Team Code – 150C

10TH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2018

BEFORE THE PANEL ESTABLISHED BY THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY

KHINDIRA – MEASURES TAKEN PURSUANT TO THE AGRICULTURAL LIVELIHOODS AND FOOD SECURITY ACT

SUTAN

(Complainant)

v.

KHINDIRA

(Respondent)

WRITTEN SUBMISSIONS ON BEHALF OF COMPLAINANT

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LIST OF ABBREVIATIONS

S. NO.	ABBREVIATION	FULL FORM
1.	¶	Paragraph
2.	¶¶	Paragraphs
3.	AB	Appellate Body
4.	ALFS	Agricultural Livelihoods and Food Security
5.	AMS	Aggregate Measurement of Support
6.	AOA	Agreement on Agriculture
7.	COA	Committee on Agriculture
8.	CWS	Centre for WTO Studies
9.	DS	Dispute Settlement
10.	DSU	Dispute Settlement Understanding
11.	ECtHR	European Court of Human Rights
12.	EU	European Union
13.	FAO	Food and Agriculture Organisation
14.	FERP	Fixed Exchange Reference Price
15.	GATT	General Agreement on Trade and Tariffs
16.	GII	Global Issues Initiative
17.	IACtHR	Inter-American Court of Human Rights
18.	IATRC	International Agricultural Trade Research Consortium
19.	ICJ	International Court of Justice
20.	IFPRI	International Food Policy Research Institute
21.	IIFT	Indian Institute of Foreign Trade

22.	ILC	International Law Commission
23.	INR	Indian Rupees
24.	ISCE	Institute for Society, Culture and Environment
25.	OECD	Organisation for Economic Co-Operation and Development
26.	p.	Page Number
27.	Q. No.	Question Number
28.	TBT	Technical Barriers to Trade
29.	TRIPS	Trade-Related Aspects of Intellectual Property Rights
30.	UN	United Nations
31.	UNGA	United Nations General Assembly
32.	URAA	Uruguay Round Agreement on Agriculture
33.	US	United States
34.	VCLT	Vienna Convention on Law of Treaties
35.	WTO	World Trade Organisation

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STATEMENT OF FACTS

----------AGRICULTURAL LIVELIHOODS AND FOOD SECURITY ACT----------

The parliament of Khindira passed the Agricultural livelihoods and Food Security Act (Bill 513) on Sept. 27, 2012 to protect and safeguard the farmers from international prices and also to provide food available at subsidised prices to the urban poor. The government will provide guaranteed support price for crops under the legislation. Traditionally, Khindira was more interested in exports but due to farmer suicides and increasing problem of malnutrition, the Khindiran Government has now put the interest of the farmers to the forefront.

----------FLEXIBLE TARIFF ADMINISTRATION----------

Section 2 of the ALFS act establishes a Committee for the Administration of Agricultural Tariffs. The Committee sets tariffs on 15th of every month for agriculture which take effect on 1st of subsequent month. This whole process is known as Flexible Tariff Administration. The committee has interpreted the phrase 'within the frame work of international obligations' as Khindira's tariff binding under WTO and other preferential agreements. The committee rarely changes tariff of most of the Agricultural commodities rather it focuses its attention on most important commodities in particular. On an average Committee changes tariffs for wheat every 2.8 months, for rice every 1.2 months and tariffs for coarse grains every 3.2 months.

Many countries and Kingdom of Sutan, in particular, had criticised Khindira for its Flexible Tariff Administration. Sutan argues that this measure imposes variable import levy which is prohibited by the WTO Agreement on Agriculture. By 2014, both Khindira and Sutan constituted bilateral working group. So far, it has been unable to resolve the dispute.

----------PRICE SUPPORT FOR AGRICULTURAL STAPLE FOODS----------

Section 3 of the act entitles a large part of the Khindiran population to receive key staples at the subsidized rates. To achieve the same, the Government of Khindira increased its administered prices by 43 percent for rice and 23 percent for wheat for the year 2012-2013. On 16 April 2016, it notified WTO committee for the support price provided in the marketing years 2012-13, 2013-14, 2014-15. Several Members including Sutan objected that Khindira has crossed its *de minimis* levels, which is in contravention of the provisions of AoA. Khindiran officials responded by taking recourse to food security. They also state that the step has been taken to preserve the livelihoods of the farmers.

To prevent any challenges by fellow members, Khindira on 1 June submitted a notification to the WTO committee on agriculture to avail the benefit of the Bali decision on the Public Stockholding for the Food Security Purpose, 2013. To meet the requirements of the Bali Decision, it provided additional information and to meet condition in the template attached to the Bali Decision it gave reference to its notification of 16 April 2016.

In the short time, Sutan by a set of comments communicate to Khindira that it is not able to avail the benefit of Bali decision due to two reasons. firstly, its notification of 16 April 2016 does not cover domestic support provided after July 2015. Secondly, its aggregate measurement support (AMS) is not exceeding only in wheat but for the rice also. Because instead of using Khindiran Lira for the calculation of current AMS as submitted by it after Uruguay round, Khindira made use of the US Dollar for the calculation of current AMS.

Khindira responded specifically for each objection. For notification requirements it said that mere a slight delay cannot deprive it of the benefit of the Bali decision. For exceeding AMS limit of the rice, it took recourse to the Article 18.4 of AoA which mandates giving consideration to the influence of inflation on ability of the member to abide by its domestic support commitments.

----------EXPORT SUBSIDIES FOR RICE----------

Due to the high levels of production, lack of administrative capacity and awareness among people of the Khindira, lot of stocks got accumulated. For this reason, Khindira was under the continuous pressure to release some for export. In past Khindira had used agricultural export to earn foreign exchange. Since the conclusion of Uruguay round, it has provided export subsidy scarcely and is well within its commitment levels. To take the cautious approach in regard to the implementation of Nairobi Decision, Khindira asked WTO secretariat for circulation of the communication mentioned in Annexure 4. Sutan objected to this communication within the five days of its circulation. Thus, the circulation stood uncertified. Khindira maintains that Nairobi decision is not legally binding on it. For the marketing years 2017-18 and 2018-19 it has included funds for export subsidies of rice in its budget projection.

----------ESTABLISHMENT OF PANEL----------

In September 2017, after unsuccessful consultations between Khindira and Sutan, Sutan has requested the WTO Dispute Settlement Body for establishment of a panel which has been ultimately established.

MEASURES AT ISSUE

ISSUE 1

WHETHER OR NOT KHINDIRA'S SYSTEM OF FLEXIBLE TARIFF ADMINISTRATION IS CONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE?

ISSUE 2

WHETHER OR NOT THE PRICE SUPPORT FOR RICE AND WHEAT PROVIDED BY KHINDIRA IS NOT INCONSISTENT WITH ARTICLES 3.2, 6.3 AND 7.2(b) OF THE AGREEMENT ON AGRICULTURE?

ISSUE 3

WHETHER OR NOT THAT KHINDIRA'S CONTINUED PROVISION OF EXPORT SUBSIDIES ON RICE IS NOT INCONSISTENT WITH ARTICLE 9.2 OF THE AGREEMENT ON AGRICULTURE AND THE NAIROBI DECISION ON EXPORT COMPETITION?

SUMMARY OF ARGUMENTS

ISSUE 1

THAT KHINDIRA'S SYSTEM OF FLEXIBLE TARIFF ADMINISTRATION IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE.

It is submitted that Khindira's system of Flexible Tariff Administration is inconsistent with Article 4.2 of the Agreement on Agriculture and results in the imposition of a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

The "tariff rates" resulting from the measure of "Flexible Tariff Administration" leads to an obstruction in the free trade between Khindira and the Kingdom of Sutan. It is submitted that the tariff rates set under the "Flexible Tariff Administration" meet the three criteria established by the Appellate Body for constituting variable import levies or similar measures, which is, firstly, they exhibit inherent variability, secondly, they lack transparency and predictability with regard to the level of the resulting levies, and lastly, they impede or obstruct transmission of international price developments to the domestic market.

It is submitted that the tariff rates resulting from the "Flexible Tariff Administration" are inherently variable. Moreover, "Flexible Tariff Administration" cannot be excluded from the scope of Article 4.2 because it is subject to a Tariff Binding.

Bill 513 requires that the Committee take into account a number of factors, including trends of domestic and international prices, information about planting decisions, harvest forecasts, demand estimates, and the size of existing stocks. The Committee sets the tariffs on 15th of every month and they are published immediately after that. Thus, it is submitted that though factors are mentioned, even then the level of transparency and predictability as could have been achieved in case of ordinary custom duties cannot be achieved because of the continuous fluctuations in world market prices.

Thus, the Kingdom of Sutan does not know and cannot reasonably predict the amount of duties, resulting into the restriction of its volume of exports to Khindira. Moreover, because of its design, architecture and effect, the measure at issue insulates domestic prices in Khindira from international price trends and impedes transmission of those trends to the domestic Khindiran market.

ISSUE 2

THAT THE PRICE SUPPORT FOR RICE AND WHEAT PROVIDED BY KHINDIRA IS INCONSISTENT WITH ARTICLES 3.2, 6.3 AND 7.2(b) OF THE AGREEMENT ON AGRICULTURE, BECAUSE IT EXCEEDS THE PRODUCT SPECIFIC *DE MINIMIS* LEVEL OF 10 PERCENT FOR EACH PRODUCT.

It is submitted that taking into account the various provisions of the WTO, Khindira has acted in violation of the basic and intrinsic provisions of the WTO Agreement on Agriculture, namely, Articles 3.2, 6.3 and 7.2(b) as Khindira has provided domestic support in excess of what was allowed under the said provisions. It is submitted that Khindira has exceeded the *de minimis* level in respect of wheat in the years 2013-14 and 2014-15 as provided by it in Annexure 1. The support provided is more than 10% of the total value of production and has thus, exceeded the *de minimis* levels.

Also, it is submitted that Khindira cannot take the benefit of Bali decision on Public Stockholding for Food Security Purposes because it has not complied with the notification obligations of the same decision. Moreover, there has been a long delay by Khindira in submitting the notification to avail the benefit of the Bali Decision on Public Stockholding for Food Security Purposes. An annual notification has to be submitted and nothing less than that would suffice, unless, the member state has got an exemption from the Committee on Agriculture (CoA). As is evident from Annexure 1 of the Moot problem, Khindira has submitted the notification after three years and there has not been an annual notification in that regard. Thus, Khindira has breached the notification requirements under G/AG/2. The notification requirements are an integral, intrinsic and non-exclusive part of the Bali Decision and hence, not submitting timely notifications and additional information under the template is against the very spirit of the Bali Decision. Also, Khindiran government has not complied with the information requirements under template of the Bali decision 2013.

Moreover, Khindira has expressed its Market Price Support (MPS) in US Dollars in the supporting Table DS:5 whereas it has used Khindiran Lira in supporting tables relating to the commitments on Agricultural Products in Part IV of the schedule. Hence, it is submitted that Khindira has acted in violation of the computation methodology provided for in Article 1 read with Annexure 3 of the AoA and Khindira cannot take recourse to 18.4 of the AOA because Article 18.4 is about the review process, which is the purview of the Committee on Agriculture, not that of individual countries.

ISSUE 3

THAT KHINDIRA'S CONTINUED PROVISION OF EXPORT SUBSIDIES ON RICE IS INCONSISTENT WITH ARTICLE 9.2 OF THE AGREEMENT ON AGRICULTURE AND THE NAIROBI DECISION ON EXPORT COMPETITION.

It is submitted that export subsidy provided by Khindira is in contravention of provisions of the Nairobi Decision on Export Competition and Agreement on Agriculture. Also, it is submitted that Nairobi decision is legally binding on Khindira and attracts every legal consequence if violated.

According to Nairobi Decision on Export Competition all developing members (Khindira is a developing member) shall eliminate their export subsidy by 2018. All members shall not implement export subsidy in such a manner that it circumvents the need of reduction of export subsidy distortion and all members must pay attention that export subsidy given by them must lead to minimal trade distorting effects.

Khindira has violated ¶ 7 by including funds for export subsidies for the year 2017-2018 and 2018-2019 in its budget projection. It has violated ¶ 9 because there has not been any step by the Khindira to reduce export commitments rather Khindira increased its budget allocation for export subsidy. And, ¶ 10 because providing export subsidy by Khindira has led to trade-distorting effects.

Nairobi decision is legally binding on Khindira because unlike other decisions by the WTO ministerial conference Nairobi decision is the decision taken by ministerial conference – which is a highest decision-making body of the WTO. Nairobi Decision falls under the definition of subsequent agreement incorporated under article 31 (3) (a) of the Vienna convention on law of treaties. Nairobi decision is a step taken in furtherance of the reform process legally recognised under Article 20 of the Agreement on Agriculture. Article 20 of the AoA provides for the continuation of the reforms to achieve long term objectives, includes export subsidy reduction, enshrined under AoA. Reform process set up under Article 20 was initiated in the year 2000, extending till Nairobi decision passing through Doha Development Agenda, Hong Kong Ministerial Declaration and Bali Declaration.

Thus, Nairobi decision is in furtherance of the article 20 of the agreement on agriculture and derives it legal force from article IX of the Marrakesh Agreement.

ARGUMENTS ADVANCED

MOST RESPECTFULLY SHOWETH:

1. THAT KHINDIRA'S SYSTEM OF FLEXIBLE TARIFF ADMINISTRATION IS INCONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE.

[¶ 1.] It is submitted that Khindira's system of flexible tariff administration is inconsistent with Article 4.2 of the Agreement on Agriculture.[1] It is submitted that such a system results in the imposition of a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

[¶ 2.] Article 4.2 is based on the principle of market access and free trade. The free-trade argument is, in principle, persuasive. It states that if each nation produces what it does best and permits trade, over the long run all will enjoy lower prices and higher levels of output, income, and consumption than could be achieved in isolation. In a dynamic world, comparative advantage is constantly changing due to shifts in technologies, input productivities, and wages, as well as tastes and preferences. A free market compels adjustment to take place. Either the efficiency of an industry must improve, or else resources will flow from low-productivity uses to those with high productivity. Tariffs and other trade barriers are viewed as tools that prevent the economy from undergoing adjustment, resulting in economic stagnation.[2]

[¶ 3.] High Rates of protection significantly depress economic development, and that open trade regimes are more conducive to growth.[3] The greatest advance made in the WTO Agreement with respect to market access for agricultural products was the prohibition of quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, nontariff measures maintained through state trading enterprises, voluntary export restraints, and similar border measures other than ordinary custom duties. Included in the list of banned practices were those that had been made possible by country-specific derogation through waivers and protocols of accession. The Agreement on Agriculture required all these measures to be converted to tariffs and then subjected to binding and/or reduction.[4]

[1] Agreement on Agriculture (URAA), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 UNTS 410.
[2] ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 134-35 (12th ed., 2009).
[3] WORLD BANK, DEVELOPMENT, TRADE, AND THE WTO 526 (Bernard Hoekman et al. 1st Indian Reprint, 2005).
[4] ANWARUL HODA & ASHOK GULATI, WTO NEGOTIATIONS ON AGRICULTURE AND DEVELOPING COUNTRIES 17 (2008).

[¶ 4.] By way of background, one of the principal objectives of the Uruguay Round negotiations was the reduction of barriers to trade in agricultural products. The negotiators undertook to improve the transparency of such barriers as well as to reduce them, and an important part of this process involved the "tariffication" of nontariff barriers, i.e., the conversion of nontariff barriers into conventional tariffs. This process was to be completed by the end of the Round. Nations with substantial nontariff barriers would have the opportunity to convert them into tariffs and schedule them even if the resulting tariffs exceeded their prior tariff bindings under GATT.[5]

[¶ 5.] In Economics, there is no place for subsidies. The law of supply and demand does not acknowledge either producer or consumer subsidies. The basis of free competition is merit and merit alone. A market driven economy recognises only competitive quality and price.[6] Essentially, it demands understanding that even the subsidies that are justified on grounds of poverty alleviation must have a time frame and be effectively targeted to the intended beneficiaries. Subsidies that are unrelated to poverty alleviations and have wider economic, commercial and trade targets should also be time bound and sharply focused. A healthy economic order must have the minimum of subsidies.[7]

[¶ 6.] During the course of the Uruguay Round, negotiators decided that certain border measures, which restricted the volume of trade or distorted the price of imports of agricultural products, had to be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. This agreement is reflected in the text of Article 4 of the Agreement on Agriculture which, as its title indicates, deals with "Market Access".[8]

[¶ 7.] Thus, Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products[9] and moreover, it restricts resorting to, maintaining or reverting back to any duty other than the ordinary custom duty.

[¶ 8.] It is submitted that the tariff rates set under the “flexible tariff administration” meet

[5] KYLE BAGWELL & ALAN O. SYKES, CHILE – PRICE BAND SYSTEM AND SAFEGUARD MEASURES RELATING TO CERTAIN AGRICULTURAL PRODUCTS (2004), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.488.4463&rep=rep1&type=pdf.
[6] KS RAMACHANDRAN, SUBSIDIES A BOTTOMLESS BUCKET 114 (2005).
[7] KS RAMACHANDRAN, SUBSIDIES A BOTTOMLESS BUCKET 116 (2005).
[8] Panel Report, *Turkey – Measures Affecting the Importation of Rice*, ¶ 7.57, WT/DS334/R (Sept. 21, 2007).
[9] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶201, WT/DS207/AB/R (Sept. 23, 2002) [hereinafter Appellate Body Report, Chile – Price Band System].

the three criteria established by the Appellate Body in Chile – Price Band System for constituting variable import levies or similar measures, which is, *firstly*, they exhibit inherent variability, *secondly*, they lack transparency and predictability with regard to the level of the resulting levies, and *lastly*, they impede or obstruct transmission of international price developments to the domestic market.

1.1. THAT TARIFF RATES SET UNDER THE FLEXIBLE TARIFF ADMINISTRATION EXHIBIT INHERENT VARIABILITY

[¶ 9.] An "import levy" would thus be a charge or obligation applied for the purpose of importation. Consequently, an "import levy" would be variable when it varies or may vary and, above all, is highly inclined or likely to vary.[10] Section 2 of Bill 513, named the "Agricultural Livelihoods and Food Security Act" is entitled as "Flexible Tariff Administration". Section 2 establishes a "Committee for the Administration of Agricultural Tariffs" within the Ministry of Agriculture.[11]

[¶ 10.] The trade policy of any country primarily aims at advancing its national interest. While national interest is of importance, one cannot forget that world economic inter-dependence has become a fact of life. Trade cannot be a one-way street and it has necessarily to be a two-way passage because of this and other reasons many economists have, for the last two centuries, been advancing the theory that there should not be any direct interference by the government in trade operations.[12]

[¶ 11.] It is submitted that a "levy" is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process. An "import" levy is, of course, a duty assessed upon importation. A levy is "variable" when it is "liable to vary".[13] It is submitted that the Khindira's system of "Flexible Tariff Administration" is "liable to vary" every month. The Committee is required to meet on the 15th of every month to set the tariffs of agricultural products. The tariffs take effect on the 1st of the following month.[14] Hence, the "Levy" imposed under the system is "variable" in nature resulting into the imposition of a "variable import levy".

[¶ 12.] The Appellate Body in Chile – Price Band System[15] observed that at least one feature

[10] Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, ¶ 7.283, WTO Doc. WT/DS457/R (Nov. 27, 2014) [hereinafter Panel Report, Peru – Price Range System].
[11] Moot Problem, ¶ 5.
[12] CS NAGPAL & AC MITTAL, INTERNATIONAL TRADE VERSUS LESS DEVELOPED COUNTRIES 290 (1993).
[13] *Supra* Note 9, ¶ 232.
[14] *Supra* Note 11.
[15] *Supra* Note 9, ¶ 233.

of "variable import levies" is the fact that the measure itself as a mechanism must impose the variability of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary customs duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula.

[¶ 13.] It is submitted that that the tariff rates resulting from the "Flexible Tariff Administration" are inherently variable. The tariff rates set under the "FTA" are based on a scheme which takes into account a number of factors. It is submitted that the measure at issue possesses inherent variability because the measure itself, as a mechanism, is capable of ensuring the change in the rate of duties every month. Under the measure, the tariff rates are capable of being changed every month.

[¶ 14.] The Panel in Peru – Price Range System[16], while deciding the validity of the PRS, observed that they use the rules of the PRS and the formulas contained therein to determine fortnightly a result which, depending on the calculations, may consist of imposing an additional duty, granting a tariff rebate, *maintaining the duties or rebates already in effect*, or deciding not to apply any rebate or duty. The PRS therefore contains a scheme or formula which causes and ensures automatic and continuous revision of the applicable duties or rebates, from one fortnight to the next.

[¶ 15.] The Panel[17] went on to state that the fact that the result may be the same for some or several fortnightly periods as a result of applying the formulas, owing for example to price stability in the reference markets, or even the fact that in some cases the formulas have not been applied correctly, does not mean that the PRS, as a mechanism, does not impose fortnightly variability of duties. The findings of Panel were also approved by the Appellate Body[18]. Thus, the duties that are being imposed may even remain same, but the factor to decide the variability is their capability to change.

1.2. FLEXIBLE TARIFF ADMINISTRATION CANNOT BE EXCLUDED FROM THE SCOPE OF ARTICLE 4.2 MERELY BECAUSE IT IS SUBJECT TO A TARIFF BINDING

[¶ 16.] "Flexible Tariff Administration" cannot be excluded from the scope of Article 4.2

[16] *Supra* Note 10, ¶ 7.321.
[17] *Id.* ¶ 7.324.
[18] Appellate Body, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/AB/R (July 20, 2015) [hereinafter Appellate Body Report, Peru – Price Range System].

because it is subject to a Tariff Binding. It has been observed that there is nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a "variable import levy" even if the products to which the measure applied were subject to tariff bindings.[19] It means that merely because the tariff does not exceed the tariff bindings does not make it consistent with the provisions of Article 4.2.

[¶ 17.] Section 2 requires the Committee to exercise its discretion "within the framework of Khindira's international obligations". The Committee has interpreted this obligation to require that the rates it sets must not exceed the tariff bindings in Khindira's World Trade Organization (WTO) schedule and in any preferential agreements to which Khindira is a party.[20] A measure cannot be excluded per se from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.[21] Thus, it is submitted that the requirement that Khindira will not exceed tariff bindings cannot justify any measure adopted by it under footnote 1 of Article 4.2 which is required to be converted into "Ordinary Custom Duty".

[¶ 18.] In Chile – Price Band System, the Appellate Body agreed with the Panel as regards the inconsistency of Chile's price band system with Article 4.2 (although not as regards the Panel's reasoning) and found that "the fact that the duties that result from the application of Chile's price band system take the same form as 'ordinary customs duties' does not imply that the underlying measure is consistent with Article 4.2 of the Agreement on Agriculture."[22]

[¶ 19.] However, border protection through import policies is discussed in the context of trade policy rather than support to agriculture as such while it offers protection to domestic agricultural production by insulating domestic markets from world markets, it does not directly support agriculture in the way, say, input subsidies do. Consequently, this aspect of support to agriculture has spawned its own class of measures.[23]

1.3. TARIFF RATES SET UNDER THE FTA LACK TRANSPARENCY AND PREDICTABILITY WITH REGARD TO THE LEVEL OF THE RESULTING LEVIES

[¶ 20.] In addition to the inherent variability resulting from the existence of a scheme or formula that causes and ensures that the measure is automatically and continuously modified,

[19] *Supra* Note 9, ¶ 254.
[20] *Supra* Note 11, ¶ 6.
[21] *Supra* Note 9, ¶ 255.
[22] *Id.* ¶ 279.
[23] ASHOK GULATI & SUDHA NARAYANAN, THE SUBSIDY SYNDROME IN INDIAN AGRICULTURE 8 (2003).

what defines a measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture is the presence of features which make it distinct from an ordinary customs duty. These features may include the measure's lack of transparency and predictability as compared to an ordinary customs duty.[24]

[¶ 21.] "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. This lack of transparency and predictability will contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.[25]

[¶ 22.] In making this statement, the Appellate Body was not identifying a "lack of transparency" and a "lack of predictability" as independent or absolute characteristics that a measure must display in order to be considered a variable import levy. Rather, the Appellate Body was simply explaining that the level of duties generated by variable import levies is less transparent and less predictable than is the case with ordinary customs duties.[26]

[¶ 23.] The Panel in Peru – Price Range System[27] observed that although operators may attempt to estimate price trends using the available historical data and futures prices, this does not give a level of transparency and predictability comparable to that afforded by an ordinary customs duty. Likewise, given the link between the total amount of applicable duties and fluctuations in world market prices, such fluctuations may, in themselves, become an additional factor in lack of transparency and predictability.

[¶ 24.] Bill 513 requires that the Committee take into account a number of factors, including trends of domestic and international prices, information about planting decisions, harvest forecasts, demand estimates, and the size of existing stocks.[28] The Committee sets the tariffs on 15th of every month and they are published immediately after that. Thus, it is submitted that though factors are mentioned, even then the level of transparency and predictability as could

[24] *Supra* Note 10, ¶ 7.291.
[25] *Supra* Note 9, ¶ 234.
[26] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Article 21.5 – Argentina)*, ¶ 156, WTO Doc. WT/DS207/AB/RW (May 7, 2007).
[27] *Supra* Note 10, ¶ 7.336.
[28] *Supra* Note 11, ¶ 6.

have been achieved in case of ordinary custom duties cannot be achieved because of the continuous fluctuations in world market prices. Ordinary Custom Duties are immune from such fluctuations.

[¶ 25.] Moreover, the factors such as demand estimates and the size of existing stocks are required to be taken into consideration. These factors are not available in public domain. Apart from these factors, the committee is at the liberty to refer to any other factor as the term used in Section 2 is *including.* The information about other factors is not available, for e.g., what those factors would be, whether their information would be available in public domain or not. It is, thus, submitted that Flexible Tariff Administration lacks transparency and predictability. Thus, the Kingdom of Sutan does not know and cannot reasonably predict what the amount of duties will be, resulting into the restriction of its volume of exports to Khindira. Hence, it falls within the ambit of the term *variable import levy.*

[¶ 26.] Since an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be[29], thus, it is submitted that, under the "Flexible Tariff Administration" given their very variability, an exporter from the Kingdom of Sutan cannot reasonably predict what the amount of 'tariff rates" would be there on a particular day, thereby restricting its volume of exports to Khindira.

[¶ 27.] Thus, even though economic operators may speculate about the future level of prices, this would never provide a degree of predictability sufficient to ensure the conditions of market access that were sought by the negotiators of the Agreement on Agriculture.

1.4. TARIFF RATES SET UNDER THE "FTA" IMPEDE OR OBSTRUCT TRANSMISSION OF INTERNATIONAL PRICE DEVELOPMENTS TO THE DOMESTIC MARKET.

[¶ 28.] It has been noted that all of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, all of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.[30]

[¶ 29.] It is submitted that, because of its design, architecture and effect, the measure at issue

[29] *Supra* Note 9, ¶ 234.
[30] *Id.* ¶ 227.

insulates domestic prices in Khindira from international price trends and impedes transmission of those trends to the domestic Khindiran market. It is further submitted that the explicit objective of the "FTA" is to neutralize fluctuations in international prices and limit the negative effects of falls in such prices; and it has the effect of completely inhibiting or severely distorting the transmission of any decline in international prices to the Khindiran market.

[¶ 30.] It is submitted that the objective of the Bill 513, named the "Agricultural Livelihoods and Food Security Act" (ALFS Act) confirms that the measure at issue constitutes a stabilization and protection mechanism that makes it possible to neutralize the fluctuations of international prices and limit the negative effects of falls in those prices. It is further submitted that "neutralizing" and "stabilizing" international price fluctuations is equivalent to impeding their transmission.

[¶ 31.] It is submitted that there is no correlation between domestic prices and international prices. It is contended that the variable nature of a levy has no bearing on the behaviour of prices. It is pointed out that a variable levy impedes or distorts the transmission of international price developments to the domestic market through the prices of imported products, and this remains the case regardless of whether domestic prices are connected or not connected to international prices by virtue of any other factor.

[¶ 32.] In any event, all the measures contained in the illustrative list in footnote 1 to the Agreement on Agriculture are prohibited under Article 4.2, regardless of whether in practice they restrict volumes, distort import prices or insulate the domestic market from international price trends. In other words, the presence of these effects may help to determine the type of measure in question when compared to an ordinary customs duty, but does not constitute a necessary condition for qualifying the measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture.[31]

[¶ 33.] Thus, it is submitted that Khindira's Flexible Tariff Administration results in the imposition of a "Variable Import Levy" and thus, is a measure which is not an "Ordinary Custom Duty" and therefore, inconsistent with Article 4.2 of the Agreement on Agriculture. Article 4.2 speaks of 'measures of the kind which have been required to be converted into ordinary customs duties. The word 'convert' means 'undergo transformation'. The word

[31] *Supra* Note 10, ¶ 7.292.

'converted' connotes 'changed in their nature', 'turned into something different.[32]

[¶ 34.] The agricultural sector, certainly more so than most, had seen a proliferation of trade barriers beyond conventional tariffs. These barriers often resulted from the prevalence of agricultural price support and stabilization policies, and the need to insulate domestic markets from foreign price fluctuations if domestic targets were to be achieved. The proliferation of these barriers - the quantitative restrictions, variable levies, minimum import price systems, and the like - complicated market access negotiations in agriculture because they made it difficult to evaluate conventional tariff concessions, lessened the expected benefits of concessions on other policy instruments, increased the uncertainty associated with agricultural trade, and made enforcement more difficult. Tariffication addressed all of these problems.[33]

[¶ 35.] If a measure is a variable import levy, a minimum import price or a measure similar to one of these, which have been required to be converted into ordinary customs duties, it cannot be an ordinary customs duty. For this reason, if a panel finds that a measure is one of those listed in the footnote, it may conclude that such a measure is not an ordinary customs duty.[34]

[¶ 36.] It is submitted that for the above-stated reasons the measure adopted by Khindira in the name of Flexible Tariff Administration is a variable import levy and does not fall within the scope of ordinary customs duty. It is based on a clear-cut scheme and lacks predictability. Moreover, it impedes the transmission of international prices to domestic market.

2. THAT THE PRICE SUPPORT FOR RICE AND WHEAT PROVIDED BY KHINDIRA IS INCONSISTENT WITH ARTICLES 3.2, 6.3 AND 7.2(B) OF THE AGREEMENT ON AGRICULTURE, BECAUSE IT EXCEEDS THE PRODUCT SPECIFIC *DE MINIMIS* LEVEL OF 10 PERCENT FOR EACH PRODUCT.

[¶ 37.] It is submitted that taking into account the various provisions of the WTO, Khindira has acted in violation of the basic and intrinsic provisions of the WTO Agreement on Agriculture, namely, Articles 3.2, 6.3 and 7.2(b) as Khindira has provided domestic support in excess of what was allowed under the said provisions.

[32] *Supra* Note 9, ¶ 216.
[33] KYLE BAGWELL & ALAN O. SYKES, CHILE – PRICE BAND SYSTEM AND SAFEGUARD MEASURES RELATING TO CERTAIN AGRICULTURAL PRODUCTS (2004), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.488.4463&rep=rep1&type=pdf.
[34] *Supra* Note 10, ¶ 7.307.

[¶ 38.] Domestic support means in agriculture, any domestic subsidy or other measure which acts to maintain producer prices at levels above those prevailing in international trade; direct payments to producers, including deficiency payments, and input and marketing cost reduction measures available only for agricultural production.[35] Domestic support deemed to have a "direct effect" on agricultural production is measured by an index referred to as the Aggregate Measure of Support (AMS).[36]

[¶ 39.] The AMS combines the monetary value of all non-exempt agricultural support into one overall measure. The AMS includes both budgetary outlays in the form of actual or calculated amounts of direct payments to producers under various commodity marketing loan provisions, input subsidies, and interest subsidies on commodity loan programs, as well as revenue transfers from consumers to producers as a result of policies that distort market prices.[37]

2.1. THAT KHINDIRA HAS EXCEEDED THE DE MINIMIS LEVEL PROVIDED IN ARTICLE 6.4 OF AOA.

[¶ 40.] It is submitted that Khindira has exceeded the *de minimis* level in respect of wheat in the years 2013-14 and 2014-15 as provided by it in Annexure 1[38]. Khindira has acted in violation of Articles 3.2, 6.3 and 7.2(b). Article 3.2 states that subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

[¶ 41.] Price support, usually operating through administered prices, it offers a sort of minimum price for the producers, so that if market price were to fall below this level, the government would intervene to buy produce at this price.[39]

[¶ 42.] Article 6.3 states that a Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's

[35] DOMESTIC SUPPORT, WTO GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (last visited Jan. 9, 2018, 12:17 PM).
[36] Randy Schnepf, *Agriculture in the WTO: Policy Commitments Made Under the Agreement on Agriculture*, CONGRESSIONAL RESEARCH SERVICE (May 12, 2005), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32916.pdf.
[37] *Ibid.*
[38] *Supra* Note 11, p. 8.
[39] ASHOK GULATI & SUDHA NARAYANAN, THE SUBSIDY SYNDROME IN INDIAN AGRICULTURE 9 (2003).

Schedule.

[¶ 43.] Article 7.3 (b) states that where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant de minimis level set out in paragraph 4 of Article 6.

[¶ 44.] Thus, in this case, Khindira does not have any scheduled Total AMS commitment levels, i.e., the commitment level specified in Section I of Part IV of Khindira's schedule is "nil".[40] Thus, Khindira also has to abide by Article 6.4 of the Agreement on Agriculture.

[¶ 45.] Article 6.4 states that a Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year and non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production.[41] An exception has been created in favour of the developing country Members, where the *de minimis* percentage under Article 6.4 shall be 10 per cent.[42] Developing countries (i.e., those self-designated countries receiving SDT benefits) agreed to a 13% reduction from their 1986-1988 base AMS over a 10-year period (1995-2004).[43]

[¶ 46.] According to the WTO, *de minimis* means Minimal amounts of domestic support that are allowed even though they distort trade-up to 5% of the value of production for developed countries, 10% for developing.[44] In the instant case, Khindira has exceeded the *de minimis* level in respect of wheat in the marketing years 2013-14 and 2014-15.

[¶ 47.] The total market price support is the product of the difference between Applied administered price & the external reference price and the total eligible production. The percentage of the total market price support to the total value of production (the product of applied administered price and eligible production) should not be more than 10% for developing countries.

[40] Important Clarifications, ¶ 1; Answer to Individual Clarification Questions, Q. No. 3.
[41] Agreement on Agriculture, Art. 6.4 (a).
[42] *Id.* Art. 6.4 (b).
[43] *Supra* Note 36.
[44] DE MINIMIS, WTO GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (last visited Jan. 9, 2018, 12:17 PM).

[¶ 48.] But, in the case at hand, the support provided is more than 10% of the total value of production and has thus, exceeded the de minimis levels. In view of the supporting table DS:5 submitted by Khindira to the WTO Committee on Agriculture on 16 April 2016, the price support provided in respect of wheat in the marketing years 2013-14 and 2014-15 was 11.11% and 14.44% of the total value of production and Khindira has, thus, exceeded the de minimis levels by 1.11% and 4.44% respectively and thereby violated the provisions of WTO. It is, thereby, submitted that Khindira has violated Articles 3.2, 6.3 and 7.2(b) of the Uruguay Round Agreement on Agriculture (URAA).

2.2. THAT KHINDIRA SHOULD NOT BE GIVEN THE BENEFIT OF BALI DECISION.

[¶ 49.] To avail the benefit of the Bali Decision on Public Stockholding for Food Security Purposes[45], the government of Khindira submitted a notification on 1 June 2017[46] while referring to its earlier notification on 16 April 2016[47]. But there has been a long delay by Khindira in submitting the said notification. Notification is the most integral and essential part of the Bali Decision and Khindira not complying with the Bali Decision should not be given the benefit of the said decision by the highest decision-making body of the WTO. comes with a mandatory obligation for notification and transparency requirements.[48]

2.2.1. That Khindira did not comply with the notification requirements provided by WTO

[¶ 50.] The Committee on Agriculture (CoA) adopted a document on 8 June 1995 titled Notification Requirements and Formats wherein the Committee has stated, regarding the notification requirements in respect of the member who has no annual commitment levels, that all Members with the exception of least-developed Members should submit "an annual notification" providing that the Committee may, at the request of a developing country Member, set aside this requirement other than in respect of Supporting Tables DS:1 to DS:3; least-developed Members should submit Supporting Tables DS:1 to DS:3 every two years. Where no support exists, a statement to this effect should be made.[49] The notification and

[45] Ministerial Conference Decision on Public Stockholding for Food Security Purposes adopted at Bali, Dec. 7, 2013, WT/MIN(13)/38, WT/L/913 [hereinafter Bali Decision].
[46] *Supra* Note 11, ¶ 12, p. 8.
[47] *Id.* ¶ 10.
[48] R. Rajesh Babu, *The Post-Bali Debacle and India's Strategy at the WTO: A Legal and Policy Perspective*, 754 IIM CALCUTTA WORKING PAPER SERIES (Sept. 2014), https://www.iimcal.ac.in/sites/all/files/pdfs/wps_754_0.pdf.
[49] WTO Committee on Agriculture, Notification Requirements and Formats, June 8, 1995, G/AG/2.

transparency requirements are not mere formalities, considering that many WTO members are extremely behind schedule in their notifications under the current obligations of the AoA.[50]

[¶ 51.] Thus, it is clear that an annual notification has to be submitted and nothing less than that would suffice, unless, the member state has got an exemption from the Committee on Agriculture (CoA). There is nothing in the proposition to suggest that the CoA has provided some exemption to Khindira or there has been any request from the side of Khindira in that regard. Instead, submission of the notification by Khindira is in itself evident of the fact that there was no exemption; otherwise Khindira need not have submitted any notification at all, whether on 16 April 2016 or on 1 June 2017.

[¶ 52.] As is evident from Annexure 1 of the Moot problem, Khindira has submitted the notification after three years and there has not been an annual notification in that regard. Thus, Khindira has breached the notification requirements under G/AG/2.

[¶ 53.] Article 3 paragraph (b) of the Bali Decision states that a developing Member benefiting from this Decision "must" have fulfilled and "continue" to fulfil its domestic support notification requirements under the Agreement on Agriculture (AoA) in accordance with document G/AG/2 of 30 June 1995. The moot problem does not provide any data as to the first part but it is clearly evident that Khindira has not complied with its Notification requirements after the adoption of the Bali Decision.

[¶ 54.] Article 3 paragraph (c) of the Bali Decision states that a developing Member benefiting from this Decision "must" have provided, and "continue" to provide on an "annual" basis, additional information by completing the template contained in the Annex of the Bali decision, for each public stockholding programme that it maintains for food security purposes. The first such information was submitted by Khindira on 1 June 2017, almost four years after the adoption of Bali Decision whereas the provision contemplates that the information should be submitted annually.

[¶ 55.] It is, henceforth, submitted that Khindira should not be granted the benefit of Bali Decision and the government of Khindira should be held liable for violation the various provisions of the WTO AoA as mentioned and cited hereinabove.

[50] Eugenio Díaz-Bonilla & David Laborde, *The Bali Agreement: An Assessment from the Perspective of Developing Countries*, 01444 INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE DISCUSSION PAPER (May 2015), https://pdfs.semanticscholar.org/582e/fcfcb9d5540b8794a0202867cc0a3aa047ff.pdf.

2.2.2. That complying with the notification requirements was an integral part of the Bali Decision.

[¶ 56.] The object and purpose of the Bali Decision would not be achieved in case there is no annual submission of the notification or the template. The data by ICTSD states that in May 2016 of this year, the chair of the WTO's agriculture talks told members that delays in reporting farm subsidies to the WTO were holding up efforts to negotiate new trade rules- about 85 percent of the 162 members are behind on their commitments. The majority of the countries in Asia, covered in this study, are five years behind in reporting domestic support to the WTO, and three out of the four countries in Africa have never submitted a domestic support notification. India, China, Indonesia and the Philippines have reported some form of farm support up until 2010, with Pakistan reporting up until 2011. *The lack of reporting leaves negotiators in the dark on domestic support as prices have become increasingly volatile since 2007*.[51]

[¶ 57.] Thus, in case states do not submit data on the amount of support being provided, there will be a delay in coming to a permanent solution, as has already been witnessed in the 11th Ministerial conference. The permanent solution was to be adopted by 11th Ministerial conference at Buenos Aires, but no permanent solution has been adopted as of yet.

[¶ 58.] Mr. R. Rajesh Babu, Associate professor at IIM Calcutta has observed that at Bali, India and G-33 were only able to negotiate an interim solution which includes, (i) temporary shelter for developing countries that exceed its de minimis limits on AMS, (ii) negotiate for an agreement for a permanent solution for adoption by the WTOs 11th Ministerial Conference, (iii) until a permanent solution is found, Members shall be immune from dispute settlement challenges in respect of public stockholding programmes for food security purposes, and (iv) interim solution shall continue until a permanent solution is found. The 'peace clause' or 'due restrain' clause was, however, limited to traditional staple food crops and to existing subsidy schemes, and comes with a mandatory obligation for notification and transparency requirements. If these conditions are not observed, subsidies can be open to challenge for WTO inconsistency.[52]

[51] ICTSD, *Public Stockholding for Food Security Purposes: Options for a Permanent Solution*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (November 2016), https://www.ictsd.org/sites/default/files/research/public_stockholding_for_food_security_purposes_options_for_a_permanent_solution.pdf.
[52] *Supra* Note 48.

[¶ 59.] It is, thus, submitted that the notification requirements are an integral, intrinsic and non-exclusive part of the Bali Decision and hence, not submitting timely notifications and additional information under the template is against the very spirit of the Bali Decision.

2.2.3. That act of Khindira has the trade-distorting effects.

[¶ 60.] It is submitted that acts of Khindira of providing domestic support in excess of *de minims* level and same acts are causing trade distortion effects. Paragraph 4 of the Bali Decision states that any developing Member seeking coverage of programmes under paragraph 2 shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members. Here, the support being provided by Khindira is distorting the trade. WTO has defined distortion when prices and production are higher or lower than levels that would usually exist in a competitive market.[53] The *peace clause* also has laid conditions that the stocks procured for food security purposes do not distort international trade or adversely affect food security of other members.[54]

[¶ 61.] The protection against challenge under the WTO dispute settlement mechanism is circumscribed in several ways and is conditional on a number of actions being taken by the country in question. They include ensuring that the procured stocks do not distort trade or adversely affect the food security of other countries.[55]

[¶ 62.] Here, Khindira's rice exports directly compete with the Sutan in many third world countries. Thus, any minimal trade distorting effect due to excessive domestic support beyond de minims level has adverse impact on the trade practice of the kingdom of Sutan.

2.3. THAT KHINDIRA HAS NOT FOLLOWED THE CONSTITUENT DATA AND METHODOLOGY.

[¶ 63.] Khindira has expressed its Market Price Support (MPS) in US Dollars in the supporting Table DS:5 whereas it has used Khindiran Lira in supporting tables relating to the commitments on Agricultural Products in Part IV of the schedule. Hence, it is submitted that Khindira has acted in violation of the computation methodology provided for in Article 1 read

[53] DISTORTION, WTO GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (last visited Jan. 9, 2018, 12:17 PM)
[54] Rashmi Banga & C.S.C Sekhar, *Public stockholding of food in India: Can it distort international trade*, CENTRE FOR WTO STUDIES (CWS) INDIAN INSTITUTE OF FOREIGN TRADE (IIFT) (Oct. 2015).
[55] Lars Brink, *Support to Agriculture in India in 1995-2013 and the Rules of the WTO*, 14-01 INTERNATIONAL AGRICULTURAL TRADE RESEARCH CONSORTIUM (IATRC) WORKING PAPER 1, 57 (Apr. 13, 2014), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.659.6733&rep=rep1&type=pdf.

with Annexure 3 of the AoA.

[¶ 64.] Article 1 (a) states that "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is, *firstly,* with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and *secondly*, with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.

[¶ 65.] The Panel on US — Upland Cotton[56] commented regarding "support": "Disciplines on 'support' are one of the three pillars of the Agreement on Agriculture, which uses the word 'support' interchangeably with 'domestic support'. Neither are defined terms, although Articles 3.2, 6.1, 6.3, 7.1 and 7.2(a) clarify their meaning somewhat by referring to 'support in favour of domestic producers' or 'domestic support in favour of agricultural producers'

[¶ 66.] Annex 3 sets out at great length a methodology for measuring the support granted by those measures which are calculated or can be calculated in an Aggregate Measurement of Support ('AMS').

[¶ 67.] The Appellate Body in Korea- Various Measures on Beef[57] held that Article 1(a) (ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be 'calculated in accordance with the provisions of Annex 3 of this Agreement'. The ordinary meaning of 'accordance' is 'agreement, conformity, harmony'. Thus, Current AMS must be calculated in 'conformity' with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while 'taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.' 'Take into account' is defined as 'take into consideration,

[56] Panel Report, *United States – Subsidies on Upland Cotton*, ¶ 7.420, WT/DS267/R (Sept. 8, 2004) [hereinafter US – Upland Cotton].
[57] Appellate Body, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 111, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Appellate Body Report, Korea – Various Measures on Beef].

notice'. Thus, when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be 'taken into account', that is, it must be 'considered'.

[¶ 68.] It further held that Article 1(a)(ii) accorded "higher priority" to the provisions of Annex 3 than to "constituent data and methodology" contained in a Member's Schedule, but as Korea had no specific "constituent data and methodology" for beef, its Current AMS for beef was to be calculated in accordance with the provisions of Annex 3.

[¶ 69.] But as Annexure 3 of the AoA does not provide as to what currency needs to be followed by the member states, henceforth, it is incumbent to look upon what methodology was followed by the member state in supporting tables relating to the commitments on Agricultural Products in Part IV of the schedule[58]. Though the Appellate Body and the Panel defined a clear hierarchy in the case aforementioned, but, wherein nothing has been mentioned under Annexure 3 of AoA, the only recourse is that of Constituent Data and Methodology.

[¶ 70.] When the table mentioned in Annexure 1 of the Moot Problem[59] is expressed in terms of Khindiran Lira, the government of Khindira appears to have breached the de minimis levels for rice as well. The market price support provided in the marketing years 2012-13, 2013-14 and 2014-15 was 44.77%, 62.24% and 69.57% of the total value of production respectively. Moreover, in respect of the marketing year 2012-13, the market support price was 68.68% of the total value of production. Thus, the market price supports exceed the *de minimis* levels by a huge and wide margin when the market price support is expressed in terms of Khindiran Lira. Also, it is submitted that Khindira cannot take recourse to 18.4 of the AOA because Article 18.4 is about the review process, which is the purview of the Committee on Agriculture, not that of individual countries.[60]

[¶ 71.] Article 18.1 gives the Committee on agriculture (CoA)the charge of reviewing the implementation of countries' commitments. Article 18.4 states *that "In the review process Members shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments".* Article 18.4 is sometimes interpreted as giving a country the right to unilaterally adjust some element of its support calculation in order to offset the effect of any inflation on its ability to stay within its

[58] *Supra* Note 11, p. 9.
[59] *Supra* Note 11, p. 8.
[60] E15 Expert Group on Agriculture, Trade and Food Security Challenges, *Agriculture, Trade and Food Security Challenges: Proposals and Analysis*, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (December, 2013), http://e15initiative.org/wp-content/uploads/2015/09/E15-Agriculture-and-Food-Security-Compilation-Report-FINAL.pdf.

commitments. For countries with only expenditure and payment support and no Bound Total AMS, the question of inflation adjustment is moot, since the values of production and the *de minimis* limits increase *pari passu* with inflation and accommodate inflation-related increases in nominal expenditures and payments.

[¶ 72.] In terms of the legal implications, the introduction of an automatic adjustment for inflation under the "due consideration" clause, would involve only a decision by the Committee of Agriculture in interpreting Article 18.4 of the AoA.[61]

[¶ 73.] Thus, it is submitted that taking into account the various provisions of the WTO, Khindira has acted in violation of the basic and intrinsic provisions of the WTO Agreement on Agriculture, namely, Articles 3.2, 6.3 and 7.2(b) as Khindira has provided domestic support in excess of what was allowed under the said provisions. Also, it is submitted that Khindira cannot take the benefit of Bali decision on public stockholding for food security purposes because it has not complied with the notification obligations of the same decision. Also, Khindiran government has not complied with the information requirements under template of the Bali Decision 2013. That Khindira cannot take recourse to article 18.4 of the AoA because only committee on agriculture have the ultimate authority to decide/review under part IX i.e. article 18 of the AoA.

3. THAT KHINDIRA'S CONTINUED PROVISION OF EXPORT SUBSIDIES ON RICE IS INCONSISTENT WITH ARTICLE 9.2 OF THE AGREEMENT ON AGRICULTURE AND THE NAIROBI DECISION ON EXPORT COMPETITION.

[¶ 74.] It is submitted that export subsidy provided by Khindira is in contravention of provision of the Nairobi decision on Export Competition[62] which is a legally binding document. Export subsidies tend to be the result of the accumulation of domestic stocks by the exporting country under public buying schemes with the goal to support prices for domestic producers. Then, disposing of those excess stocks on world markets is a way to reduce the cost to domestic taxpayers of these policies. Implicitly, export subsidies also provide a way to make producers

[61] Panos Konandreas and George Mermigkas, *WTO domestic support disciplines: options for alleviating constraints to stockholding in developing countries in the follow-up to Bali*, 45 FOOD AND AGRICULTURE ORGANIZATION COMMODITY AND TRADE POLICY RESEARCH WORKING PAPER 1, 22 (2014), http://www.fao.org/3/a-i3819e.pdf.

[62] Ministerial Conference Decision on Export Competition adopted at Nairobi, Dec. 21, 2015, WT/MIN(15)/45, WT/L/980 [hereinafter Nairobi Decision].

in the rest of the world pay for that support through lower prices and displaced production.[63]

3.1. THAT ACTS OF KHINDIRA ARE IN CONTRAVENTION OF NAIROBI DECISION AND THE AOA.

[¶ 75.] It is submitted that Khindira's act of giving export subsidies on rice by including funds for export subsidies for rice in the marketing years 2017-2018 and 2018 – 2019 in budget projection is in contravention of the Nairobi Decision.

[¶ 76.] Khindira is a developing country. It enacted ALFS Act to provide domestic support due to which there was an overproduction of wheat and rice. Khindira has violated provisions of the Nairobi decision contained in ¶ 7, 9 and 10. ¶ 7 states that Developing Country Members *shall* eliminate their export subsidy entitlements by the end of 2018. ¶ 9 states that Members *shall not* apply export subsidies in a manner that circumvents the requirement to reduce and eliminate all export subsidies. Nairobi decision also imposes duty upon members under ¶ 10 that members shall ensure that any export subsidies have at most minimal trade distorting effects and do not displace or impede the exports of another Member.

[¶ 77.] Without any sense of obligation and responsibility Khindira, a self-recognised developing country[64], has violated this provision by providing funds for export subsidies for rice in the marketing years of not only for the year 2018 but has moved more ahead in disobeying this decision by providing funds for export subsidies in the year 2018-2019.[65] Thus, act by Khindiran government of including funds for export subsidies for rice in its marketing year 2018-19 is the act of export subsidy which is meant to be eliminated till the end of 2018.

[¶ 78.] Under footnote 5 to the Nairobi Decision a Developing Member is allowed for continuing export subsidies till 2022 only if it has notified export subsidy of that product in its last three notifications to the agricultural committee before the adoption of the Nairobi decision. The government of Khindira submitted export subsidy notifications before the adoption of the Nairobi Decision, but it did not notify any export subsidies for rice in any of the last three notifications submitted before the adoption of the Nairobi Decision.[66] Hence,

[63] Eugenio Díaz-Bonilla & David Laborde, *Export Competition Issues after Nairobi: The Recent World Trade Organization Agreements and their Implications for Developing Countries*, 01557 INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE DISCUSSION PAPER (Sept. 2015), http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/130688/filename/130899.pdf.
[64] *Supra* Note 11, ¶ 9.
[65] *Supra* Note 11, ¶ 18.
[66] Clarifications, Answer to Individual Clarification Questions, Q. No. 10.

Khindira is not protected by footnote 5 of the Nairobi Decision.

[¶ 79.] Paragraph 9 explicitly mentions that while implementing export subsidies, member countries must keep in mind that it should not in any way sidestep the requirement of reducing and eliminating export subsidies i.e. all member countries must execute export subsidies in a way which is in compliance of reduction and eliminating of all export subsidies. But, in the case at hand, while implementing export subsidy by Khindira, no attempt was made in the direction of reducing or eliminating export subsidies rather implementation by Khindira transgressed the imperative requirement of eliminating all export subsidies by 2018.

[¶ 80.] It is submitted that Khindira has provided export subsidy in relation to only rice and not in relation to wheat whereas, there was accumulation of stocks in relation to both rice and wheat. This proves that export subsidies were given under pressure from the Association of Rice Wholesalers and not by reason of accumulation of stocks.

[¶ 81.] Nairobi decision further imposes a duty that exports of one member country must lead to minimal trade distorting effects and also it should not impede the exports of another country. One of the most important goals of the AoA has been removal of trade distortions resulting from different levels of input subsidies, price and market support, export subsidy and other kind of trade-distorting support across countries.[67] It is submitted that export subsidy provided by Khindira is adversely affecting the interests of Sutan as the exporters of Khindira directly compete with those of Sutan in the international market.

3.2. THAT NAIROBI DECISION IS LEGALLY BINDING ON KHINDIRA.

3.2.1. That Ministerial Decisions shows firm commitment of the members as they are made by the Highest Decision-making Body of WTO

[¶ 82.] It is submitted that Ministerial Decisions are the manifestation of the ministers of all countries who sit together and decide for what action shall be taken on any particular concerned matter. Importance of the Ministerial Decisions is best explained by Panel[68] in US – Lead Bismuth II. This states that "We note that the Ministerial Declaration is a mere Declaration, rather than a Decision of the Ministers. In our view, a Declaration lacks the mandatory authority of a Decision. In the Ministerial Declaration, Ministers simply recognize the need for the

[67] Ramesh Chand & Linu Mathew Philip, *Subsidies and Supporting Agriculture: Is WTO providing Level Playing Field?*, 36.32 ECONOMIC AND POLITICAL WEEKLY 3014, 3014 (Aug. 11, 2001).
[68] Panel Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 6.17, WT/DS138/R (Dec. 23, 1999).

consistent resolution of disputes. In our opinion, the simple recognition of the need for an action does not mandate that action. In a Ministerial Decision, by contrast, Ministers decide that certain action shall be taken".

[¶ 83.] Ministerial conference is the highest decision-making body of WTO. It is a world parliament on all trade – related issues, which are the subject matter of the WTO. It may also be termed as the highest legislature body of the WTO empowered to take any decision by consensus with equal voting right to each member. According to WTO regulations there has to be one ministerial conference at the interval of every two years. At the end of each ministerial conference a declaration is made setting out the decisions taken and the process of its implementation.[69]

3.2.2. That Nairobi decision derives its binding force from the AoA itself and hence, binding.

[¶ 84.] It is submitted that Nairobi decision unlike other declarations and decisions derives its binding powers from AoA itself. Article 20 of the AoA mandates for the Continuation of the Reform Process.

[¶ 85.] Article 20 (d) states that recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account what further commitments are necessary to achieve the above mentioned long-term objectives.

[¶ 86.] Thus, owing to the provision of the continuation of the reform processes, General Council decided to launch negotiations at the meeting in year 2000. Then in the Doha Development Agenda (DDA), members elaborated the working under Article 20 of the AoA. Agenda decided at Doha was adopted by Honk Kong Ministerial Declaration in 2005. As members failed to follow the Honk Kong Ministerial Declaration, then, in pursuance of the same under Bali declaration members reaffirmed their positions. Again, failure of the members to confirm to the provision of the Bali declaration led to the Nairobi Ministerial Decision.

a) Decision to launch negotiations on Agriculture

[¶ 87.] At its meeting of 7 and 8 February 2000, the General Council decided to launch a

[69] RAJ KUMAR SEN & JOHN FELIX RAJ, WTO & ASIAN UNION 27 (2009).

new negotiating round on agriculture, stating that under Article 20 of the Agreement on Agriculture, Members had agreed that negotiations for continuing the reform process would be initiated one year before the end of the implementation period, i.e. 1 January 2000.[70]

[¶ 88.] It is clear that countries, in signing the Agreement on Agriculture, have bound themselves to a continuation of the reform process which has as its long-term objective, substantial progressive reductions in support and protection resulting in fundamental reform, and that negotiations on this process should start following 1999 and take into account a number of factors.[71]

b) Doha Development Round and Hong Kong ministerial declaration

[¶ 89.] At its Fourth Ministerial Conference at Doha, Members agreed that the negotiations mandate contained in Article 20 of the Agreement on Agriculture would be further elaborated, stating that we recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.[72]

[¶ 90.] Thus, in the Doha development round members reaffirmed their position regarding adoption of and implementation of the export subsidy reduction commitments which were incorporated originally in the AoA. Also, Members committed themselves for the negotiations incorporated and mandated under AOA. After that, to the same effect, it was again reaffirmed in the Hong Kong Ministerial Declaration.[73]

[70] General Council Meeting, Feb. 7-8, 2000, ¶ 12, WT/GC/M/53.
[71] J GREENFIELD, CONTINUING THE REFORM PROCESS IN AGRICULTURE: ARTICLE 20 ISSUES, http://www.fao.org/docrep/003/x7353e/X7353e08.htm (last visited Jan. 2, 2018).
[72] Ministerial Declaration adopted at Doha, Nov. 20, 2001, ¶ 13, WT/MIN(01)/DEC/1 [hereinafter Doha Declaration].
[73] Ministerial Declaration adopted at Hong Kong, Dec. 18, 2005, ¶ 4, WT/MIN(05)/DEC [hereinafter Hong Kong Ministerial Declaration].

c) Bali Declaration is in pursuance of Doha Development Agenda, Hong Kong Ministerial Declaration and Article 20

[¶ 91.] During the process leading up to the 2013 Bali Ministerial Conference, several agricultural-exporting developing countries asked for specific steps to comply with the 2005 Hong Kong Ministerial Declaration, which defined 2013 as the deadline for eliminating export subsidies. A small number of developed countries opposed this option, arguing that they were not ready to make a firm commitment in the absence of a more comprehensive reform of all agricultural issues in a finished Doha Round. In the end, the Bali Ministerial adopted a Ministerial Declaration on Export Competition[74] that committed WTO members to apply the "utmost restraint" when using export subsidies and to maintain those subsidies at the lower levels of the early 2010s (when they were less utilized because of high world prices).

[¶ 92.] We recognize that all forms of export subsidies and all export measures with equivalent effect are a highly trade distorting and protectionist form of support, and that, accordingly, export competition remains a key priority of the agriculture negotiations in the context of the continuation of the ongoing reform process set out in Article 20 of the Agreement on Agriculture, in accordance with the Doha work programme on agriculture and the 2005 Hong Kong Ministerial Declaration.[75] It is, thus, submitted that all the Declarations and General Council Decisions prior to the Nairobi Decision were in pursuance of Article 20 as part of the reform process and to take up additional commitments.

d) That Nairobi Decision was adopted to give legal force to commitments

[¶ 93.] The elimination of agricultural export subsidies, new rules for export credits, and decisions on international food aid and exporting state trading enterprises make up an important part of the "Nairobi Package" adopted at the WTO's Tenth Ministerial Conference in December 2015. Collectively, these issues are known as "export competition".

[¶ 94.] The decision to fully eliminate any form of agricultural export subsidies is an historic decision and constitutes a significant step in the reform of agricultural trade. It ensures that countries will not resort to trade-distorting export subsidies and thereby levels the playing field for agriculture exporters.

[¶ 95.] Due to the high commodity prices in recent years, many countries have significantly

[74] Ministerial Conference Declaration on Export Competition, De. 7, 2013, WT/MIN(13)/40, WT/L/915 [hereinafter Bali Declaration].
[75] Bali Declaration, ¶ 1.

reduced their export subsidies and only a handful of WTO members still use export subsidies, according to a WTO survey in 2015. In times of low prices, however, countries often resort to export subsidies and history has shown that once one country does so, others would quickly follow suit.

[¶ 96.] Under the Nairobi Decision, developed countries will immediately remove export subsidies, except for a handful of agriculture products, and developing countries will do so by 2018. In addition, developing countries will keep the flexibility of covering marketing and transport costs for agriculture exports until the end of 2023.

[¶ 97.] It is submitted that after a long failure of all countries to implement export subsidy reduction commitments, Nairobi decision came as a much-awaited decision on export subsidy. In this member countries reaffirmed their position and commitments under Bali ministerial declaration, Doha development agenda, Hong Kong ministerial declaration and parent statute i.e. AoA. Member's firm commitment to eliminate export subsidy is prima facie evident from usage of word *shall* in the paragraphs dealing with export subsidy. Paragraph 6 to 11 of the Nairobi decision makes usage of the word shall. Meaning of word shall is "*As used in statutes and similar instruments, this word is generally imperative or mandatory*".[76]

[¶ 98.] Describing the importance of Nairobi decision Roberto Azevedo, WTO Director General, said that the Nairobi Package contained a number of important decisions — including a decision on export competition. This is truly historic. It is the most important reform in international trade rules on agriculture since the creation of the WTO. And said "The elimination of agricultural export subsidies is particularly significant in improving the global trading environment" we concluded an important deal on export competition in agriculture.[77]

[¶ 99.] It is, thus, submitted that Nairobi Decision was adopted because of the unenforceable nature of the Declarations. The term used again and again in the Nairobi Decision is *shall*, which is evident of the mandatory nature of the Decision. The Decision is in furtherance of the Agreement on Agriculture itself and hence, derives its force from there. Moreover, it is passed by the highest decision-making body of WTO and hence, there is no reason to term it as a mere political document.

[76] HENRY CAMPBELL BLACK, A LAW DICTIONARY 1041 (2nd ed., 1995) (ebook).
[77] WTO News: Speeches, *Build on historic success of Nairobi to tackle urgent challenges facing the WTO*, WORLD TRADE ORGANISATION (Jan. 19, 2016), https://www.wto.org/english/news_e/spra_e/spra109_e.htm.

3.2.3. That Nairobi Decision is a subsequent Agreement in terms of Vienna Convention on Law of Treaties

[¶ 100.] Article 31 (3) (a) of the VCLT[78] states that there shall be taken into account, together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. A subsequent agreement under article 31 (3) (a) must be an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.[79]

[¶ 101.] The Appellate Body[80] held that a subsequent agreement must fulfil two conditions, *firstly*, the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement and *secondly*, the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law.

[¶ 102.] It is submitted that Nairobi Decision is a subsequent agreement as it is concerned with the application of the AoA. It cannot be dispute that Nairobi decision has been adopted after the AoA. Further, according to the paragraph 1, it owes its origin from the Bali Ministerial Declaration which in itself derives its authority from the Art. 20 of the AoA. Also, many paragraphs themselves contain reference to many provisions of AoA itself. Paragraph 2 and 8 of the Nairobi decision contain reference to article 10.2 and 9.4 of the AoA respectively. Hence, it fulfils all the conditions for being termed as a subsequent agreement.

[¶ 103.] It is, thus, submitted that Nairobi Decision being a legally binding document, deriving its force from Article 20 of the AoA and extending the Application of the provisions of AoA in respect of Export Competition cannot be ignored by Khindira and hence, Khindira is bound to implement it.

[78] Vienna Convention on Law of Treaties, 1155 UNTS 331.
[79] Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 371, WT/DS381/AB/R (May 16, 2012).
[80] Appellate Body Report, *United States - Measure affecting the Production and Sale of Clove Cigarettes*, ¶ 262, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter Appellate Body Report, US- Clove Cigarettes].

REQUEST FOR FINDINGS

Wherefore in light of the measure of issues, legal pleadings, reasons given and authorities cited, Khindira, respectfully requests the panel to declare that:

1. Khindira's system of Flexible Tariff Administration is inconsistent with article 4.2 of the Agreement on Agriculture.
    1.1. Tariff rates set under the Flexible Tariff Administration exhibit inherent variability.
    1.2. Flexible tariff administration cannot be excluded from the scope of article 4.2 merely because it is subject to a tariff binding.
    1.3. Tariff rates set under the Flexible Tariff Administration lack transparency and predictability with regard to the level of the resulting levies.
    1.4. Tariff rates set under the Flexible Tariff Administration impede or obstruct transmission of international price developments to the domestic market.
2. The price support for rice and wheat provided by Khindira is inconsistent with Articles 3.2, 6.3 and 7.2(b) of the Agreement on Agriculture because it exceeds the product specific de minims level of 10 percent for each product.
    2.1. Khindira has exceeded the de minims level provided in article 6.4 of Agreement on Agriculture.
    2.2. Khindira should not be given the benefit of Bali Decision.
    2.3. Khindira has not followed the constituent data and methodology.
3. Khindira's continued provision of export subsidies on rice is inconsistent with Article 9.2 of the Agreement on Agriculture and the Nairobi Decision on Export Competition.
    3.1. Acts of Khindira are in contravention of Nairobi Decision and the Agreement on Agriculture.
    3.2. Nairobi Decision is legally binding on Khindira.

All of which is respectfully affirmed and submitted,

Counsel for the complainant, 150.