of factors including the importance of the interests at stake, the measure's trade-restrictiveness and its contribution to the objective pursued.[67] While Syldavia agrees that the protection of health is important, it considers the two measures' contribution limited and their trade-restrictiveness substantial.

Regarding the NESI decision, Syldavia recalls section 1.3 outlining its significant *trade-restrictiveness* for fabrics excluded from the 'Cotton Fabric' label, and the measure's limited *contribution* to its carbon reduction objective, and thus the protection of human, animal, plant life and health. Regarding the SOCA tax, Syldavia argues that it is also very *trade-restrictive* as it radically reduces powerloom producers' competitive opportunities on Borginia's market due to a higher price needed to offset the tax burden on their profit margin. Further, Syldavia highlights that 1000g of carbon under the world's biggest carbon trading market, the EU ETS, only cost 0.7 cent, while Borginia charges an overly trade-restrictive rate of 20 cents for the same amount.[68] At the same time, the *contribution* of the SOCA tax to life and health protection is greatly undermined by the 'Cotton Fabric' exemption due to the lack of verification of domestic producers' self-declarations regarding carbon emissions, explained in section 1.3.

Syldavia further submits that the NESI decision is not 'necessary' due to the existence of several reasonably available, less trade restrictive and equally effective alternatives, as shown in section 1.3. Syldavia submits that there is also such an alternative in relation to the SOCA tax in the form of a lower carbon tax akin to those imposed by other Members like the EU, in combination with verification visits to both domestic and foreign producers before determining the tax rate. This combination of measures would be less *trade-restrictive* due to the lesser burden of a lower tax and the equal implementation of the tax to all producers. As Borginia clearly has the capacity to carry out verification visits requiring detailed documentation on carbon emission levels in the context of the NESI decision, this alternative is *reasonably available*. Moreover, since the alternative would entail verification of all producers, it would accurately tax all cotton fabrics based on their actual level of carbon emissions, thus being at

[67] ABR, *Brazil – Retreaded Tyres*, [141-145 and 182]; ABR, *EC – Asbestos*, [172].

[68] European Commission 2016; Icap 2017.

least *equally effective* to the SOCA tax.

In conclusion, the two measures are not 'necessary' to protect life or health and so cannot be provisionally justified under Art. XX(b) GATT.

3.2 The NESI decision and the SOCA tax cannot be provisionally justified under Art. XX(g) GATT

For the purposes of Art. XX(g) GATT, Syldavia concedes that the two measures concern the conservation of the 'exhaustible natural resource' of a stable climate. However, Syldavia submits that they cannot be provisionally justified under Art. XX(g) GATT, since (i) they do not 'relate to' this conservation; and (ii) they are not 'made effective in conjunction with restrictions on domestic production or consumption'.[69]

Syldavia submits that the NESI decision does not 'relate to' the conservation of exhaustible natural resources as it is 'disproportionately wide in its scope and reach in relation to its policy objective'.[70] This is shown by the unnecessary burden of detailed reports on carbon emissions during NESI verification visits, and the exclusion from the NESI label of fabrics produced with renewable energies, elaborated in section 1.2.2.2. Regarding the SOCA tax, it is argued that it is not 'primarily aimed at' carbon emission reduction, and thus the conservation of a stable climate, as it allows tax-free cotton fabric production that possibly emits carbon by not verifying domestic self-declarations, as argued in section 3.1.[71]

Syldavia submits that the two measures are not 'made effective in conjunction with restrictions on domestic production or consumption' since they do not fulfil the requirement of even-handedness, as established in *US – Gasoline*.[72] The NESI decision's lack of *even-handedness* is clearly demonstrated by its stricter enforcement against Syldavia's textile industry by way of verification visits, as argued in section 1.2.2.1. With respect to the SOCA tax, it is argued that the lack of verification visits in Borginia and the ensuing opportunity for Borginia's producers to illegitimately receive the NESI label and thus the exemption from the SOCA tax, also contradicts the requirement of *even-handedness*.

Therefore, the two measures cannot be provisionally justified under Art. XX(g) GATT.

3.3 The NESI decision and the SOCA tax do not satisfy the chapeau of Art. XX GATT

Syldavia submits that the NESI decision is not applied consistently with the chapeau of Art. XX GATT since, recalling its arguments in section 1.2.2.2, it is applied in a manner constituting a means of 'arbitrary or unjustifiable discrimination between countries where the same

[69] ABR, *US – Shrimp*, [127, 135 and 143].
[70] ABR, *US – Shrimp*, [141-142].
[71] ABR, *US – Gasoline*, 19.
[72] ABR, *US – Gasoline*, 20-21.

conditions prevail', and a 'disguised restriction on international trade'. Syldavia notes that Borginia and Syldavia are countries where 'the same conditions prevail' since the risk of carbon emissions threatening the stable climate and the life and health of humans, animals and plants originates in Borginia as much as in Syldavia.[73]

Syldavia submits that the application of the SOCA tax constitutes an 'unjustifiable discrimination' for the following reasons. First, Borginia failed to engage in 'serious, across-the-board' negotiations with Syldavia and other WTO Members,[74] as elaborated in section 1.2.2.2. Moreover, in light of the lack of verification of domestic producers' self-declarations, Syldavia claims that the application of the exemption undermines its objective due to the likely incorrect labelling of Borginia's domestic cotton fabrics.[75] In addition, as argued in section 2.2, Syldavia submits that 'the design, the architecture and the revealing structure' of the SOCA tax demonstrate a 'disguised restriction on international trade'.[76]

Therefore, the two measures' application does not satisfy the chapeau of Art. XX GATT and, consequently, the measures cannot be justified under Art. XX GATT.

4 THE TTUFS IS INCONSISTENT WITH THE *SCM AGREEMENT*

4.1 The TTUFS is inconsistent with Art. 3.1(a) SCM

Syldavia submits that the TTUFS is inconsistent with Art. 3.1(a) SCM as it is a prohibited export subsidy under Art. 3.1(a) SCM and since Borginia is no longer covered by the exemption to this provision provided by Art. 27.2(a) SCM.

4.1.1 The TTUFS is a prohibited export subsidy under Art. 3.1(a) SCM

Syldavia submits that the TTUFS is a prohibited export subsidy under Art. 3.1(a) SCM as it is a 'subsidy' under Art. 1 SCM and is 'contingent […] upon export performance'. The TTUFS is a 'subsidy' under Art. 1 SCM as it is a 'direct transfer of funds' 'by the government' of Borginia which confers a 'benefit' to textile units, enabling them to modernise production technologies at no cost making them 'better off' than they would be under terms available in the market.[77] As an export subsidy, it is rendered 'specific' under Art. 2.3 SCM.

Moreover, Syldavia submits that the TTUFS is *de jure* export contingent since 'the condition to export is clearly, though *implicitly*, in the instrument comprising the measure' (emphasis added).[78] The TTUFS is granted exclusively to textile units in the TEPZs, which are legally required to export 80% of their production. It follows that the TTUFS contains an *implicit* legal

[73] ABR *EC – Seal Products*, [2.256, 5.299, and 5.317].
[74] ABR, *US – Shrimp*, [166].
[75] ABR *Brazil – Retreaded Tyres*, [227-228 and 246].
[76] PR, *US – Shrimp (Article 21.5 – Malaysia)*, [5.142] referring to ABR, *Japan – Alcoholic Beverages II*, 29.
[77] ABR, *Canada – Aircraft*, [157].
[78] ABR, *Canada - Autos*, [100].

condition to export for granting the subsidy, resulting in its *de jure* export contingency. Should the Panel disagree, Syldavia submits that the TTUFS is *de facto* export contingent. In *Canada – Aircraft*, the AB summarised the three elements in fn. 4 SCM to infer *de facto* contingency: (i) the granting of a subsidy (ii) is tied to (iii) actual or anticipated exportation or export earnings.[79] Syldavia submits, as a direct transfer of funds, the TTUFS involves the 'granting of a subsidy'. Also, there were 'anticipated exportation or export earnings' when the TTUFS was designed. Given the TEPZs' legal obligation to export, Borginia must have been aware of the export-orientation of these units, which predate the creation of the TTUFS by several years. Finally, as the TTUFS is granted exclusively to units in the TEPZs to modernise production technology which improves the units' competitiveness, the scheme is 'tied to' the anticipated exports, resulting in *de facto* export contingency.

4.1.2 Borginia is not exempted from Art. 3.1(a) SCM by Art. 27.2(a) SCM

Syldavia submits that Borginia is no longer exempted from the prohibition under Art. 3.1(a) SCM by Art. 27.2(a) SCM since, while initially listed in Annex VII(b) SCM, it graduated from this Annex in 2015. Borginia's graduation is based on reaching in 2015 a GNP per capital level of US $1000 for three consecutive years.[80]

In conclusion, the TTUFS is inconsistent with Art. 3.1(a) SCM.

4.2 The TTUFS is inconsistent Art. 27.4 SCM

Syldavia submits that the TTUFS is inconsistent with Art. 27.4 SCM, which, pursuant to Art. 27.2 SCM, applies to developing countries except those in Annex VII SCM. As argued in section 4.1, Borginia graduated from this Annex in 2015, thereby becoming subject to Art. 27.4 SCM. Syldavia submits that the TTUFS is in violation of Borginia's obligation under Art. 27.4 SCM to phase-out export subsidies in a period of eight years from the date of entry into force of the *WTO Agreement*. Although in 2001 the SCM Committee adopted a set of procedures to authorise certain export subsidies to operate beyond this date, this only covered subsidies taking the form of exemptions from import duties and internal taxes and existing before 1 September 2001.[81] In 2007, the General Council decided that by the end of 2015 all export subsidies shall be phased out, except those for which Annex VII(b) Members had secured rights in 2001.[82] The TTUFS is a direct transfer of funds, not an exemption from import duties or internal taxes, and was introduced in 2015, thus not existing before or in 2001. Hence, it is ineligible for extension of the phasing-out period and thereby inconsistent with Art. 27.4 SCM.

[79] ABR, *Canada – Aircraft*, [171].
[80] EMC^2 Case 2017-2018, [3.3].
[81] SCM Committee Procedure, [2].
[82] General Council Decision on Art. 27.4 SCM, section 1.

4.3 The TTUFS is inconsistent with Art. 27.5 SCM

Syldavia submits that the TTUFS is inconsistent with Borginia's obligation under Art. 27.5 SCM to phase-out, in a period of two years, export subsidies granted by a developing country Member to products in which it has reached 'export competitiveness'.

According to Art. 27.6 SCM, 'export competitiveness' in a product exists if a Member's exports of that product reach at least 3.25% of world trade for two consecutive calendar years. A 'product' is defined by Art. 27.6 SCM as a 'section heading' of the HS. This definition of 'product' is highly problematic as 'section heading' does not exist as a category in the HS.[83] Syldavia invites the Panel to address this drafting error by interpreting 'section heading' to identify the 'product' in Art. 27.5 SCM in light of the ordinary meaning of words understood in the context of this provision and in light of the object and purpose of the *SCM Agreement*.[84]

The Oxford Dictionary defines 'product' as 'an article or substance that is manufactured or refined for sale',[85] which implies a single and distinguishable item that can be purchased by a consumer. Interpreting 'section heading' as a two-digit code in the HS, referred to as a 'section', would be contrary to this definition as 'textiles' (two-digit HS Code 52) is a general category and not a product fit for consumer purchase. Even a four-digit HS classification, referred to as a 'heading', remains too wide as four-digit HS Code 5208 encompasses a general list of cotton fabrics with varying composition, rather than one exact product. Syldavia further notes that both Art. 27.5 SCM specifically as well as the *SCM Agreement* in its entirety are intended to impose disciplines on subsidies which distort international trade,[86] and thus protect fair competition between products from different Members. Interpreting 'section heading' as a broad category would restrict the ability of Art. 27.5 SCM and the *SCM Agreement* to achieve this goal as competition exists between specific products fit to be purchased by a consumer, in this case being cotton textiles with 100% cotton, not between textiles or cotton fabrics as such. Hence, Syldavia believes the appropriate interpretation of 'section heading' is section *of a* heading, *i.e.* a six-digit category in the HS. This is specific enough to delineate a 'product' in the ordinary meaning of the word and facilitates the objective of Art. 27.5 SCM.

In 2015, Borginia's world export market share of HS section heading 5208.05 products (cotton textiles with 100% cotton) exceeded for its second consecutive year 3.25%, making Borginia 'competitive' in this product and thus subject to the obligation to phase-out export subsidies. As the TTUFS was introduced in 2015, it is inconsistent with Art. 27.5 SCM.

[83] Coppens 2013, 87.
[84] VCLT Art. 31.
[85] Oxford Dictionary.
[86] ABR, *Brazil – Aircraft*, [173].

Request for Findings

With regard to the NESI decision, Syldavia respectfully requests the Panel to:

i. Find that the NESI decision is a 'technical regulation' within the meaning of Annex 1.1 to the *TBT Agreement*;
ii. Find that the NESI decision is inconsistent with Arts. 2.1, 2.2, and 2.4 of the *TBT Agreement*;
iii. Find that the NESI decision is inconsistent with Art. III:4 of the GATT 1994.

With regard to the SOCA tax, Syldavia respectfully requests the Panel to:

iv. Find that the SOCA tax is an ODC that is inconsistent with Arts. II:1(a), II:1(b), second sentence, and II:2(a) of the GATT 1994;
v. In the alternative, find that the SOCA tax is an internal charge that is inconsistent with Art. III:2 of the GATT 1994.

With regard to the NESI decision and the SOCA tax, Syldavia respectfully requests the Panel to:

vi. Find that the NESI decision and the SOCA tax cannot be justified under Article XX of the GATT 1994.

With regard to the TTUFS, Syldavia respectfully requests the Panel to:

vii. Find that the TTUFS is inconsistent with Art. 3.1(a) of the *SCM Agreement*;
viii. Find that the TTUFS is inconsistent with Arts. 27.4 and 27.5 of the *SCM Agreement*.