



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 RESPONDENT

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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.	example given
EU	European Union
EU ETS	European Union Emissions Trading System
fn.	footnote
GATT	General Agreement on Tariffs and Trade 1994
GDP	Gross Domestic Product
GNI	Gross National Income
GHGs	Greenhouse Gases
Gms	Grams
HS	Harmonised System
ISO	International Organisation for Standardisation
LDC(s)	Least-Developed Country(ies)
NESI	National Environmental and Sustainability Institute
PR	Panel Report
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) and parties to the Paris Agreement. As a small island state, Borginia is suffering from adverse consequences of climate change which threaten, *inter alia*, the life and health of its population, its fauna and flora. In response, Borginia's National Environmental and Sustainability Institute (NESI) has developed a comprehensive strategy to tackle climate change by means of carbon emission reductions, introducing a series of measures in several sectors of its economy.
2. To ensure the use of carbon-neutral production practices in the textile industry, NESI introduced a decision stipulating that only 100% handloom cotton fabric can be marketed as 'Cotton Fabric' in Borginia (the NESI decision). Accordingly, only fabrics produced without electricity, machines or any form of conventional energy can carry this label. This distinguishes the NESI decision from the ISO standard 14666, which prescribes the appellation '100% cotton fabric' for all fabrics composed 100% of cotton, regardless of their production method.
3. The NESI decision is implemented on the basis of self-declarations by producers, the accuracy of which is subsequently verified. Producers not meeting these requirements may continue to market their fabrics in Borginia, but without the 'Cotton Fabric' label. To facilitate the positive implementation of the NESI decision, Borginia has been undertaking various activities with powerloom producers in other countries to promote the advantages of handloom products and the acquisition of the requisite technology.
4. As part of its comprehensive strategy, Borginia also introduced a tax through its Save Our Climate Act (SOCA tax), whose rate is determined by the level of carbon emissions per square metre fabric in the production of cotton fabrics. The tax is collected at the point of customs clearance for imported powerloom cotton fabrics and at the point of sale for domestic powerloom cotton fabrics. Products labelled 'Cotton Fabric' are exempted from the SOCA tax as the amount of carbon emissions in the production process is negligible.
5. The SOCA tax is pooled into a Textile Technology Upgrade Fund Scheme (TTUFS). The TTUFS is aimed at modernising Borginia's textile units, most of which are located in the Textile Export Promotion Zones (TEPZs), to bring their technology in line with Borginia's environmental goals.
6. Borginia was included in Annex VII(b) of the *SCM Agreement* since its per capita income is one of the lowest in the world. Specifically, Borginia's GNP per capita has been calculated by the World Bank at 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 not a ‘technical regulation’ within the meaning of Annex 1.1 to the TBT Agreement**

- The NESI decision is not a ‘technical regulation’ within the meaning of Annex 1.1 TBT as it is not ‘mandatory’.

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

- The NESI decision is consistent with Borginia’s national treatment obligation under Art. 2.1 TBT since the imported and domestic products at issue, namely powerloom and handloom cotton fabrics, are not ‘like’.
- In the alternative, the NESI decision does not accord ‘less favourable treatment’ within the meaning of Art. 2.1 TBT as any possible detrimental impact caused by the measure stems exclusively from a legitimate regulatory distinction.

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

- The NESI decision is not ‘more trade restrictive than necessary’ to fulfil a ‘legitimate objective’, namely that of mitigating climate change through the reduction of carbon emissions.

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

- Although the ISO 14666 was not used as the ‘basis’ for the NESI decision, this standard is not an ‘international standard’ under Art 2.4 TBT and is not ‘relevant’ to the NESI decision.
- In the alternative, the ISO 14666 would be an ‘ineffective or inappropriate’ means for fulfilling the NESI decision’s carbon reduction objective.

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

- Although the NESI decision accords ‘less favourable treatment’ to imported powerloom cotton fabrics, these are not ‘like’ domestic handloom cotton fabrics.

The SOCA tax is an internal tax consistent with Art. III:2 of the GATT 1994

- The SOCA tax is an internal tax and not a border charge.
- The SOCA tax is consistent with Art. III:2, first, and, in the alternative, second sentence, GATT.

The SOCA tax is consistent with Arts. II:1(a) and (b) and II:2(a) GATT 1994

- The SOCA tax is not an ‘ordinary customs duty’ but an ODC.
- The SOCA tax is a BTA under Art. II:2(a) GATT since it is a tax on a product and is ‘equivalent to’ an internal tax ‘imposed consistently with’ Art. III:2 GATT in respect of a

‘like’ domestic product. It is thereby exempted from Art. II:1(b), second sentence, GATT and, consequently, also consistent with Art. II:1(a) GATT.

The NESI decision and the SOCA tax are justified under Art. XX of the GATT 1994

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

The TTUFS is not inconsistent with Art. 3.1(a) of the *SCM Agreement*

- Borginia is exempted from the prohibition of Art. 3.1(a) SCM by Art. 27.2(a) SCM.
- In the alternative, the TTUFS is not prohibited by Art. 3.1(a) SCM as it is not ‘contingent [...] upon export performance’.

The TTUFS is not inconsistent with Art. 27.4 SCM of the *SCM Agreement*

- Borginia falls within the scope of Art. 27.2(a) SCM, and not Art. 27.2(b) SCM, and is thus not subject to Art. 27.4 SCM.

The TTUFS is not inconsistent with Art. 27.5 of the *SCM Agreement*

- Art. 27.5 SCM does not apply since Borginia is not yet ‘export competitive’ in cotton textiles.

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. Only fabrics produced without electricity can carry this label. The second measure at issue is the SOCA tax, whose rate is determined by the level of carbon emissions per square metre fabric in the production process. Products labelled ‘Cotton Fabric’ are exempted from this tax due to their negligible carbon emissions. The third measure at issue is the TTUFS. This is a fund into which the SOCA tax is pooled to finance the modernisation of technology of textile units in the TEPZs.

Legal Pleadings

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

1.1 The NESI decision is not a ‘technical regulation’ within the meaning of Annex 1.1 TBT

Borginia submits that the NESI decision does not raise any issue of inconsistency with Arts. 2.1, 2.2 and 2.4 TBT as it is not a ‘technical regulation’ falling within the scope of those provisions. According to the AB in *EC – Sardines*, a measure is a technical regulation under Annex 1.1 TBT if (i) it applies to an identifiable product or group of products, (ii) it lays down product characteristics, and (iii) it is mandatory.¹ While Borginia concedes that the first two conditions are met, it disputes that the NESI decision is ‘mandatory’ since products not adhering to it may still be sold in Borginia’s market using an alternative label. Unlike the ‘dolphin-safe’ label at issue in *US – Tuna II (Mexico)*, the NESI decision does not impose a ‘single and legally mandated set of requirements’² for making any statement regarding the subject matter of its label, namely the composition of fabrics. The NESI decision does not prohibit other labels indicating the composition of fabrics, like ‘Pure Cotton’ or ‘100% Cotton’, but merely sets out the conditions for use of the ‘Cotton Fabric’ label.

Therefore, the NESI decision is not a technical regulation falling within the scope of Arts. 2.1, 2.2 and 2.4 TBT. Should the Panel disagree, Borginia argues that the NESI decision is consistent with its obligations under these provisions.

1.2 The NESI decision is consistent with Art. 2.1 TBT

Following *US – Clove Cigarettes*, Borginia submits that the NESI decision is consistent with its national treatment obligation under Art. 2.1 TBT since the imported and domestic products

¹ ABR, *EC – Sardines*, [176].

² ABR, *US – Tuna II (Mexico)*, [193].

at issue, namely powerloom and handloom cotton fabrics, are not ‘like’ and, alternatively, there is no ‘less favourable treatment’ within the meaning of Art. 2.1 TBT.³

1.2.1 Powerloom cotton fabrics and handloom cotton fabrics are not ‘like’ products

Borginia submits that the ‘nature and extent of the competitive relationship’ between powerloom and handloom cotton fabrics in Borginia’s market does not support a conclusion that they are ‘like’ under Art. 2.1 TBT.⁴ According to well-established case law, this competitive relationship is determined on the basis of a non-exhaustive list of four criteria, namely the product’s physical characteristics, their end-uses, consumer preferences, and the products’ international tariff classification.⁵

While recognising that the HS *classifies* all woven cotton fabrics under the same tariff line, Borginia notes that the *physical characteristics* of handloom and powerloom cotton fabrics exhibit a number of differences, which translate into a higher quality of the former. First, the handloom makes it possible to weave fabrics with diverse and intricate designs which are impossible for the powerloom to produce,⁶ making handloom fabrics more aesthetic and visually appealing. Further, handloom fabrics, being woven manually, exhibit variations, giving them an uneven rugged appearance, as opposed to powerloom products which are far more uniform and thus lack the rare ethnic appeal of handloom fabrics.⁷

With respect to *end-uses*, Borginia emphasises that handloom fabrics are versatile and have a wider variety of uses than powerloom fabrics.⁸ For example, handloom fabrics are preferred for use in ‘rough clothes of very low counts such as durries, floor coverings, rugs etc.’⁹ Further, handloom fabrics are more appropriate to produce clothes with multi coloured designs, and short pieces of cloth having unique designs to meet individual tastes.¹⁰

As regards *consumer preferences*, relevant graphs show that sales of powerloom fabrics had already begun to drop in Borginia in 2014, thus before the adoption of the NESI decision, while sales of handloom fabrics increased in parallel.¹¹ This development is arguably reflective of changing consumer preferences in Borginia with regard to handloom and powerloom cotton fabrics, in light of the heavy carbon impact of powerloom production, and has taken place regardless of the premium price handloom fabrics attract in Borginia. The change is clearly a response of Borginian consumers to the various steps taken in connection with the LFN Action Plan to promote environment-friendly production practices, as well as general efforts of the

³ ABR, *US – Clove Cigarettes*, [87].

⁴ ABR, *US – Clove Cigarettes*, [120].

⁵ ABR, *EC – Asbestos*, [101].

⁶ Goswami and Jain 2014, 96.

⁷ Ghosh et al. 2015, 87.

⁸ India Ministry of Textiles 2015, 3.

⁹ Sinha 2014, 212.

¹⁰ Sinha 2014, 212.

¹¹ EMC² Case 2017-2018, Annex 2, Tables A and B.

Borginian government to raise awareness of global warming and its consequences, in particular for small island states.¹²

Borginia therefore submits that powerloom and handloom cotton fabrics are not ‘like’ under Art. 2.1 TBT.

1.2.2 The NESI decision does not accord ‘less favourable treatment’ within the meaning of Art. 2.1 TBT

Should the Panel find that handloom and powerloom cotton fabrics are like, Borginia argues that the NESI decision does not accord ‘less favourable treatment’ within the meaning of Art. 2.1 TBT as any possible detrimental impact caused by the measure on the conditions of competition of powerloom cotton fabrics ‘stems exclusively from a legitimate regulatory distinction’.¹³ The *regulatory distinction* made between handloom and powerloom cotton fabrics can be fully explained by reference to the *legitimate* objective of the NESI decision, namely carbon emission reduction, given the substantial carbon impact of the latter’s production method.

According to the AB in *US – Clove Cigarettes*, in determining whether a measure stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinise whether the technical regulation at issue is ‘even-handed’.¹⁴ In *US – Tuna II (Article 21.5 – Mexico)*, the AB held that this even-handedness analysis should include an assessment of whether the measure is ‘calibrated to’ the risks it aims to mitigate.¹⁵ Borginia claims that the NESI decision is even-handed because it is *calibrated to* the risks of carbon emissions. This risk is created by the production of powerloom fabrics, not handloom, which explains the reduced competitive opportunities that the NESI decision creates for the former.

According to the AB, a technical regulation is also not even-handed if it constitutes a means of ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.¹⁶ Relying on the case law interpreting the chapeau of Art. XX GATT, from which the AB drew this term, Borginia submits that the NESI decision is not *arbitrary* since it is not ‘rigid and unbending’.¹⁷ It does not prohibit powerloom cotton fabrics from being marketed in Borginia or from using other labels indicating their composition, as previously argued in section 1.1.

¹² EMC² Case 2017-2018, [1.4-1.7].

¹³ ABR, *US – Clove Cigarettes*, [182].

¹⁴ ABR, *US – Clove Cigarettes*, [182].

¹⁵ ABR, *US – Tuna II (Article 21.5 – Mexico)*, [7.157].

¹⁶ ABR, *US – Clove Cigarettes*, [173].

¹⁷ ABR, *US – Shrimp*, [177].

Borginia also submits that the adoption of the NESI decision does not constitute *unjustifiable discrimination* as Borginia made serious attempts to reach a multilateral solution before turning to this measure.¹⁸ Borginia is party to the Paris Agreement, the most advanced international environmental agreement addressing climate change, which shows that it makes every currently feasible effort to achieve carbon emission reduction multilaterally. Further, Borginia argues that, unlike the situation in *US – Shrimp*,¹⁹ it cooperated with all other countries where *the same conditions prevail*, namely small island states which are especially affected by climate change. These states wished to act more quickly and drastically than the rest of the international community as multilateral negotiations typically take too long, and efforts to reach international consensus may lead to low standards of protection,²⁰ unsuitable to address their special circumstances. The urgent threat climate change poses for these countries justifies their joint action, as explicitly envisaged by the Paris Agreement.²¹

In addition, Borginia submits that the NESI decision does not constitute a *disguised restriction on international trade* as nothing in ‘the design, the architecture, and the revealing structure’ of the measure indicates that it was adopted to benefit Borginia’s domestic handloom industry.²² On the contrary, subsequent to the decision’s adoption, Borginia undertook activities to promote the handloom sector in other countries including Syldavia,²³ despite it being a key exporter of textiles to Borginia.

In conclusion, the NESI decision is consistent with Art. 2.1 TBT since powerloom and handloom cotton fabrics are ‘like’ and, alternatively, the NESI decision does not accord ‘less favourable treatment’ under this provision.

1.3 The NESI decision is consistent with Art. 2.2 TBT

Borginia submits that the NESI decision is consistent with Art. 2.2 TBT as it is not ‘more trade restrictive than necessary’ to ‘fulfil’ a ‘legitimate objective’, namely that of mitigating climate change through the reduction of carbon emissions. This falls under environmental protection, which is specifically listed in Art. 2.2 TBT as a legitimate objective. As held by the AB in *US – COOL*, whether a technical regulation ‘fulfils’ a legitimate objective concerns its contribution to that objective.²⁴ Borginia argues that the NESI decision contributes to its carbon reduction objective by granting the ‘Cotton Fabric’ label only to fabrics that use carbon-neutral practices throughout their whole production, thereby promoting the purchase of carbon-neutral

¹⁸ ABR, *US – Shrimp*, [41].

¹⁹ ABR, *US – Shrimp*, [166].

²⁰ Green 2005, 188.

²¹ Paris Agreement, Art. 4(6).

²² PR, *US – Shrimp (Article 21.5 – Malaysia)*, [5.142] referring to ABR, *Japan – Alcoholic Beverages II*, 29.

²³ EMC² Case 2017-2018, [2.5].

²⁴ ABR, *US - COOL*, [461].

fabrics. The decision's actual contribution to the objective is confirmed by the continuing drop in consumption of powerloom fabrics following its adoption.²⁵

Borginia further submits that the NESI decision is not 'more trade-restrictive than necessary' to fulfil its legitimate objective. The assessment of whether a technical regulation is more trade-restrictive than necessary involves first a 'relational analysis' of the following factors: the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the legitimate objective, and the risks non-fulfilment of the objective would create.²⁶ Although the NESI decision is admittedly *trade-restrictive* with regards to powerloom fabrics, this is offset by the *material contribution* it makes to Borginia's carbon mitigation objective, the *non-fulfilment* of which entails very serious climate change consequences, especially for Borginia as a small island state. Borginian consumers were already showing preference for handloom cotton fabrics before the NESI decision was implemented, however, the measure was necessary in order to consolidate this trend and achieve Borginia's desired level of carbon emission reduction. With respect to the 'comparative analysis', the second part of the necessity test under Art. 2.2 TBT, Borginia recalls that the burden of proof to suggest a reasonably available, less trade restrictive, yet, as effective alternative rests on Syldavia.²⁷

Concluding, Borginia submits that the NESI decision is not 'more trade restrictive than necessary' to 'fulfil' a 'legitimate objective', thereby consistent with Art. 2.2 TBT.

1.4 The NESI decision is consistent with Art. 2.4 TBT

Borginia submits that the NESI decision is consistent with Art. 2.4 TBT. While Borginia concedes that the ISO 14666 standard was not used as the 'basis' for the NESI decision, Borginia argues that this is not an 'international standard' within the meaning of Art 2.4 TBT and is not 'relevant' to the NESI decision. Alternatively, Borginia argues that ISO 14666 would be an 'ineffective or inappropriate' means for fulfilling its carbon mitigation objective.

1.4.1 The ISO 14666 is not an 'international standard'

Borginia submits that the ISO 14666 is not an 'international standard' within the meaning of Art. 2.4 TBT as it is not based on consensus. Borginia realises that in *EC – Sardines* the AB interpreted the last sentence of the Explanatory Note to Annex 1.2 TBT as meaning that international standards need not be based on consensus to be covered by Art. 2.4 TBT.²⁸ However, Borginia relies on the AB's more recent decision in *US – Tuna II (Mexico)* to argue that consensus is indeed required. In this case, the AB held that the TBT Committee Decision,

²⁵ EMC² Case 2017-2018, Annex 2, Tables A and B.

²⁶ ABR, *US – Tuna II (Mexico)*, [322]; ABR *US – COOL*, [374].

²⁷ ABR, *US – Tuna II (Mexico)*, [323].

²⁸ ABR, *EC – Sardines*, [222-225].

which sets out consensus as one of the six principles for the elaboration of international standards,²⁹ is a ‘subsequent agreement’ within the meaning of Article 31(3)(a) VCLT and can thus be used as interpretative context of the *TBT Agreement*.³⁰ Accordingly, Borginia argues that the term ‘international standards’ in Art. 2.4 TBT should be interpreted as referring only to those adopted by consensus. Consequently, the last sentence of the Explanatory Note to Annex 1.2 TBT can be interpreted as referring to domestic, as opposed to international, standards not adopted by consensus. This view is shared by scholars.³¹ It is also consistent with the different objectives of the *TBT Agreement* in relation to domestic and international standards. Since the *TBT Agreement* seeks to prevent the use of domestic standards in a protectionist way, whether these have been adopted by consensus should not affect how they are disciplined. By contrast, in light of the trade facilitative capacity of international standards,³² the role of the *TBT Agreement* is to mandate their use in domestic regulation, which, for obvious legitimacy reasons, becomes problematic if they do not have the support of all Members.

Having argued that consensus is a requirement for international standards to be covered by Art. 2.4 TBT, Borginia submits that ISO 14666 was not adopted by consensus and is, thus, not an ‘international standard’. This follows from the fact that ISO does not require consensus for the adoption of international standards³³ as well as from the fact that Borginia consistently opposed the adoption of ISO 14666.³⁴

1.4.2 The ISO 14666 is not ‘relevant’

Should the Panel find the ISO 14666 to be an international standard, Borginia contends that it is in any case not ‘relevant’ to the NESI decision as it does not ‘bear upon, relate to or be pertinent to’ the NESI decision.³⁵ The ISO 14666 regulates only the cotton content of fabric, while, by contrast, the NESI decision also pertains to the production method of cotton fabrics.

1.4.3 The ISO 14666 is an ‘ineffective or inappropriate’ means to fulfil the legitimate objective pursued

In the alternative, Borginia submits that the ISO 14666 is an ‘ineffective or inappropriate’ means to fulfil the legitimate objective pursued by the NESI decision, namely that of reducing carbon emissions. According to *EC – Sardines*, the term ‘ineffective’ refers to a means which does not have the ‘function of accomplishing’ the legitimate objective pursued, while the term

²⁹ TBT Committee Decision, [1].

³⁰ ABR, *US – Tuna II (Mexico)*, [372].

³¹ Trebilcock and Howse 2013, 317; Delimatsis 2015, 132; Howse 2011, 390.

³² TBT Agreement, Recital 3.

³³ ISO Directives, clause 2.7.3.

³⁴ EMC² Case 2017-2018, [2.6].

³⁵ ABR, *EC – Sardines*, [231].

‘inappropriate’ describes a means which is not ‘specially suitable’ for the fulfilment thereof.³⁶ It is argued that ISO 14666 is ‘ineffective’ as it in no way *accomplishes* Borginia’s carbon mitigation objective. Instead, it is aimed at guaranteeing that fabrics whose cotton content is 100% are given the appellation ‘100% cotton fabric’, regardless of whether they are made by hand or machine. Since ISO 14666 does not differentiate between products on the basis of their carbon emissions, it is not *suitable* to fulfil the objective of the NESI decision to encourage carbon-neutral production practices in the textile industry and, thus, also ‘inappropriate’.

Borginia therefore submits that the NESI decision is consistent with Art. 2.4 TBT.

1.5 The NESI decision is consistent with Article III:4 GATT

Borginia submits that the NESI decision is consistent with Article III:4 GATT. For a violation of this provision to be established, three elements must be satisfied: (i) the measure at issue is a ‘law, regulation, or requirement [...]’ covered by Art. III:4 GATT; (ii) the imported and domestic products at issue are ‘like’; (iii) the imported products are accorded ‘less favourable treatment’ than like domestic products.³⁷ Borginia concedes that the NESI decision is a regulation covered by Art. III:4 GATT and that it accords less favourable treatment to powerloom cotton fabrics. However, reiterating its submissions in section 1.2.1, Borginia argues that imported powerloom cotton fabrics and domestic handloom cotton fabrics are not ‘like’ under Art. III:4 GATT. Borginia submits that the ‘accordion’ of likeness³⁸ stretches to the same extent under Art. 2.1 TBT and Art. III:4 GATT, as confirmed by the AB’s explicit reliance on the text and interpretation of Art. III:4 GATT to interpret the meaning of ‘like’ products under Art. 2.1 TBT.³⁹ Consequently, Borginia’s arguments concerning likeness of the two products at issue made under Art. 2.1 TBT are also applicable in relation to Art. III:4 GATT.

Therefore, Borginia submits that powerloom and handloom cotton fabrics are not ‘like’ and the NESI decision is thus consistent with Art. III:4 GATT. Should the Panel disagree, Borginia argues in section 3 that the measure can be justified under Art. XX GATT.

2 THE SOCA TAX IS CONSISTENT WITH THE GATT 1994

2.1 The SOCA tax is an internal tax consistent with Art. III:2 GATT

Borginia submits that the SOCA tax does not raise any issue of inconsistency with Arts. II:1(a) and (b) and II:2(a) GATT as it is an internal tax and not a border charge covered by

³⁶ PR, *EC – Sardines*, [7.116].

³⁷ ABR, *Korea – Various Measures on Beef*, [133].

³⁸ ABR, *Japan – Alcoholic Beverages II*, 21.

³⁹ ABR, *US – Clove Cigarettes*, [120].

these provisions. As an internal tax, it is consistent with Art. III:2, first sentence, and in the alternative, second sentence, GATT.

2.1.1 The SOCA tax is an internal tax and not a border charge

Borginia submits that the SOCA tax is an internal tax since, in line with the AB in *China – Auto Parts*, ‘the obligation to pay [it...] accrue[s] due to an internal event’,⁴⁰ namely the sale of those products in Borginia’s market, and not due to importation. The fact that the SOCA tax is collected at the border for imported products and at the point of sale for domestic products does not preclude it from being an internal tax. As provided in *Ad Note to Art. III GATT*, and confirmed by the AB in *China – Auto Parts*, the time at which a charge is collected or paid is not decisive of whether it is as an internal tax or charge.⁴¹

2.1.2 The SOCA tax is consistent with Art. III:2, first sentence, GATT

While Borginia concedes that imported powerloom cotton fabrics are taxed ‘in excess of domestic handloom cotton fabrics, it submits that the SOCA tax is consistent with Art. III:2, first sentence, GATT since the two are not ‘like’ products. Referring to its arguments in sections 1.2.1 and 1.5 on the lack of likeness under Art. 2.1 TBT and Art. III:4 GATT, Borginia submits that the two products are consequently also not ‘like’ in the narrower scope of Article III:2, first sentence, GATT established in *Japan – Alcoholic Beverages II*.⁴²

2.1.3 The SOCA tax is consistent with Art. III:2, second sentence, GATT

In the alternative, and applying the test established in *Japan – Alcoholic Beverages II*, Borginia concedes that imported powerloom cotton fabrics and domestic handloom cotton fabrics are ‘not similarly taxed’, but argues that the two are not ‘directly competitive or substitutable’ products, and that the dissimilar taxation is not ‘applied [...] so as to afford protection to domestic production’.⁴³

Although the scope of ‘directly competitive or substitutable’ products is broader than that of like products in Art. III:4 and Art. III:2 first sentence, GATT, Borginia argues that the evidence presented in section 1.2.1 supports also a finding that powerloom and handloom cotton fabrics are not ‘interchangeable’ or ‘alternative ways of satisfying a particular need or taste’.⁴⁴ Borginia refers in particular to the wider variety of uses of handloom cotton fabrics and the consumers’ preference for these fabrics despite their considerably higher price.

Borginia further argues that the dissimilar taxation is not ‘applied [...] so as to afford protection to domestic production’ since nothing in ‘the design, the architecture and the

⁴⁰ ABR, *China – Auto Parts*, [162].

⁴¹ ABR, *China – Auto Parts*, [162].

⁴² ABR, *Japan – Alcoholic Beverages II*, 20.

⁴³ ABR, *Japan – Alcoholic Beverages II*, 24.

⁴⁴ ABR, *Korea – Alcoholic Beverages*, [115].

revealing structure'⁴⁵ of the SOCA tax suggests that it was adopted to benefit its domestic handloom industry. On the contrary, in the same period, Borginia undertook activities to promote the handloom sector in other countries including Syldavia,⁴⁶ despite it being a key exporter of textiles to Borginia.

In conclusion, Borginia submits that the SOCA tax is an internal tax falling outside the scope of Art. II GATT and consistent with Art. III:2 GATT.

2.2 The SOCA tax is consistent with Arts. II:1(a) and (b) and II:2(a) GATT

Should the Panel find that the SOCA tax is a border charge, Borginia submits that it is not inconsistent with Art. II:1(b), first sentence, GATT as it is not an ordinary customs duty but an ODC falling outside the scope of this provision. This is since the tax is based on an 'underlying scheme or formula',⁴⁷ namely the amount of carbon emitted during the production of cotton fabrics per square metre fabric.

Borginia further submits that the SOCA tax is a BTA consistent with Art. II:2(a) GATT and thereby exempted from the prohibition of ODCs in Art. II:1(b), second sentence, GATT. The SOCA tax falls within the former provision as it is a tax on a product and is 'equivalent to' an internal tax 'imposed consistently with' Art. III:2 GATT in respect of a 'like' domestic product.

2.2.1 The SOCA tax is a tax on a product

Borginia submits that the SOCA tax is a tax on a product as the language of Arts. II:2(a) and III:2 GATT supports a broad interpretation of what constitutes taxes on products, covering also carbon taxes. Specifically, Art. II:2(a) GATT authorises charges imposed on a like product *or* 'an article from which the imported product has been manufactured or produced in whole or in part', implying a broad coverage. In addition, Art. III:2, first sentence, GATT refers to taxes levied on products 'directly or *indirectly*' (emphasis added), which has been interpreted broadly to require only 'some connection, even indirect' between the tax and the product.⁴⁸ This has been found to be satisfied by a tax on the distribution of soft drinks, which was considered to be an indirect tax on the sweeteners in those drinks,⁴⁹ and by a tax levied on a service, which was considered to be an indirect tax on the product.⁵⁰ Accordingly, Borginia argues that the carbon emitted during the production of fabrics has an *indirect* connection to those products so that its taxation amounts to an indirect tax on a product for the purposes of Arts. II:2(a) and III:2 GATT.

⁴⁵ ABR, Japan - *Alcoholic Beverages II*, 29

⁴⁶ EMC² Case 2017-2018, [2.5].

⁴⁷ ABR, Chile - *Price Band System*, [233].

⁴⁸ PR, Mexico - *Soft Drinks*, [8.42].

⁴⁹ PR, Mexico - *Soft Drinks*, [8.152].

⁵⁰ PR, Canada - *Periodicals*, [5.29].

Borginia submits that its argument above is consistent with the object and purpose of Art. II:2(a) GATT, being to enable Members to level the competitive playing field between imported and domestic products,⁵¹ which may have been upset by some domestic measure. Carbon taxes aimed at reducing emissions can seriously impair the international competitiveness of domestic firms⁵² so, were Members not allowed to adjust them at the border, the rationale behind Art. II:2(a) GATT would be undermined. Therefore, Borginia invites the Panel to consider that the SOCA tax, being a carbon tax, qualifies as an indirect product tax that is eligible for BTA in accordance with Art. II:2(a) GATT.

2.2.2 The SOCA tax is a charge ‘equivalent to’ an internal tax ‘imposed consistently with’ Art. III:2 GATT in respect of a ‘like’ domestic product

Borginia submits that the SOCA tax applied at the border on imported powerloom cotton fabrics is ‘equivalent to’ an internal tax on ‘like’ domestic powerloom cotton fabrics. This is since the two taxes have the same ‘function’, namely to tax carbon emissions per square metre of fabric, as well as the same ‘effect and amount’,⁵³ given that they are levied on imported and domestic powerloom fabrics using the same underlying formula. Moreover, since the border tax on imported powerloom fabrics is not ‘in excess of’ the internal tax on those products, the SOCA tax is imposed consistently with Art. III:2, first sentence, GATT, which is the relevant part of the provision regulating taxation of ‘like’ products.⁵⁴ Borginia notes that powerloom and handloom cotton fabrics are not ‘like’ under Art. III:2, first sentence, GATT, as argued in section 2.1.2, so their different taxation is not inconsistent with Art. III:2, first sentence, GATT.

In conclusion, Borginia submits that the SOCA tax is a BTA consistent with Art. II:2(a) GATT, which exempts it from the prohibition of Art. II:1(b), second sentence, GATT, and thereby is also consistent with Art. II:1(a) GATT.

3 THE NESI DECISION AND THE SOCA TAX ARE JUSTIFIED UNDER ART. XX of the GATT 1994

Should the Panel find any inconsistency of the NESI decision or the SOCA tax with the GATT, Borginia submits that they are justified under Art. XX GATT since they fall within the exception in Art. XX(b) and XX(g) GATT and satisfy the chapeau of Art. XX GATT.

⁵¹ Kaufmann and Weber 2011, 498.

⁵² Pauwelyn 2013, 448.

⁵³ ABR, *India - Additional Import Duties*, [175].

⁵⁴ ABR, *India - Additional Import Duties*, [170].

3.1 The NESI decision and the SOCA tax are provisionally justified under Art. XX(b) GATT

Borginia submits that the NESI decision and the SOCA tax are provisionally justified under Art. XX(b) GATT 1994 since they are ‘designed to’ and ‘necessary’ to protect human, animal and plant life and health.⁵⁵

3.1.1 The measures are ‘designed’ to protect human, animal and plant life and health

Borginia submits that the two measures are ‘designed’ to protect human, animal and plant life and health by addressing the causes of climate change and the threatening ensuing consequences induced by carbon emissions. Borginia notes that the threshold for this requirement is low, simply requiring that a measure is ‘not incapable’ of protection.⁵⁶

Borginia notes that climate change caused by carbon emissions poses a ‘specific risk’ to the life and health of humans, animals and plants.⁵⁷ The vast majority of scientists as well as the international community agree that GHG emissions, including carbon, severely contribute to climate change which particularly threatens small island states.⁵⁸ The ensuing coastal erosion, extreme weather phenomena, and higher water and air temperatures lead *inter alia* to physical injuries, increased transmission of vector borne diseases, a threat to agricultural production and freshwater sources, dying coral reefs, and a threat to the variety and availability of fish, all ultimately affecting the life and health of humans, animals and plants in Borginia.⁵⁹

Borginia further submits that the two measures are *capable* of reducing carbon emissions. They do so by incentivising the production of carbon-neutral handloom fabrics by stimulating increased consumption of such fabrics, in case of the NESI decision, and subjecting them to fewer taxes than powerloom fabrics, in case of the SOCA tax. An increased production of handloom cotton fabrics will directly lead to the reduction of carbon emissions, thereby contributing to a more stable climate.

3.1.2 The measures are ‘necessary’ to protect human, animal and plant life and health

Borginia submits that the measures at issue are ‘necessary’ to protect the life and health of humans, animals and plants. According to established case law, necessity involves a process of weighing and balancing a series of factors including the contribution of the measure to the pursued objective, analysed in quantitative or qualitative terms,⁶⁰ the importance of the

⁵⁵ PR, *EC - Tariff Preferences*, [7.198-7.199].

⁵⁶ ABR, *Colombia-Textiles*, [5.68, 5.89, 5.126].

⁵⁷ PR, *Brazil – Retreaded Tyres*, [7.46].

⁵⁸ UNFCCC 2005; NASA 2017.

⁵⁹ UNFCCC 2005; NASA 2017.

⁶⁰ ABR, *EC – Asbestos*, [167 and 172]; ABR, *Brazil – Retreaded Tyres*, [146].

interests at stake and the trade-restrictive impact of the measure,⁶¹ as well as an examination whether less trade-restrictive, yet equally effective, alternatives are reasonably available.⁶²

The two measures mitigate climate change and although their contribution may not be immediately observable, they can still be ‘necessary’ under Art. XX(b), as accepted by the AB in *Brazil – Retreaded Tyres*.⁶³ Recalling its arguments in section 3.1.1, Borginia submits that the two measures *substantially contribute* to the reduction of carbon emissions, and thereby protect the interests falling within Art. XX(b) GATT. Borginia further submits that human, animal or plant life and health are *interests of utmost importance* not only to Borginia but to the international community as a whole, as confirmed by the AB in *Brazil – Retreaded Tyres*.⁶⁴ With regard to the *trade-restrictiveness* of the two measures, Borginia argues that they are of a rather limited trade restrictive impact. There was already a consumer preference in Borginia away from powerloom fabrics towards more carbon-neutral handloom fabrics before the measures’ adoption in 2015, as argued in section 1.2.1. Moreover, neither measure prohibits powerloom fabrics from being sold on Borginia’s market but merely stimulates the purchase of handloom products. Borginia emphasises in particular the direct relationship between the trade-restrictiveness of the SOCA tax and its contribution to its objective. Since the tax is determined by the level of carbon emissions, the trade-restrictiveness will be lower the more powerloom producers make efforts to reduce emissions, for example by using renewable energy. Lastly, Borginia stresses that the burden of proof with respect to the existence of alternatives rests on Syldavia.⁶⁵

In light of the internationally recognised high importance of climate change mitigation by reducing carbon emissions, the substantial contribution of both measures to this objective outweighs their limited trade restrictiveness. Therefore, Borginia submits that the two measures at issue are ‘necessary’ to protect human, animal and plant life and health, thereby being provisionally justified under Art. XX(b) GATT.

3.2 The NESI decision and the SOCA tax are provisionally justified under Art. XX(g) GATT

Borginia submits that the two measures are provisionally justified under Art. XX(g) GATT since they (i) are concerned with the ‘conservation of exhaustible natural resources’, (ii) ‘relate

⁶¹ ABR, *Brazil – Retreaded Tyres*, [141-145]; ABR, *EC – Asbestos*, [172].

⁶² ABR, *Brazil – Retreaded Tyres*, [156].

⁶³ ABR, *Brazil-Retreaded Tyres*, [151].

⁶⁴ PR, *Brazil – Retreaded Tyres*, [7.108]; ABR, *Brazil – Retreaded Tyres*, [144].

⁶⁵ ABR, *Brazil – Retreaded Tyres*, [156].

to' the conservation of exhaustible natural resources, and (iii) are 'made effective in conjunction with restrictions on domestic production or consumption'.⁶⁶

3.2.1 The NESI decision and the SOCA tax are concerned with the 'conservation of an exhaustible natural resource'

Borginia submits that the measures at issue are concerned with the conservation of an 'exhaustible natural resource', namely a stable climate, by ensuring clean low-carbon air and promoting carbon-neutral production processes. The AB ruled in *US – Shrimp* that this term is 'by definition, evolutionary' and must thus be read and interpreted in light of contemporary concerns of the community of nations about the protection and conservation of the environment which is to be found in international conventions and declarations.⁶⁷ The 195 countries that ratified the UNFCCC, and the Kyoto Protocol and the 170 Parties that ratified the Paris Agreement stress the importance of reducing GHG concentrations at a level that would ensure a stable climate for the benefit of present and future generations.⁶⁸ Thereby, they acknowledge that a stable climate is susceptible of exhaustion and depletion, making it to fall within the scope of Art. XX(g) GATT.

3.2.2 The NESI decision and the SOCA tax 'relate to' the conservation of an exhaustible natural resource

Borginia submits that the measures at issue 'relate to' the conservation of a stable climate since they fulfil the requirement of a substantial 'close and real' relationship to its conservation,⁶⁹ which is less strict than the necessity requirement under Art. XX(b) GATT.⁷⁰ They both do so by incentivising the production and consumption of handloom cotton fabrics, in the case of the NESI label, and a low-carbon production, in the case of the SOCA tax. An increased carbon-neutral or low-carbon production will directly lead to the carbon emission reductions, thereby contributing to a more stable climate.

3.2.3 The NESI decision and the SOCA tax are 'made effective in conjunction with restrictions on domestic production or consumption'

Borginia submits that the two measures are made effective in conjunction with restrictions on domestic production or consumption since they fulfil the requirement of 'even-handedness' required by *US – Gasoline*.⁷¹ The *even-handedness* of the measures is evidenced by a series of

⁶⁶ ABR *US – Shrimp*, [127, 135 and 143].

⁶⁷ ABR, *US – Shrimp*, [129-130].

⁶⁸ UNFCCC, Recitals 2 and 6 and Arts. 2-4; Kyoto Protocol, Art. 2-3; Paris Agreement, Art. 2; European Council 2017.

⁶⁹ ABR, *US – Gasoline*, 19.

⁷⁰ ABR, *US – Gasoline*, 16-18.

⁷¹ ABR, *US – Gasoline*, 20-21.

actions Borginia has adopted in relation to its domestic industry to reduce carbon emissions, including vehicle congestion taxes and phase-out coals-based power plants.⁷²

Borginia therefore submits that the two measures are provisionally justified under Art. XX(g) GATT.

3.3 The NESI decision and the SOCA tax are applied consistently with the chapeau of Art. XX GATT

Borginia submits that the two measures meet the requirements of the chapeau of Art. XX GATT as their application constitutes neither ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, nor a ‘disguised restriction on international trade’.

Referring to its argument in section 1.2.2, Borginia submits that the measures do not amount to ‘unjustifiable discrimination’ due to Borginia’s serious attempt to reach a multilateral solution before turning to the unilateral measures at issue. Moreover, Borginia submits that any possible discrimination is not ‘arbitrary’ since the NESI decision is not applied in a ‘rigid or unbending’ manner,⁷³ as outlined in section 1.2.2. Similarly, the SOCA tax is not *rigid* since it does not prescribe a single way to achieve carbon reductions but taxes the products according to the actual level of carbon emitted in its production. Thus, countries are free to mitigate emissions in different ways suitable for their own economic and technological capacities.

Referring to its arguments in section 1.2.2, Borginia submits that ‘the design, the architecture and the revealing structure’ of the NESI decision is not indicative of a ‘disguised restriction on international trade’.⁷⁴ The same arguments, as well as those under section 2.1.3, apply *mutis mutandis* to the SOCA tax. The fact that neither of them constitutes an arbitrary or unjustifiable discrimination is also a strong indicator for this finding.⁷⁵

In conclusion, Borginia submits that the two measures are applied in a manner that meets the requirements of the chapeau of Art. XX GATT and are, thus, justified under Art. XX GATT.

4 THE TTUFS IS CONSISTENT WITH THE SCM AGREEMENT

4.1 The TTUFS is not inconsistent with Art. 3.1(a) SCM

Borginia submits that the TTUFS is not inconsistent with Art. 3.1(a) SCM as Borginia is exempted from this provision by Art. 27.2(a) SCM and, in the alternative, the TTUFS is not prohibited by this provision as it is ‘contingent [...] upon export performance’.

⁷² EMC² Case 2017-2018, [1.5 and 1.6].

⁷³ ABR, *US – Shrimp*, [177].

⁷⁴ PR, *US – Shrimp (Article 21.5 – Malaysia)*, [5.142] referring to ABR, *Japan – Alcoholic Beverages II*, 29.

⁷⁵ ABR, *US – Gasoline*, 25.

4.1.1 Borginia is exempted from Art. 3.1(a) SCM by Art. 27.2(a) SCM

Borginia argues that it falls under Annex VII SCM and thus exempted from the prohibition of Art. 3.1(a) SCM by Art. 27.2(a) SCM. Although Borginia graduated from Annex VII(b) SCM in 2015, it argues that it qualifies as a LDC Member under the UN criteria, thereby falling within Annex VII(a) SCM. According to the UN income-only criteria applicable in 2015, countries cease to be least-developed when their GNI per capita reaches US \$2484.⁷⁶ Borginia's GNP per capita, which is comparable to GNI,⁷⁷ reached its highest point in 2014 at US \$1080 in 1990 terms, which adjusted to inflation would in 2014 be the equivalent to US \$1956.20.⁷⁸ This is below the UN threshold of US \$2484 set for LDCs. On this basis, Borginia submits that it falls under Annex VII(a) SCM which comprises LDCs designated as such by the UN. Consequently, it falls within the scope of Art. 27.2(a) SCM and is therefore exempted from Art. 3.1(a) SCM.

4.1.2 The TTUFS is not prohibited by Art. 3.1(a) SCM

In the alternative, Borginia argues that the TTUFS is not prohibited by Art. 3.1(a) SCM as it is not 'contingent, in law or in fact, [...] upon export performance'. As there is no explicit or implicit export condition in the instrument comprising the measure,⁷⁹ the TTUFS is not *de jure* export contingent. To infer *de facto* export contingency, the three elements, as summarised by the AB in *Canada – Aircraft*, are: (i) the granting of a subsidy (ii) is tied to (iii) actual or anticipated exportation or export earnings.⁸⁰ Borginia concedes the 'granting of a subsidy' and the existence of 'anticipated export earnings' with regards to the TTUFS, however, it submits that the TTUFS is not 'tied to' these exports. As footnote 4 SCM clearly states, the fact that a subsidy is granted to enterprises which export is not enough to deem a subsidy as *de facto* contingent. The TTUFS was not tied to export results or earnings, rather, it was granted for the purpose of eco-friendly technological modernisation of the textile industry.⁸¹ In this regard, Borginia recalls that in *Canada – Aircraft* it was accepted that a subsidy granted 'for general purposes such as improving efficiency or adopting new technology' is less likely to be contingent on exports.⁸² Borginia further emphasises that it has not been demonstrated that the ratio of exports to domestic sales has been skewed by the TTUFS toward exports.⁸³

In conclusion, Borginia is exempted from Art. 3.1(a) SCM as it is a LDC and, alternatively, the TTUFS is not export contingent, and thereby not prohibited by Art. 3.1(a) SCM.

⁷⁶ UN 2015.

⁷⁷ SCM Secretariat Addendum, fn. 1.

⁷⁸ US Inflation Calculator.

⁷⁹ ABR, *Canada – Autos*, [100].

⁸⁰ ABR, *Canada – Aircraft*, [171].

⁸¹ EMC² Case 2017-2018, [3.2].

⁸² PR, *Canada – Aircraft*, [9.337–9.339].

⁸³ ABR, *EC and certain member States – Large Civil Aircraft*, [1047].

4.2 The TTUFS is not inconsistent with Art. 27.4 SCM

Borginia submits that the TTUFS is not inconsistent with Art. 27.4 SCM as this provision does not apply to Borginia. As argued in section 4.1.1, Borginia is an Annex VII SCM Member, and thus falls under Art. 27.2(a) SCM, and not Art. 27.2(b) SCM, which is the provision requiring compliance with Art. 27.4 SCM. Borginia therefore submits that it falls outside the scope of Art. 27.4 SCM and that the TTUFS is, hence, not inconsistent with this provision.

4.3 The TTUFS is not inconsistent with Art. 27.5 SCM

Borginia submits that Art. 27.5 SCM does not apply to the TTUFS as Borginia is not yet 'export competitive' in cotton textiles.

'Export competitiveness' in a product is defined in Art. 27.6 SCM as reaching a share in the world trade in 'a product' of at least 3.25% for two consecutive calendar years. 'A product' is defined in Art. 27.6 SCM as 'a section heading of the Harmonised System Nomenclature'. Debate has surrounded the meaning of 'a section heading' given that the HS contains no such expression in its English version, only the expression 'section' (for two-digit headings) and 'heading' (for four-digit headings).⁸⁴ While an expression equal to four-digit heading in the HS is used in the French and Spanish versions of Art. 27.6 SC (*partie* and *partida*, respectively), Borginia notes that it has not reached 'export competitiveness' under either of the two possible interpretation. Under the two-digit interpretation (HS Chapter 52), Borginia has never exceeded 2.75% of world exports, while under the four-digit interpretation (HS Heading 5208) Borginia's world exports have not exceeded 2.6% of world exports.⁸⁵ Hence, in both instances, Borginia falls below the threshold of 3.25% set by Art. 27.6 SCM. Borginia has reached this threshold only with regard to the six-digit category of the HS (5208.05) referred to as 'sub-heading' in the HS, but notes that interpreting 'a section heading' as 'sub-heading' would be against the ordinary meaning of the words used in this context, inconsistent with the rules of interpretation of Art. 31 VCLT.

Borginia therefore submits that it is not obligated by Art 27.5 SCM to phase out export subsidies on cotton textiles and hence the TTUFS is not inconsistent with this provision.

⁸⁴ Hoda and Ahuja 2005, 1028.

⁸⁵ EMC² Case 2017-2018, Table D.

Request for Findings

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

- i. Find that the NESI decision is not a ‘technical regulation’ within the meaning of Annex 1.1 to the *TBT Agreement*;
- ii. In the alternative, find that the NESI decision is consistent with Arts. 2.1, 2.2 and 2.4 of the *TBT Agreement*;
- iii. Find that the NESI decision is consistent with Art. III:4 of the GATT 1994.

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

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

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

- vi. Find that the NESI decision and the SOCA tax are justified under Art. XX of the GATT 1994.

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

- vii. Find that the TTUFS is not inconsistent with Art. 3.1(a) of the *SCM Agreement*;
- viii. Find that the TTUFS is not inconsistent with Art. 27.4 and 27.5 of the *SCM Agreement* as these provisions do not apply to Borginia.