Team Code – 150R

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 RESPONDENT

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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.	Art.	Article
8.	CoA	Committee on Agriculture
9.	CWS	Centre for WTO Studies
10.	DS	Dispute Settlement
11.	DSU	Dispute Settlement Understanding
12.	ECtHR	European Court of Human Rights
13.	ET	Economic Times
14.	EU	European Union
15.	FAO	Food and Agriculture Organisation
16.	FERP	Foreign Exchange Reference Price
17.	GATT	General Agreement on Trade and Tariffs
18.	GII	Global Issues Initiative
19.	IACtHR	Inter-American Court of Human Rights
20.	IATRC	International Agricultural Trade Research Consortium
21.	ICJ	International Court of Justice
22.	IFPRI	International Food Policy Research Institute
23.	IIFT	Indian Institute of Foreign Trade
24.	ILC	International Law Commission
25.	INR	Indian Rupees
26.	Iran – USCTR	Iran – United States Claims Tribunal Reports
27.	ISCE	Institute for Society, Culture and Environment
28.	OECD	Organisation for Economic Co-Operation and Development
29.	p.	Page Number
30.	pp.	From Page Number to Page Number

31.	Q. No.	Question Number
32.	TBT	Technical Barriers to Trade
33.	TRIPS	Trade-Related Aspects of Intellectual Property Rights
34.	UN	United Nations
35.	UNGA	United Nations General Assembly
36.	UNTS	United Nations Treaty Series
37.	URAA	Uruguay Round Agreement on Agriculture
38.	US	United States
39.	USD	United States Dollars
40.	VCLT	Vienna Convention on Law of Treaties
41.	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 CONSISTENT WITH ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE.

It is submitted that Khindira's system of Flexible Tariff Administration is consistent with Article 4.2 and it does not result in the imposition of a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

For a duty to become a variable import levy, the first essential condition is that, the measure must inhibit variability. Variability is shown when a measure contains a formula or a scheme. Section 2 of the "Agricultural Livelihoods and Food Security Act" does not provide for any formula and the tariff rates are determined by a Committee after taking into account a number of factors. Thereby, ensuring to protect the domestic interests of the farmers, the underlying objective of the Bill 513, and at the same time preserving the interests of exporters. The tariff rates are set by the Committee is an executive act and the rates are not changed automatically and continuously. Thus, the measure of flexible tariff administration does not contain any kind of variability.

Moreover, the "Flexible Tariff Administration" ensures full transparency and predictability as the tariff rates are published immediately and much of the information about the factors on which the tariff rates are set, is in the public domain. Thus, it is submitted that the measure of "Flexible Tariff Administration" does not result in the imposition of a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the "Agreement on Agriculture".

Moreover, Flexible Tariff Administration is a measure adopted by the Government of Khindira to safeguard its domestic industry. The farmers were committing suicides. The main objective of the statute is to safeguard the farmers from the volatility of international prices.

Lastly, the Committee bases its decision of any change in tariff rates on exogenous factors, which are beyond the control and speculation of Khindira itself. The WTO Appellate Body has approved this method of changing the tariff rates on the basis of change in exogenous factors.

ISSUE 2

THAT 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.

It is not the stand of Khindira that it has not exceeded the *de minimis* levels for wheat for the year 2013-14 and 2014-15. It merely contends that it should be given the benefit of Bali Decision, i.e., no legal action should be brought against it for breaching the 10% level.

It is submitted that on 1 June 2017, Khindira submitted a notification to the Committee on Agriculture declaring that it was at the risk of exceeding AMS limit with respect to wheat. Along with the said notification, the government of Khindira also submitted additional information in accordance with the template attached to the Bali Decision on Public Stockholding for Food Security Purposes while referring to its notification on 16 April 2016. But a mere slight delay in submitting notifications cannot deprive it of the benefit of the Bali Decision which is to be interpreted in the light of its object and purpose. It is submitted that the object of the Bali Decision was not to secure notifications from the defaulting members but to safeguard any developing member from a legal challenge. Moreover, its notification pattern is consistent with that of many other developing member countries.

The Bali decision on the Peace Clause allows the interim solution to continue until a permanent solution is agreed upon within four years until the 11th Ministerial Conference in 2017. The "Peace Clause option' outlined in third option in a non-paper submitted by G33 in October 2013 has a direct bearing on the instant case. It was as a result of this that the Bali Decision on Public Stockholding for Food Security Purposes was enacted and hence, it was not compliance with the notification requirements that was integral and essential for the Bali Decision but the absence of any legal challenge against a developing country, when it acts for the purposes aforementioned.

It is submitted that the notification requirements in relation to the countries with base or annual commitment levels are far more stringent as compared to the members with no such commitments. The members with no such commitment can even get an exemption for submission of the notification. It is submitted that due to the excessive inflation, the Khindiran Government is bound to use US$ in place of Khindiran Lira.

ISSUE 3

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.

It is submitted that giving away export subsidies is not in the contravention of the Agreement on Agriculture or the Nairobi Decision on Export Competition. Khindira has to give export subsidies as a result of the accumulation of the stocks and provision for subsidies is the last resort. Moreover, it has not contravened any provision of the Agreement on Agriculture or the Nairobi Decision on Export Competition and it has complied with them as far as possible. It is submitted that the bare perusal of the Nairobi Decision provisions provides that it is only article 9.4 of the Agreement on Agriculture whose application has been extended.

It is submitted that the Ministerial Decisions passed by the Ministerial Conference of the WTO constituted under Article IV of the Marrakesh Agreement constituting the WTO are not legally binding and are mere political documents.

The ministerial decisions are not taken by a unanimous decision. Unlike the conventions and covenants, in which only those are bound who ratify or sign an instrument of accession to it, in ministerial decisions, all those members against the decision are also being made bound by it. This is the reason why the Ministerial Decisions passed in furtherance of Article IX:1 are not considered to be legally binding.

It is submitted that Nairobi Decision on Export Competition is not a subsequent agreement in view of Article 31 (3) (a) of the Vienna Convention on Law of Treaties. The Nairobi Decision on Export Competition is neither an interpretation of the Agreement on Agriculture or an application of any of the provisions of the Agreement on Agriculture. Thus, a political document like the Nairobi Decision need not be followed for lack of legal force and Article 9.2 of the AoA is not applicable to the present circumstances.

ARGUMENTS ADVANCED

MOST RESPECTFULLY SHOWETH:

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

[¶ 1.] It is submitted that Khindira's system of flexible tariff administration is consistent with Article 4.2 of the Agreement on Agriculture[1] and it does not result in the imposition of a "variable import levy" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

[¶ 2.] The objectives of the Bill 513, named "Agricultural Livelihoods and Food Security" (ALFS Act) Act is firstly, to set tariffs to shield the Khindiran farmers from some of the volatility of international prices and secondly, to make the stocks acquired from the Khindiran farmers available to the poor at subsidized prices. This bill achieves a balance between the needs of the citizens in the city and in the countryside.

1.1. FLEXIBLE TARIFF ADMINISTRATION IS A MEASURE WHICH DOES NOT IMPOSE VARIABLE IMPORT LEVY

[¶ 3.] A "levy" is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.[2] An "import" levy is, of course, a duty assessed upon importation. A levy is "variable" when it is "liable to vary".[3]

[¶ 4.] The Appellate Body in Chile – Price Band System[4] held that variability alone is not determinative when defining a measure as a "variable import levy" within the meaning of footnote 1 to the Agreement on Agriculture. *An "ordinary customs duty" could also fit this description.* A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty. This change in the applied rate of duty could be made, for example, through an act of a Member's legislature or executive at any time. Thus, the mere fact that an import duty can be varied

[1] Agreement on Agriculture (URAA), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 UNTS 410.
[2] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶232, WT/DS207/AB/R (Sept. 23, 2002) [hereinafter Appellate Body Report, Chile – Price Band System].
[3] Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 7.34, WT/DS207/R (May 3, 2002) [hereinafter Panel Report, Chile – Price Band System].
[4] *Supra* Note 2, ¶ 232.

cannot, alone, bring that duty within the category of "variable import levies" for purposes of footnote 1.[5]

[¶ 5.] It is, thus, submitted that variability is not the only condition to decide that whether an import levy is a variable import levy as an ordinary custom duty can also be variable and subject to change as has been seen in this case. No "variability" is inherent under the "Flexible Tariff Administration"

1.1.1. That no scheme or formula has been prescribed and that ordinary custom duties can also be varied

[¶ 6.] The Appellate Body in Chile – Price Band System[6] observed that at least one feature 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. The level at which ordinary customs duties are applied can be varied by a legislature, but such duties will not be automatically and continuously variable. To vary the applied rate of duty in the case of ordinary customs duties will always require separate legislative or administrative action, whereas the ordinary meaning of the term "variable" implies that no such action is required.

[¶ 7.] It is submitted that in the instant case, there is no formula for determining the tariff rates.[7] The tariff rates under the "Flexible Tariff Administration" are determined by a Committee, which is an executive act and it does not depend upon any formula. A measure is said to be "variable" when it incorporates a scheme or formula.[8] Tariff rates under the "Flexible Tariff Administration" are not changed automatically and continuously and are determined by the Committee after taking into account number of factors[9], thereby, protecting the interests of both the domestic farmers.

[¶ 8.] It is, further, submitted that Tariff rates set under the "Flexible Tariff Administration" do not exceed the Khindira's Tariff Bindings.[10] A tariff binding in a Member's

[5] Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, ¶ 7.285, WT/DS457/R (Nov. 27, 2014) [hereinafter Panel Report, Peru – Price Range System].
[6] *Supra* Note 2, ¶ 233.
[7] Moot Problem, ¶ 6.
[8] *Supra* Note 5, ¶ 7.286.
[9] *Supra* Note 7.
[10] *Ibid*.

Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule.[11] This change in the applied rate of duty could be made, for example, through an act of a Member's legislature or executive at any time. Moreover, it is clear that the term "variable import levies" as used in footnote 1 must have a meaning different from "ordinary customs duties", because "variable import levies" must be converted into "ordinary customs duties".[12]

[¶ 9.] It is submitted that the tariff rates set under the system of "Flexible Tariff Administration" are determined by a Committee. Section 2 of the "Agricultural Livelihoods and Food Security" Act establishes a "Committee for the Administration of Agricultural Tariffs" within the Ministry of Agriculture.[13] Thus, the determination of tariff rates under the "Flexible Tariff Administration" is through an act of the executive and not in accordance of some pre-determined mathematical formula as was in the case of Peru – Price Range System, where due to a mathematical formula determining the rate of duties, the Panel[14] as well as the Appellate Body[15] observed that Peru has used variable import levy.

[¶ 10.] Moreover, it does not exceed the tariff bindings in Khindira's World Trade Organization (WTO) Schedule and in any preferential agreements to which Khindira is a party. 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 to any preferential agreement to which Khindira is a party.[16]

[¶ 11.] WTO has stated[17] that Since any modification to a WTO Schedule requires full consensus, the bindings are not easily changed. Therefore, security and predictability are achieved through the inclusion of a Members' commitments (the bindings in particular) in legal instruments (i.e. the Schedules) which are not easily changed.

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[11] Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 46, WT/DS56/AB/R (Mar. 27,1998) [hereinafter Appellate Body, Argentina – Measures affecting Imports].
[12] Appellate Body Report, *Chile – Price Band System*, ¶ 232.
[13] *Supra* Note 7, ¶ 5.
[14] *Supra* Note 5, ¶ 8.1.b.
[15] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, ¶ 5.120, WT/DS457/AB/R (July 20, 2015) [hereinafter Appellate Body Report, Peru – Price Range System].
[16] Moot problem, ¶ 6.
[17] WTO E-LEARNING, INTRODUCTION TO MARKET ACCESS IN TRADE IN GOODS IN THE WTO, https://ecampus.wto.org/admin/files/Course_385/Module_1578/ModuleDocuments/MA-L1-R1-E.pdf (last visited Jan. 5, 2018).

[¶ 12.] It is submitted that all the international obligations undertaken by Khindira are taken into consideration by the Committee while setting tariffs and the tariffs set never exceed the tariff bindings in Khindira's WTO schedule. Thus, no trade distorting practices are adopted by Khindira and the interests of the exporters of the Kingdom of Sutan are well preserved.

1.1.2. That the system of "Flexible Tariff Administration" is Transparent and Predictable

[¶ 13.] It is submitted the system of "Flexible Tariff Administration" is both Transparent and Predictable. Variable import levies have 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 features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures.[18]

[¶ 14.] It is submitted that the Khindiran government has ensured full transparency and predictability in the system of "Flexible Tariff Administration", thereby taking all due measures to protect the interests of exporters. The tariffs under the system are set by a Committee and 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.[19]

[¶ 15.] The Committee for the Administration of Agricultural Tariffs relies in its decision-making on such information which is in the public domain (e.g., data on domestic and international prices, harvest forecasts, and the size of existing stocks).[20] The exporters can reasonably predict about the rate of tariffs as the rate of tariffs are not imposed arbitrarily and the information of the factors on which they are based are within the public domain, which is easily accessible by the exporters. Moreover, the applied rates are published immediately after they are set by the Committee for the Administration of Agricultural Tariffs.[21]

[¶ 16.] Thus, all the measures are effectively followed by the Khindiran government to enlighten their exporters about any change in tariff. In practice, the Committee rarely changes the tariffs of most agricultural products[22]; instead, it focuses its attention on the most important

[18] *Supra* Note 2, ¶ 234.
[19] *Supra* Note 7.
[20] Clarifications, Answer to Individual Clarification Questions, Q. 17.
[21] *Id.* Q. 15.
[22] *Supra* Note 7, ¶ 7.

agricultural commodities for Khindira's farmers, including rice, wheat, and coarse grains.

1.2. THAT FLEXIBLE TARIFF ADMINISTRATION IS A MEASURE WHICH IS ENACTED TO PROTECT THE DOMESTIC INDUSTRY

[¶ 17.] While revenue is a paramount consideration, Customs duties may also be levied to protect the domestic industry from foreign competition.[23] The rationale for imposing customs duty is couched in the need to protect domestic industry – typically infant industries – so that it is sheltered from aggressive foreign competition that may occur even before domestic units have had adequate time to catch up with that competition.[24]

[¶ 18.] As is obvious, by imposing a tariff on an import item, the price of such a product is raised which, in turn reduces de, and for the same as far as the developing countries are concerned, by imposing an import duty, which is generally on the high side, they aim at achieving certain objectives, *firstly*, discouraging imports, thereby providing protection to the domestic industry, on the one hand and improving their balance of payments position, and *secondly*, raising revenues. The aim of the developed countries in imposing import tariffs is generally to provide protection to specified domestic industries.[25]

[¶ 19.] The epidemic of farmer suicides, the increased frequency of extreme weather events due to climate change, and a continuing crisis of malnutrition in an urbanizing population have led Khindira's politicians to put the livelihoods of farmers and the food security needs of the population at the forefront of the country's agricultural policies.[26] In practice, the Committee rarely changes the tariffs of most agricultural products; instead, it focuses its attention on the most important agricultural products for Khindira's farmers, including rice, wheat, and coarse grains.[27]

[¶ 20.] Thus, the intention of the Khindiran government was a bona fide one in introducing the system of flexible tariff administration. They wanted to safeguard their domestic farmers from some of the volatility of international prices and to prevent them from committing suicides. Giving protection to domestic farmers against the competition of the exports was one

[23] ET Online, *Customs Duty*, ECONOMIC TIMES, Feb. 27, 2015, https://economictimes.indiatimes.com/c/customs-duty/articleshow/46394349.cms.
[24] Parthasarathi Shome, *Customs in International Relations*, 7 WORLD CUSTOMS JOURNAL, 55, 56, http://worldcustomsjournal.org/Archives/Volume%207%2C%20Number%201%20(Mar%202013)/07%20Shome.pdf.
[25] CS NAGPAL & AC MITTAL, INTERNATIONAL TRADE VERSUS LESS DEVELOPED COUNTRIES 296-297 (1993).
[26] *Supra* Note 7, ¶ 4.
[27] *Supra* Note 7, ¶ 7.

such measure to enhance their incomes and to decrease the rate of suicides in their country.

[¶ 21.] But at the same time, the interests of the exporters of other nations are also protected. Section 2 of the Act has in lucid terms imposed the obligation that the Committee will exercise its discretion "within the framework of Khindira's international obligations".[28] The rates set by the Committee 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.

1.3. THAT BEING BASED ON EXOGENOUS FACTORS FLEXIBLE TARIFF ADMINISTRATION IS A MEASURE WHICH IMPOSES ORDINARY CUSTOMS DUTY

[¶ 22.] It is submitted that Tariff rates set under the "Flexible tariff Administration" are expressed in the form of "ad valorem duties".[29] Contextual support for interpreting the term "ordinary customs duties" also appears in Annex 5 to the Agreement on Agriculture. Annex 5, read together with the Attachment to Annex 5 (*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*), contemplates the calculation of "tariff equivalents" in a way that would result in ordinary customs duties "expressed as ad valorem or specific rates". It was found that there is no obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls "exogenous factors". Rather, all that is required is that "ordinary customs duties" be expressed in the form of "ad valorem or specific rates".[30]

[¶ 23.] It is thus submitted that "Tariff rates" set under the "Flexible Tariff Administration" depend upon the Exogenous factors. It has been observed by the Appellate Body in Chile – Price Band System[31] that Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their applied tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are exogenous factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such exogenous factors are not ordinary customs duties. This would imply that such duties be prohibited under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column of a Member's Schedule. No legal basis was seen for such a conclusion by the Appellate Body and thus, the finding of the

[28] *Supra* Note 7, ¶ 6.
[29] *Supra* Note 20, Q. 19.
[30] *Supra* Note 2, ¶ 277.
[31] *Id.* ¶ 273.

Panel was overruled.

[¶ 24.] It is submitted that the under the Khindira's "Flexible Tariff Administration", the Committee while setting the tariff rates 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.[32] Thus, in the light of the Appellate Body Report, it is submitted that tariffs set by the Committee are based on the "exogenous" factors and can validly be termed as "Ordinary Custom Duties".

[¶ 25.] Thus, it is submitted that Khindira has not violated Article 4.2 of the Agreement on Agriculture because no variable duties were imposed within the meaning of footnote 1 of Article 4.2. Variability is inherent in a measure under a scheme or formula and the rates set under such measure changes automatically and continuously. But no such formula is laid down under the measure of "Flexible Tariff Administration". The prima facie reason behind introducing the "Flexible Tariff Administration" was to protect and safeguard the domestic farmers and to prevent them from committing suicides. It is only when the farmer suicides started happening in the state of Khindira, the government was obligated to take effective measures to protect the lives of farmers. But at the same time, the interests of the exporters are also well preserved by making the system of "Flexible Tariff Administration", Transparent and Predictable. The Committee set the tariff rates after taking into consideration a number of factors and the information about those factors are in the public domain itself which is easily accessible by the exporters at any time.

2. THAT 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.

[¶ 26.] It is submitted that on 1 June 2017, Khindira submitted a notification to the committee on agriculture declaring that it was at the risk of exceeding AMS limit with respect to wheat.[33] A mere slight delay in submitting notifications cannot deprive it of the benefit of the Bali Decision on Public Stockholding for Food Security Purposes[34]. Subsidies that are justified on grounds of poverty alleviation must have a time frame and be effectively targeted

[32] *Supra* Note 7, ¶ 6.
[33] *Supra* Note 7, ¶ 12.
[34] 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].

to the intended beneficiaries.[35] It is further submitted that Bali decision must be interpreted in the light of its object and purpose. Khindira is under no compulsion to use only Khindiran Lira for the calculation of current AMS.

2.1. THAT KHINDIRA SHOULD BE GIVEN THE BENEFIT OF THE BALI DECISION

2.1.1. That slight delay in submitting the notification cannot deprive Khindira of the benefit of Bali Decision

[¶ 27.] It is submitted that government of Khindira on 1 June 2017 notified WTO Committee on Agriculture[36] in accordance with the notification requirements under the Bali Decision. It is further submitted that its notification pattern compares favourably with that of many other members. It is conceded that the government of Khindira has exceeded the *de minimis* levels permitted by the WTO Agreement on Agriculture for the marketing years 2013-14 and 2014-15 in respect of wheat but according to the Bali Ministerial Decision, which contained the 'peace clause' or the 'due restraint clause', no action can be brought against the member state for breaching the de minimis levels till a permanent solution is reached for public stockholding for food security purposes. The Bali decision on the Peace Clause allows the interim solution to continue until a permanent solution is agreed upon within four years until the 11th Ministerial Conference in 2017.[37]

[¶ 28.] On 7 December 2013 WTO members in ninth Ministerial Conference adopted Ministerial Decision on Public Stockholding for Food Security Purposes to avail the benefit of not being challenged against the provisions of Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops.[38]

[¶ 29.] According to this decision if any developing member is seeking benefit from Bali decision then it must comply with the certain conditions, *firstly*, have notified the Committee on Agriculture that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support (AMS) limits (the Member's Bound Total AMS or the de minimis level) as result of its programmes mentioned above, *secondly*, have fulfilled and continue to fulfil its domestic support notification requirements under the AoA in accordance with

[35] KS RAMACHANDRAN, SUBSIDIES A BOTTOMLESS BUCKET 116 (2005).
[36] *Supra* Note 7, ¶ 12.
[37] Martha Getachew Bekele, *Offer of a Truce: The Peace Clause Agreement on Food Stockholding in Bali*, 7 CUTS INTERNATIONAL, 1, 5 (2014), http://www.cuts-geneva.org/pdf/BP-2014-7-Peace%20Clause.pdf.
[38] Bali Decision, ¶¶ 1-2.

document G/AG/2 of 30 June 1995[39], as specified in the Annex, *thirdly*, have provided, and continue to provide on an annual basis, additional information by completing the template contained in the Annex, for each public stockholding programme that it maintains for food security purposes, and *lastly*, provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available, as well as any information updating or correcting any information earlier submitted.[40]

[¶ 30.] Government of Khindira fulfilled the first condition by notifying the WTO Committee on Agriculture on 1 June 2017[41] and declaring that it is at the risk of exceeding its AMS limits with respect to wheat. Along with the said notification, the government of Khindira also submitted additional information in accordance with the template attached to the Bali Decision while referring to its notification on 16 April 2016.[42] But mere a slight delay in submitting the said notification and template should not deprive Khindira of the benefit of Bali Decision as ultimately the objective of the Bali Decision was to avoid any legal challenge against any developing country in respect of food security till some permanent solution is reached by the member states.

[¶ 31.] A paper by International Food Policy Research Institute (IFPRI)[43] stated that since a marketing year's actual expenditures are usually not known until well after the end of the year, some delays in the filing of formal notifications were anticipated.

[¶ 32.] The notification record of developing countries on domestic support is highly incomplete, with about half of developing countries not having notified at all or notified simply that they do not have domestic support programmes. As regards those developing countries that have notified domestic support, substantial delays are common for all of them. The non-submission of notifications and the long delays in the submission by those developing countries that choose to do so, is a clear indication of the technical difficulties that some of them face when compiling their notification.[44]

[39] WTO Committee on Agriculture, Notification Requirements and Formats, June 8, 1995, G/AG/2.
[40] Bali Decision, ¶ 3.
[41] *Supra* Note 7, ¶ 12.
[42] *Supra* Note 7, ¶ 12.
[43] Conference Draft Paper, International Food Policy Research Institute (IFPRI), An Overview of WTO Domestic Support Notifications (Mar. 14-15, 2008), https://www.ifpri.org/file/35033/download.
[44] 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, 18 (2014), http://www.fao.org/3/a-i3819e.pdf.

[¶ 33.] According to OECD and FAO the crop marketing year of rice commences 1 January for all countries[45] except Japan, Australia, United States, European Union, Mexico and Korea. The document does not comment on the marketing year of wheat for other countries. The differences in marketing years of different countries is because of the reason that the sowing and harvesting differs according to the crop and the marketing year.

[¶ 34.] The Kingdom of Sutan considers that Khindira is not in compliance with its notification obligations under the Agreement on Agriculture, since its last notification, of 16 April 2016, does not cover domestic support provided after July 2015, the end of the 2014-2015 marketing year.[46] This is evident of the fact that in Khindira the marketing year ends in July and since, the notification requirements under the WTO do not contemplate any half-yearly data, the information after July 2015 could not be submitted on 16 April 2016.

[¶ 35.] It is, thus, submitted that there has not been delay in the actual sense and delay, if there is any, should not deny Khindira it's right under the Bali Decision.

2.1.2. That Bali Decision should be interpreted in the light of its object and purpose

[¶ 36.] It is submitted that the object of the Bali Decision was not to secure notifications from the defaulting members but to safeguard any developing member from a legal challenge. Moreover, the Government of Khindira did not have any mala fide intention and if, in fact, it had any mala fide intention, then it would not have submitted the notification at all. The genuine concern of the government of Khindira is voiced through the Parliamentary Debates on Bill 513 where the main objective was to safeguard the interests of the farmers on the one hand and to make food affordable for the urban poor on the other.[47]

[¶ 37.] The Bali Decision states that in the interim, until a permanent solution is found, and provided that the conditions set out below are met, Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision, that are consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA

[45] OECD-FAO AGRICULTURAL OUTLOOK 2007-16 (2007).
[46] *Supra* Note 7, ¶ 14.
[47] *Supra* Note 7, ¶¶ 1-3.

when the developing Member complies with the terms of this Decision.[48]

[¶ 38.] For the interpretation of the Bali Decision, Vienna Convention on Law of Treaties[49] has to be referred. Article 31.1 of the Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, the object and purpose should not be only resorted to whenever there is an ambiguity in the provisions, it should be resorted to whenever a provision has to be interpreted. This tool of interpretation has also been used by the WTO Appellate Body while interpreting Article 4.2 of the Agreement on Agriculture.[50]

[¶ 39.] In its first report the Appellate Body[51] identified what it described as 'a fundamental rule of treaty interpretation whose most authoritative and succinct expression' figures in Article 31 (1) of the Vienna Convention, which provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[¶ 40.] Characterizing it as the 'general rule of interpretation' (the title of Article 31 in the Vienna Convention), the Appellate Body specifies that this rule 'has attained the status of a rule of customary or general international law', and that 'As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3.2 of the DSU, to apply.'[52]

[¶ 41.] Thus, from the outset, the Appellate Body adopted a clear stand and a comprehensible (albeit obvious) methodology on interpretation. this was particularly important, as interpretation lies at the heart and constitutes the bulk of the work of the Appellate Body, given the limitation of its mandate to reviewing 'issues of law and legal interpretations' (Article 17.5 of the DSU).[53]

[¶ 42.] Paragraph 1 of the Bali Decision states that Members agree to put in place an interim mechanism as set out below, and to negotiate on an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial

[48] Bali Decision, ¶ 2.
[49] Vienna Convention on Law of Treaties, 1155 UNTS 331.
[50] Appellate Body Report, *Chile – Price Band System*, ¶¶ 204-217.
[51] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* pp. 16-17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Appellate Body Report, US – Gasoline].
[52] Appellate Body Report, *United States – Gasoline,* pp. 16-17.
[53] WTO, THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 457 (Giorgio Sacerdoti et al., 2006).

Conference.

[¶ 43.] In the past seven years, agricultural prices have been both high and volatile and while the rise in food prices has affected almost all agricultural products, the price volatility has been confined to mainly grains and some oil seeds that constitute the major food products of concern when discussing food security. The under-developed nature of agriculture in most developing countries has made the sector vulnerable to price fluctuations with particularly dire consequences on the poor and other vulnerable consumers who devote a high portion of their incomes to the purchase of food. For many developing countries, therefore, stock adjustments serve as a buffer for both their producers and consumers against the vagaries of price volatility especially in basic food products such as grains.[54]

[¶ 44.] The G33 had initially proposed in November 2012 an amendment to footnote 5 of paragraph 3 of Annex 2 (see Text Box 1) to the effect that acquisition of stocks of foodstuffs by developing country Members with objective of supporting low-income or resource-poor producers shall not be required to be accounted for in the AMS. In a non-paper submitted by G33 in October 2013, three considerations/ options were outlined.

[¶ 45.] *Firstly*, Redefining the external reference price in the context of footnote 5. Under this option the G33 argued that for purposes of footnote 5, the "external reference price" shall be understood to mean differently from or be less prescriptive than the specified "fixed external reference price" in the general calculation of AMS (under paragraphs 8 and 9 of Annex 3) which is based on the 1986-88 average. The proposed definition of the external reference price for the purposes of footnote 5 was either (a) a three-year average based on the preceding five-year period, excluding the highest or the lowest entry or (b) last year's average producer/farm gate price in the 13 largest suppliers of a foodstuff in the country.

[¶ 46.] *Secondly*, Defining excessive rates of inflation. The justification for this was based on Article 18.4 of the AoA which requires WTO Members to "give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments". The essence of the G33 proposal on that was to compare the actual rate of inflation in a country with a "comparator normal" level of inflation and adjust administrative prices based on the gap between actual and normal levels of inflation.

[¶ 47.] *Thirdly*, Peace Clause. Under this option, the acquisition of stocks of foodstuffs by

[54] ARCHANA JATKAR & CHENAI MUKUMBA, UNPACKING THE BALI PACKAGE: A SNAPSHOT OF THE BALI MINISTERIAL DECISIONS OF THE WTO MEMBERS 8 (2014).

developing country Members and its subsequent release at administered prices, undertaken with the objective of meeting food requirements of urban and rural poor in developing countries would be exempt from challenges by other Members, and that exemption would remain valid for a period till a final mechanism is established.[55]

[¶ 48.] The third option has a direct bearing on the case at hand. It was as a result of this that the Bali Decision on Public Stockholding for Food Security Purposes was enacted and hence, it was not compliance with the notification requirements that was integral and essential for the Bali Decision but the absence of any legal challenge against a developing country, when it acts for the purposes aforementioned.

2.1.3. That Notification requirements are not to be followed in a strict manner

[¶ 49.] The Committee on Agriculture (CoA) adopted a document on 8 June 1995 titled Notification Requirements and Formats wherein the Committee has stated that for all Members with base and annual commitment levels shown in Section I of Part IV of their Schedule, a notification should be made no later than 90 days following the end of the calendar (or, marketing, fiscal, etc.) year in question. Where the notification submitted within the 90-day period is provisional, the final notification should be submitted no later than 120 days following the end of the year. A summary table (Table DS:1) and supporting tables (Supporting Tables DS:1 to DS:9) as attached should be submitted.

[¶ 50.] It has further contemplated in respect of the Members with no base or annual commitment levels shown in Section I of Part IV of their Schedule 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.[56]

[¶ 51.] Thus, it is evident from the bare language of the above-listed notification that the notification requirements in relation to the countries with base or annual commitment levels are far more stringent as compared to the members with no such commitments. The members with no such commitment can even get an exemption for submission of the notification.

[55] *Supra* Note 44 at 10-11.
[56] *Supra* Note 39, p. 11.

2.2. THAT KHINDIRA IS ENTITLED TO USE US$ IN ITS SUPPORTING TABLES INSTEAD OF DOMESTIC CURRENCY

[¶ 52.] It is submitted that though Khindira expressed the external reference price in Khindiran Lira when it submitted its Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules at the conclusion of the Uruguay Round, but still it has the right to use US$ while submitting the supporting tables. In this regard, 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, (i) 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 (ii) 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.[57]

[¶ 53.] The Appellate Body in Korea-Various Measures on Beef[58] 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, 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'.

[¶ 54.] Thus, it is only the provisions of annexure 3 of the WTO AoA which are binding and not the constituent Data and methodology used while submitting the draft schedules.

[57] Agreement on Agriculture, Article 1 (a).
[58] 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].

Annexure 3 nowhere makes it mandatory to use the domestic currency in place of US$ or to use only that currency which was used by the country while submitting the draft schedule. The constituent data and methodology is only to be "taken into account" or "considered" and the supporting tables submitted subsequently need not necessarily be based on such methodology used in the draft schedules.

[¶ 55.] Further, Mr. Sachin Kumar Sharma, member at the Centre for WTO Studies (CWS), Indian Institute of Foreign Trade (IIFT), New Delhi, has stated that in the domestic support notifications to the WTO, many member countries have notified their domestic support in US$ rather than their local currency. Under the AoA, a member country can make notification in any other currency. The benefit of using US$ in comparison to local currency is that depreciation of local currency vis-a-vis US$ is considered while calculating product specific support to agriculture sector and it provides the much-needed space for many developing countries in implementing price support to its agriculture sector….Allowing member countries to use the currency of their choice for the domestic support notification would give few countries flexibility to some extent to implement food security policies without exceeding their commitment level.[59]

[¶ 56.] Moreover, from the year 1986-88 (the base period for determining the external reference price) to the year 2014-15, the exchange rate has risen up to great heights from merely 12 Khindiran Lira equating one dollar to forty-seven Khindiran Lira equating one dollar. Thus, inflation has a great bearing on the markets and the amount of inflation is evident from the exchange rate. The ultimate authority, if any, rests with the Committee on Agriculture to decide the influence of excessive rates of inflation in accordance with Article 18.4 of the Agreement on Agriculture concerning the review process.

[¶ 57.] In a document by the Food and Agricultural Organisation of the United Nations, it has concluded that some developing members have opted to notify their AMS in US$, in an apparent effort to address the effect of inflation[60], for e.g., India, Pakistan and Turkey. All these three countries had used their local or domestic currency while submitting the draft schedules under part IV of the Member's schedule but after that, they shifted to submitting the supporting tables in US$.

[59] SACHIN KUMAR SHARMA, THE WTO AND FOOD SECURITY: IMPLICATIONS FOR DEVELOPING COUNTRIES 215 (2016).
[60] *Supra* Note 44 at 12.

[¶ 58.] Lars Brink, Associated Faculty at the Global Issues Initiative (GII) of the Institute for Society, Culture and Environment (ISCE) Virginia Polytechnic Institute and State University has stated that India's external reference price in all years' notifications is a USD/tonne price derived by dividing the 1986-88 INR/tonne FERP in AGST by the 1986-88 INR/USD exchange rate. The value of the INR against the USD has dropped greatly since 1986-88. The derived USD/tonne reference price used in the current year is thus much higher than if the 1986-88INR/tonne FERP had been divided by the current year INR/USD exchange rate. The exchange rate was about 13 INR/USD in 1986-88 and about 60 INR/USD in 2013.[61]

[¶ 59.] It is submitted that due to the excessive inflation, the Khindiran Government is bound to use US$ in place of Khindiran Lira. Moreover, the slight delay in submitting the aforesaid notification cannot deprive it of the benefit of Bali Decision which is to be interpreted in the light of object and purpose. Moreover, it's notification pattern is consistent with that of many other developing member countries.

3. 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.

[¶ 60.] It is submitted that giving away export subsidies by Khindira is not in the contravention of the Agreement on Agriculture or the Nairobi Decision on Export Competition[62]. Khindira has to give export subsidies as a result of the accumulation of the stocks and provision for subsidies is the last resort.[63] The accumulation of stocks is partly due to the lack of administrative capacity and partly due to the lack of awareness among the general public.[64] Export policies include those that either promote exports (through instruments like subsidies and marketing arrangement that exportable of a country more competitive) or those that constrain exports.[65] Thus, it is submitted that export subsidies are being granted as the last resort and due to circumstances beyond the control of the Government of Khindira. Moreover, it has not contravened any provision of the Agreement on Agriculture or the Nairobi Decision on Export Competition and it has complied with them as far as possible because of the

[61] 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, 35 (Apr. 13, 2014), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.659.6733&rep=rep1&type=pdf.
[62] Ministerial Conference Decision on Export Competition adopted at Nairobi, Dec. 21, 2015, WT/MIN(15)/45, WT/L/980 [hereinafter Nairobi Decision].
[63] *Supra* Note 7, ¶ 18.
[64] *Supra* Note 7, ¶ 17.
[65] ASHOK GULATI & SUDHA NARAYANAN, THE SUBSIDY SYNDROME IN INDIAN AGRICULTURE 8 (2003).

following reasons:

3.1. THAT KHINDIRA HAS NOT CONTRAVENED ANY PROVISION OF THE AOA AND HAS GONE AS FAR AS IT COULD TO IMPLEMENT THE NAIROBI DECISION

[¶ 61.] It is submitted that any provision of the Agreement on Agriculture has not been contravened rather the respondent has taken full care to comply with the provisions of Agreement on Agriculture. Export subsidies refer to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement.[66]

[¶ 62.] Khindira is not the only country which grants export subsidies. Countries with export subsidy entitlements before the tenth WTO ministerial meeting in Nairobi include Uruguay, Brazil, Canada, the European Union, Israel, Norway, Australia, Iceland, South Africa, Switzerland, Mexico, the United States, Indonesia, Colombia, Panama, Turkey, and Venezuela,[67] and they continue to do so even now.

[¶ 63.] The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.[68] Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.[69] Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.[70]

[¶ 64.] Article 9.1 of the Agreement enumerates the meaning and categories of export subsidies. Article 9.2 of the Agreement prohibits any state to provide export subsidies in excess of budgetary outlay commitments or the quantity reduction commitments as provided under the Member's Schedule. Khindira's schedule is given as Annexure 3 in the Moot Problem.[71] Further, Article 9.2 also deals with the situations if the state exceeds the commitment levels in

[66] Agreement on Agriculture, Article 1 (e).
[67] THIRD WORLD NETWORK, AMENDING AOA EXPORT SUBSIDY SCHEDULES RAISE LEGAL, SYSTEMIC ISSUES http://www.twn.my/title2/wto.info/2016/ti160610.htm (last visited Dec. 27, 2017).
[68] *Supra* Note 66, Art. 3.1.
[69] *Id.* Art. 3.2.
[70] *Id.* Art. 8.
[71] *Supra* Note 7, p. 10.

any one year of the implementation period.[72]

[¶ 65.] Thus, Article 9.2 exclusively deals with the implementation period and not to situations after that. There is nothing in Article 9.2 to suggest that it applies beyond the implementation period. The document relevant to cover the situation after the completion of the period of 10 years is the 'July Package' of 2004. Thereafter, Nairobi Decision on Export Competition in 2015 deals with the issue of export subsidy. But it will be proved through arguments 3.2 and 3.3 of the memorial that Nairobi Decision is not binding in nature. It is, thus, submitted that this is not a case of exceeding the commitment levels or of the implementation period.

[¶ 66.] Domestic and export subsidies are almost trivial by comparison, contributing only 2 percent, respectively, of the global gains from agricultural reform.[73] A jurist has noted that removing export subsidies or domestic support alone appears not to enhance world agricultural trade. When only agricultural export subsidies worldwide are eliminated, world agricultural trade falls 0.7 percent in value and 1.8 percent in volume.[74] It is because of the fact that eliminating all the export subsidies would take away the incentive given to the exporters and there will be decline in the international agricultural trade.

[¶ 67.] The Annex to the Nairobi Decision states that consistent with the Bali Ministerial Declaration on Export Competition[75] and in addition to annual notifications requirements under the relevant provisions of the Agreement on Agriculture and related decisions, Members shall continue to provide information on export subsidies within the context of an annual examination process. Each year, WTO members are required to notify the WTO Committee on Agriculture concerning the volume of their subsidized exports, their expenditure on export subsidies, and the volume of their unsubsidized exports, by commodity, as specified in their country schedules.[76]

[¶ 68.] Moreover, Nairobi Decision states that developing country Members shall eliminate

[72] *Supra* Note 66, Art. 9.2 (b).
[73] GARY P. SAMPSON & W. BRADNEE CHAMBERS, DEVELOPING COUNTRIES AND THE WTO-POLICY APPROACHES 27 (1st ed., 2008).
[74] TERRY ROE, AGAPI SOMWARU AND XINSHEN DIAO, A GLOBAL ANALYSIS OF AGRICULTURAL REFORM IN WTO MEMBER COUNTRIES, https://www.gtap.agecon.purdue.edu/resources/download/452.pdf (last visited Dec. 30, 2017).
[75] Ministerial Conference Declaration on Export Competition adopted at Bali, Dec. 7, 2013, WT/MIN(13)/40 and WT/L/915 [hereinafter Bali declaration].
[76] Susan E. Leetmaa and Karen Z. Ackerman, *Export Subsidy Commitments: Few are Binding Yet, But Some Members Try to Evade Them*, WRS-98-4 INTERNATIONAL AGRICULTURE AND TRADE REPORTS 21, 21 (December 1998).

their export subsidy entitlements by the end of 2018.[77] Developing country Members shall continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture until the end of 2023, i.e. five years after the end-date for elimination of all forms of export subsidies. Least developed countries and net food-importing developing countries listed in G/AG/5/Rev.10 shall continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture until the end of 2030.[78]

[¶ 69.] It is clear from the bare perusal of the above provisions that it is only article 9.4 of the Agreement on Agriculture whose application has been extended. Moreover, developing countries have been given time till the end of 2018 to eliminate all kinds of export subsidies in view of Article 7 of the Nairobi Decision on Export Competition.

[¶ 70.] The complainant has not pleaded even once that Khindira has exceeded its annual commitments nor have they adduced any evidence in this regard. The respondent maintains its stance that Nairobi Decision on Export Competition is a mere political document and is not a legally binding document. And because of the reason that Article 9 is applicable only during the implementation period and not beyond that unless specifically applied so, Khindira cannot be held liable.

3.2. THAT THE NAIROBI DECISION ON EXPORT COMPETITION IS A MERE POLITICAL DOCUMENT WITHOUT ANY LEGAL BINDING

[¶ 71.] It is submitted that the Ministerial Decisions passed by the Ministerial Conference of the WTO constituted under Article IV of the Marrakesh Agreement[79] constituting the WTO are not legally binding and are mere political documents. This is not the first time when an argument like this is being raised.

[¶ 72.] In regard to the Doha Declaration, the United States has maintained that Doha was a political declaration with no legal authority. The United States Trade Representative's Fact Sheet summarizing the results of the Doha meeting refers to the Doha Declaration on TRIPS and Public Health as a political declaration.[80] A "declaration" has no specific legal status in the framework of WTO law, it is not strictly an authoritative interpretation in terms of Article IX.2

[77] Nairobi Decision, ¶ 7.
[78] Id. ¶ 8.
[79] Marrakesh Agreement Establishing the WTO, 1867 UNTS 14.
[80] James Thuo Gathii, *The legal status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties*, 15.2 HARVARD JOURNAL OF LAW & TECHNOLOGY 291, 315 (2002).

of the Marrakesh Agreement establishing the WTO.[81]

[¶ 73.] But declarations are certainly different than decisions. Only those Ministerial Decisions which are taken in furtherance of Article IX:2 of the Marrakesh Agreement are termed to be binding in nature and having a legal force. Moreover, Mr. Van den Bossche, a former WTO Appellate Body Member, has written in his book that, "Ministerial Decisions and Declarations do not generate specific rights and obligations for WTO members which can be enforced through WTO dispute settlement."[82]

[¶ 74.] Mr. Rodrigo Bardoneschi, Diplomat and Legal Advisor at the WTO Dispute Settlement Department of the Ministry of Foreign Affairs of Argentina, while dealing with the Nairobi Decision on Export Competition has stated that the lack of legal enforcement of these disciplines has concrete commercial implications. Some export subsidies have actually increased.[83] The doubt as to whether ministerial decisions are legally binding is further clarified by the remarks of Peter Jan Kuijper, where he states that in most international organisations such broad decision-making powers of a plenary organ do not normally produce binding decisions.[84] For example, United Nations General Assembly (UNGA) decisions do not necessarily create law.[85]

[¶ 75.] Mary Footer identifies soft law instruments in the WTO as the resolutions adopted by the organisation's institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman's statements and so on.[86]

[¶ 76.] They may not be legally binding in the "hard law" sense in that they do not create treaty-based State obligations such that any non-compliance therewith could theoretically be redressed or remedied through recourse to some sort of institutionalized dispute settlement

[81] Carlos M. Correa, *Implications of the Doha Declaration on the Trips Agreement and Public Health*, ESSENTIAL MEDICINES AND HEALTH PRODUCTS INFORMATION PORTAL: A WORLD HEALTH ORGANISATION, http://apps.who.int/medicinedocs/en/d/Js2301e/14.html (last visited Dec. 30, 2017).
[82] PETER VAN DEN BOSSCHE AND WERNER ZDOUC, THE LAW AND POLICY OF WORLD TRADE ORGANIZATION 51 (3rd ed. 2013) (ebook).
[83] RODRIGO BARDONESCHI, ACCELERATING THE ELIMINATION OF EXPORT SUBSIDIES IN AGRICULTURE, https://www.ictsd.org/opinion/accelerating-the-elimination-of-export-subsidies-in-agriculture (last visited Jan. 2, 2018).
[84] MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 43 (2006) (ebook).
[85] *Supra* Note 80.
[86] DIANE DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW (1st ed. 2015) (ebook).

mechanism. Within the WTO framework, only those agreements that are covered by the Dispute Settlement Understanding (DSU) may be considered as containing "hard law" treaty obligations on the part of WTO Members. [87]

[¶ 77.] Thus, the statements of above jurists clearly and aptly clarify the situation that Ministerial Decisions do not create binding law in the hard law sense and are merely political documents and then, it is on the Member states whether to implement the Ministerial Decision or not.

[¶ 78.] In US – Clove Cigarettes,[88] one of the major issues before the panel was whether paragraph 2 of Article 5 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns[89] is binding. The main issue related to the interpretation of the term 'reasonable interval' occurring in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade[90] (hereinafter TBT Agreement). Article 5.2 of the Doha Ministerial Decision provides with the interpretation of the term 'reasonable interval' as one being normally not less than six months.

[¶ 79.] The panel without commenting upon the legal status of Article 5.2 of the Doha Ministerial Decision held that it would consider Article 5.2 while interpreting the term 'reasonable interval'. But the Appellate Body[91] clarified the legal status of the Doha Ministerial Decision to some extent. The Appellate Body[92] found that Multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement have a pervasive legal effect. Such interpretations are binding on all Members. As we see it, the broad legal effect of these interpretations is precisely the reason why Article IX:2 subjects the adoption of such interpretations to clearly articulated and strict decision-making procedures.

[¶ 80.] Noting the pervasive legal effect of authoritative interpretations under Article IX:2 of the WTO Agreement, which binds all Members, the Appellate Body emphasised the 'clearly

[87] South Centre, *Ministerial-Level Meetings and Their Outcomes as Legal Instruments*, SOUTH CENTRE ANALYTICAL NOTE, June 2003, https://www.southcentre.int/wp-content/uploads/2013/07/AN_IG2_Ministerial-level-meetings_EN.pdf.
[88] Panel Report, *United States - Measure affecting the Production and Sale of Clove Cigarettes*, ¶¶ 7.575-7.576, WT/DS406/R (Sept. 2, 2011) [hereinafter Panel Report, US- Clove Cigarettes].
[89] Ministerial Conference Decision on Implementation-Related Issues and Concerns adopted at Doha, Nov. 14, 2001, WT/MIN(01)/17 [hereinafter Doha Ministerial Decision].
[90] Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 UNTS 120.
[91] Appellate Body Report, *US- Measure affecting the Production and Sale of Clove Cigarettes*, ¶¶ 250, 256, 268, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter Appellate Body Report, US- Clove Cigarettes].
[92] Appellate Body Report, *US- Clove Cigarettes*, ¶ 250.

articulated and strict decision-making procedures' to which Article IX:2 subjects such interpretations.[93] Meaning thereby, if any decision of the Ministerial Conference is pursuant to Article IX:2 of the Marrakesh Agreement and not in pursuance of Article IX:1, then in such cases it might be considered to be binding.

[¶ 81.] In EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)[94], the Appellate Body opined that multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are "meant to clarify the meaning of existing obligations, not to modify their content".

[¶ 82.] The Appellate Body enunciated the two requirements of an interpretation to fall within the scope of Article IX:2, *firstly*, a decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members and *secondly*, such interpretations shall be taken on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement.[95] Consequently, the Appellate Body held that paragraph 5.2 of the Doha Ministerial Decision does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the WTO Agreement[96], as it does not fulfil the second condition.

[¶ 83.] The Doha Ministerial Decision was passed having regard to Article IX of the Marrakesh Agreement. Even then, the Panel and the Appellate Body were concerned only with Article IX:2 because otherwise the Decision would not have any binding force. The Nairobi Decision starts with the words *"Having regard to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization"*, which means that the Decision was not made pursuant to Article IX:2 and thus, it does not have any binding legal effect.

[¶ 84.] The Ministerial Conference shall take decisions in accordance with the decision-making provisions of the WTO Agreement, in particular Article IX thereof entitled "Decision-Making".[97] Paragraph 1 of Article IX Entitled Decision-Making of the Marrakesh Agreement states that the decisions of the Ministerial Conference…shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade

[93] TRACEY EPPS AND MICHAEL J. TREBILCOCK, RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 143 (2013) (ebook).
[94] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 21.5 – Ecuador II) / (Article 21.5 – US)*, ¶ 383. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (Nov. 26, 2008).
[95] *Supra* Note 91, ¶ 251.
[96] *Id.* ¶ 256.
[97] Rule 28, Rules of Procedure for Sessions of the Ministerial Conference, WT/L/161 (25 July 1996).

Agreements.

[¶ 85.] Thus, it is aptly clear that the ministerial decisions are not taken by a unanimous decision. Unlike the conventions and covenants, in which only those are bound who ratify or sign an instrument of accession to it, in ministerial decisions, all those members against the decision are also being made bound by it. This is the reason why the Ministerial Decisions passed in furtherance of Article IX:1 are not considered to be legally binding.

3.3. THAT THE NAIROBI DECISION ON EXPORT COMPETITION IS NOT A SUBSEQUENT AGREEMENT WITHIN THE MEANING OF ARTICLE 31 (3) (A) OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

[¶ 86.] It is submitted that Nairobi Decision on Export Competition is not a subsequent agreement in view of Article 31 (3) (a) of the Vienna Convention on Law of Treaties. The article 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. It is submitted that the Nairobi Decision on Export Competition is neither an interpretation of the Agreement on Agriculture or an application of any of the provisions of the Agreement on Agriculture.

[¶ 87.] The Panel in US – Clove Cigarettes,[98] found that paragraph 5.2 "*could"* be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of 'reasonable interval' in Article 2.12 of the TBT Agreement. The phrase used by the panel was 'could', which implies that the panel refrained from giving any definite finding.

[¶ 88.] The Appellate Body[99] held that based on the text of Article 31(3)(a) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if, *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. The Nairobi Decision on Export Competition was adopted on 19 December 2015, i.e., subsequent to the Agreement on Agriculture. But the Decision is neither an interpretation nor an application of the provisions of the Agreement. Thus, in the present case, though the first

[98] *Supra* Note 88, ¶¶ 7.575-7.576.
[99] *Supra* Note 91, ¶ 262.

condition is being fulfilled, but the second condition is far from being fulfilled and Nairobi Decision cannot be termed to be a subsequent agreement under the Vienna Convention on Law of Treaties.

[¶ 89.] Even if it were to be considered subsequent agreement under the Vienna Convention on Law of Treaties, even then, it would not become binding. It may at best be considered to be a source of interpretation. Even after considering it as a subsequent agreement of the parties within the meaning of Article 31(3) (a) of the VCLT, it does not add or diminish legal obligations of the WTO members. For the reason that provisions governing ministerial declarations and decisions does not address them as "legal instruments" and are not covered WTO agreements.[100] The International Law Commission (ILC) has stated that by considering subsequent agreement and subsequent practice according to articles 31 (3) (a) and (b) [where 31 (3) (b) deals with subsequent practice] of the Vienna Convention to be "objective evidence of the understanding of the Parties", the Commission conceived them as "authentic" means of interpretation.[101]

[¶ 90.] Sean D. Murphy, a member of the United Nations International Law Commission, states that when using subsequent conduct to interpret a treaty, the idea is that a particular treaty provision is ambiguous and requires interpretation; to that end, resort might be had to any subsequent conduct of the parties, as indicated by Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT).[102] In its commentaries on the Draft articles on the Law of Treaties, the ILC states that a subsequent agreement between the parties within the meaning of Article 31 (3) (a) must be read into the treaty for the purposes of its interpretation.[103] The Appellate Body in US – Clove Cigarettes "read the relevant agreement into the interpreted treaty" and did not use relevant agreement to replace or override the interpreted term or provisions.[104]

[¶ 91.] The International Court of Justice (ICJ)[105], the Iran-United States Claims Tribunal[106]

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[100] ADITYA SATPUTE, LEGAL STATUS OF MINISTERIAL DECLARATIONS AND DECISIONS: CAN THEY BE ENFORCED THROUGH WTO DISPUTE SETTLEMENT, https://tradelawanalyst.wordpress.com/2014/09/10/legal-status-of-ministerial-declarations-and-decisions-can-they-be-enforced-through-wto-dispute-settlement/ (last visited Dec. 20, 2017).

[101] Georg Nolte (Special Rapporteur), *First Rep. on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, ¶ 30, UN Doc. A/CN.4/660 (Mar. 19, 2013).

[102] SEAN D. MURPHY, THE RELEVANCE OF SUBSEQUENT AGREEMENT AND SUBSEQUENT PRACTICE FOR THE INTERPRETATION OF TREATIES 3 (Georg Nolte ed., 2013).

[103] *Supra* Note 91, ¶ 269.

[104] CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES 210 (2017) (ebook).

[105] Case concerning Kasikili/Sedudu Island (Botswana v. Namibia) [1999] ICJ Reports 1076.

[106] The United States of America (and others) and the Islamic Republic of Iran (and others), Award No. 108-A-16/582/591-FT, (1984) 5 Iran-USCTR 57.

and the WTO in its Appellate Body reports[107] have considered subsequent agreements and subsequent practice as a means of interpretation and nothing else. However, the Human Rights Committee and other Human Rights Bodies have not referred to subsequent agreements at all. Though the European Court of Human Rights (ECtHR)[108] seems to have referred to and used subsequent practice as a means of interpretation but the same is not true for Inter-American Court of Human Rights (IACtHR).[109]

[¶ 92.] It is, thus, submitted that the Nairobi Decision is not a subsequent agreement within the meaning of Article 31 (3) (a) of the Vienna Convention on the Law of Treaties and even if it were to be considered so, then also, it may at best serve as a mode of interpretation because there is only one way that the text of the agreement can be modified which is through amendment under Article X of the Marrakesh Agreement.

[¶ 93.] It is submitted that a political document like the Nairobi Decision need not be followed for lack of legal force and Article 9.2 of the AoA is not applicable to the present circumstances and this is an accepted principle of international law that if the states chose not to be bound by some covenant, it cannot be forced on them.

[107] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (Oct. 4, 1996) and Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R and WT/DS11/R (July 11, 1996); Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 259, WT/DS269/AB/R and WT/DS286/AB/R (Sept. 12, 2005) and Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R and WT/DS286/R (30 May 2005); Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 92-93, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R (June 5, 1998), and Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R and WT/DS68/R (Feb. 5, 1998); Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) and Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

[108] Lautsi and Others v. Italy, ¶ 61, App. No. 30814/06 (ECtHR, Mar. 18, 2011) and Herrmann v. Germany, ¶ 78, App. No. 9300/07 (ECtHR, June 26, 2012).

[109] *Supra* Note 101, ¶ 37-39.

REQUEST FOR FINDINGS

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

1. Khindira's system of Flexible Tariff Administration is consistent with Article 4.2 of the Agreement on Agriculture.

    1.1 Flexible Tariff Administration is a measure which does not impose variable import levy.

    1.2 Flexible Tariff Administration is a measure which is enacted to protect the domestic industry.

    1.3 Flexible Tariff Administration being based on exogenous factors is a measure which imposes ordinary customs duty.

2. 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.

    2.1 Khindira is eligible to avail the benefit of the Bali decision.

    2.2 Khindira is entitled to use US$ in its supporting tables instead of domestic currency.

3. 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.

    3.1 Khindira has not contravened any provision of the AOA and has gone as far as it could to implement the Nairobi decision.

    3.2 The Nairobi decision on export competition is a mere political document without any legal binding.

    3.3 The Nairobi decision on export competition is not a subsequent agreement within the meaning of article 31 (3) (a) of the Vienna Convention on the Law of Treaties.

All of which is respectfully affirmed and submitted,

Counsel for the Respondent, 150.