

TENTH GNLU INTERNATIONAL MOOT COURT COMPETITION 2018

IN THE WORLD TRADE ORGANIZATION PANEL



**KHINDIRA—MEASURES TAKE PURSUANT TO THE AGRICULTURAL
LIVELIHOODS AND FOOD SECURITY ACT**

WT/DSxxx

**KINGDOM OF SUTAN
(COMPLAINANT)**

v.

**KHINDIRA
(RESPONDENT)**

MEMORANDUM ON BEHALF OF COMPLAINANT

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LIST OF ABBREVIATIONS

AB	Appellate Body
Act	Agricultural Livelihoods and Food Security Act
AMS	Aggregate Measure of Support
Annex	Annexure
AoA	Agreement on Agriculture
Bali Decision	Ministerial Decision on Public Stockholding for Food Security Purposes
Committee	Committee for the Administration of Agricultural Tariffs
EC	European Committees
Flexible Tariff Administration	Section 2 of the Agricultural Livelihoods and Food Security Act
K₺	Khindiran Lira
LDC	Least Developed Country
Nairobi Decision	Ministerial Decision on Export Competition adopted at the Nairobi Ministerial on 19 December 2015
R.	Factual Record
Sutan	Kingdom of Sutan
U.S.	United States
USD	United States Dollar

WTO	World Trade Organization

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STATEMENT OF FACTS

The Kingdom of Sutan (“Sutan”) is a developing country and a founding member of the World Trade Organization (“WTO”). Sutan has significant export interests in rice, wheat, and coarse grains. Its farmers rely on the ability to export these products to nearby countries, and are highly vulnerable to changes in foreign agricultural trading policies. One of Sutan’s major trading partners is Khindira, another founding member of the WTO. Khindira also has strong export interests in rice, wheat, and coarse grains, and these products are staple foods for the country. Traditionally, Sutan has had an amicable trading relationship with Khindira, but recent changes in Khindira’s agricultural policies have disintegrated this relationship.

On September 27, 2012, Khindira enacted the Agricultural Livelihoods and Food Security Act (“Act”). The Act was designed to protect Khindira’s agricultural interests by giving a number of advantages to its domestic farmers and exporters. According to Khindira’s Minister of Agriculture, the purpose of the Act was to “shield [Khindira’s] farmers from some of the volatility of international prices” while providing subsidies to Khindirans that purchase domestic products. This purpose was achieved through two major provisions of the Act: Section 2’s Flexible Tariff Administration and Section 3’s price support system.

Section 2 of the Act created the “Flexible Tariff Administration,” which established a procedure for Khindira to modify its tariffs on foreign agricultural imports on a monthly basis. Under the Flexible Tariff Administration, the Committee for the Administration of Agricultural Tariffs (“Committee”) must meet on the 15th of each month to set the country’s tariffs for the following month. Although the provision does not establish a precise formula for resetting the tariff rates, the Committee is required to consider a number of factors, including price trends, planting decisions, harvest forecasts, demand estimates, and existing supplies. Any changes that the Committee makes automatically go into effect on the 1st of the next month. On average, the tariffs for rice, wheat, and coarse grains are modified every 1.2, 2.8, and 3.2 months respectively.

Section 3 of Act substantially increased Khindira’s price supports for domestic supplies of agricultural food staples. For the 2013–14 marketing year, Khindira raised its price supports for rice by 43% and wheat by 23%. Since these increases were above the 10% *de minimis* level, Khindira attempted to avail itself of the Ministerial Decision on Public Stockholding for Food Security Purposes (“Bali Decision”). However, Khindira’s notification had a number of flaws. Khindira’s April 16, 2016 notification did not include information of

price supports provided after July 2015, which was the end of the subsequent marketing year. Furthermore, Khindira's notification only indicated that it was in excess of its Aggregate Measurement of Support ("AMS") for wheat, not rice. Unlike its 2016 notification, Khindira's Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules were submitted in K£, not USD. If AMS is calculated in K£, Khindira is in excess of its AMS limits with respect to both rice and wheat for each of marketing years 2012–13, 2013–14, and 2014–15. Sutan sent comments to this effect shortly after Khindira submitted its notification.

In reply to the Sutan, Khindira merely stated that its notification record was similar to that of other WTO Members, and that it should not be deprived of the benefits of the Bali Decision based a delay in reporting its price supports after July 2015. Khindira did not make any attempt to argue that its late notification actually complied with the Bali Decision. Khindira also indicated that the inflation of its currency should be considered under Article 18.4 when determining its AMS.

Khindira's price supports for domestic farmers were so favorable that the country ultimately developed an excess supply of wheat and rice. In response to pressure from the country's Association of Rice Wholesalers, Khindira decided to enact export subsidies for rice, wheat, and coarse grains. Interpreting its obligations under the Ministerial Decision on Export Competition ("Nairobi Decision") lightly, Khindira submitted a draft schedule that was circulated by the WTO Secretariat on 27 June 2017 notifying the WTO of its continued use of export subsidies for rice. Within 5 days of releasing its revised schedule, Sutan formally objected.

Both the Act and the export subsidy have caused strife among Khindira's trading partners. Several Members have expressed frustration that the Flexible Tariff Administration makes the markets for agricultural exports unpredictable. Despite repeated inquiries to the WTO Committee on Agriculture, Khindira has failed to release the basis for determining its tariff rates. Additionally, multiple Members have complained that Khindira's price supports exceed the *de minimis* level. To resolve these concerns, Sutan voluntarily entered a bilateral working group with Khindira, but this attempt to negotiate proved unfruitful.

On September 27, 2017, Sutan submitted a request for the establishment of a panel to the WTO Dispute Settlement Body.

MEASURES AT ISSUE

- A. Whether Khindira's Flexible Tariff Administration Breached Article 4.2 of the Agreement on Agriculture.**

- B. Whether Khindira's Price Support for Rice and Wheat is Inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture.**

- C. Whether 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.**

SUMMARY OF PLEADINGS

A. Khindira's Flexible Tariff Administration Breached Article 4.2 of the Agreement on Agriculture.

Khindira's Flexible Tariff Administration violates Article 4.2 of the Agreement on Agriculture because it is either a variable import levy or a border measure similar to a variable import levy. Footnote 1 to Article 4.2 prohibits Members from enacting variable import levies. Variable import levies are tariffs on the importation of goods that have a tendency to fluctuate over time. To be a variable import levy, a border measure must satisfy two requirements: 1) it must be inherently variable and 2) it must possess additional features that undermine the purpose of Article 4. Khindira's Flexible Tariff Administration satisfies both of these standards. The Flexible Tariff Administration is inherently variable because it incorporates a scheme that causes Khindira's tariff rates to fluctuate automatically and continuously. The Committee has little discretion over the tariffs ultimately imposed because is required to consider a number of factors when setting the rates. Khindira tariffs are also subject to modification by the Committee every single month. Furthermore, the Flexible Tariff Administration undermines the purpose of Article 4 because it is nontransparent and unpredictable, limiting the country's trading partners' access to the Khindiran market.

Even if Khindira's Flexible Tariff Administration is not identical to a variable import levy, it is still a similar border measure prohibited by the catchall provision in footnote 1. A border measure is similar to a variable import levy if it is of the same nature and kind based on a comparative analysis. Here, the Flexible Tariff Administration possesses many of the characteristics of a variable import levy. It incorporates a scheme that causes the country's tariff rates on its major agricultural products to change with significant regularity. Although Khindira does release some of the factors that it considers in setting its tariff rates, it does not indicate the weight given to these factors or whether it ever considers additional factors. This lack of transparency and predictability has caused significant strife among the country's trading partners, who have continuously asked Khindira to clarify its decision-making process with no avail. For these reasons, the Flexible Tariff Administration is either a variable import levy or similar to a variable import levy, making it inconsistent with Article 4.2 of the Agreement on Agriculture.

B. Khindira's Price Support for Rice and Wheat is Inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture.

Khindira's price support with respect to both rice and wheat is inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture. On 16 April 2016, Khindira submitted a notification to the WTO Committee on Agriculture with its price support in USD for marketing years 2012–13, 2013–14, and 2014–15. When calculated in K£, Khindira's AMS for both rice and wheat exceeds the 10% *de minimis* increase over its commitment levels allowed under Article 6.4 for each of the marketing years at issue. K£ is the appropriate currency in which to calculate Khindira's AMS as Khindira's Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules was submitted in K£ at the conclusion of the Uruguay Round. Further, the inflation experienced by Khindira in the years between its post-Uruguay submission and its notification on 16 April 2016 does not rise to the level of "excessive" needed for it to be considered under Article 18.4.

Article 3.2 prohibits Members from providing support for their domestic products in excess of the commitment levels set out in Part IV of their schedules. Since Khindira's price support for both rice and wheat exceeds its commitment levels for each relevant market year by more than the 10% *de minimis* level when calculated in K£, Khindira's price support is inconsistent with Article 3.2. Similarly, Article 6.3 states that with respect to support reduction commitments, Members are in compliance when their Current Total AMS is less than the corresponding annual and final bound commitment levels. Khindira's Current Total AMS is in excess of its final bound commitment levels by more than the allowable 10% with respect to both rice and wheat for each relevant marketing year. Finally, Article 7.2(b) states that a Member's provision of domestic support must not exceed the Article 6.4 *de minimis* level when there is no Total AMS commitment in Part IV of a Member's Schedule. Since Khindira's Schedule contains no Total AMS and Khindira's price supports exceed the 10% level for rice and wheat for each of the marketing years at issue, Khindira's price support is inconsistent with Article 7.2(b).

Khindira seeks to avail itself of the benefits of the Bali Decision, which protects a developing Member's domestic support from challenge by another Member when appropriate notifications are made. However, Khindira only notified of overages with respect to wheat, not rice, and even for wheat has not fulfilled its notification requirements. Thus, Khindira is not entitled to benefit from the Bali Decision.

C. 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.

Khindira's export subsidies with respect to rice are inconsistent with Article 9.2 of the Agreement on Agriculture. Article 9.2 states that for each year of the implementation period, a Member's budgetary outlay commitment levels represent the maximum expenditure for export subsidies allowable in that year, and for quantity reduction commitments, the maximum quantity of agricultural products that can receive export subsidies in that year. Article 9.2(b)(iv) provides an additional limitation, stating that Member's budgetary outlays at the end of the implementation period cannot exceed 76% of the base period levels for developing countries. Khindira's budgetary outlay commitment level for rice is in excess of 76% of its base outlay level, thus it is inconsistent with Article 9.2.

Similarly, Khindira's continued use of export subsidies is inconsistent with the Nairobi Decision. The Nairobi Decision requires developing Members to eliminate their export subsidies by the end of 2018. Khindira's continued provisions of export subsidies for rice in the 2018–2019 marketing year are inconsistent with the clear language and purpose of the Nairobi Decision. Khedira must not be allowed to avoid its obligations under the Nairobi Decision, as doing so would render the Decision moot.

LEGAL PLEADINGS

A. **Khindira’s Flexible Tariff Administration Breached Article 4.2 of the Agreement on Agriculture.**

Article 4.2 of the Agreement on Agriculture prohibits Members from implementing non-tariff border measures that restrict the importation of foreign agricultural products.¹ It states that “Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties.”² Footnote 1 to this article contains a non-exhaustive list of the border measures required to be converted to ordinary customs duties.³ These measures include “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties.”⁴ If a Member enacts any of the non-tariff border measures prohibited by footnote 1, it violates Article 4.2.⁵

Khindira’s Flexible Tariff Administration violates Article 4.2 for two reasons. First, it is variable import levy explicitly prohibited by footnote 1. Second, even if it is not identical to a variable import levy, the Flexible Tariff Administration is still a similar border measure barred by the catchall provision of footnote 1. Therefore, Khindira breached Article 4.2 by enacting its Flexible Tariff Administration.

1. *Khindira’s Flexible Tariff Administration is a variable import levy explicitly prohibited by footnote 1.*

Khindira’s Flexible Tariff Administration violates Article 4.2 because it is a variable import levy within the meaning of footnote 1. While the term is not explicitly defined in the Agreement on Agriculture, variable import levies are generally understood as duties assessed on the importation of goods that have both 1) a tendency to vary and 2) additional characteristics that undermine the purpose of Article 4.⁶

- a. **Khindira’s Flexible Tariff Administration is inherently variable.**

¹ Agreement on Agriculture, Apr. 15, 1994, 1867 U.N.T.S. 410, art. 4.2 [hereinafter Agreement on Agriculture].

² *Id.*

³ *Id.* at art. 4.2 n.1.

⁴ *Id.*

⁵ *Id.*

⁶ Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶¶ 233-34, WTO Doc. WT/DS207/AB/R (adopted Sept. 23, 2002) [hereinafter *Chile—Price Band System (AB)*]; Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 5.40-5.41, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru—Agricultural Products (AB)*].

To be a variable import levy, the border measure must be “highly inclined or likely to vary.”⁷ This variability must be inherent in the measure itself.⁸ Variability is inherent in a border measure if it implements a scheme or formula that causes the tariff rate to fluctuate automatically and continuously.⁹ While ordinary customs duties may occasionally change as the result of discrete legislative action, variable import levies incorporate a mechanism that routinely modifies the tariffs on agricultural imports.¹⁰

A border measure may vary “automatically” even if the scheme or formula employed in the measure is not self-executing. In *Peru—Agricultural Products*, the Peruvian government had to take a number of administrative steps to actually vary the tariff rates imposed by its price range system.¹¹ These steps included the creation and endorsement of customs tables, the delivery of economic data by Peru’s Central Reserve Bank, and the publishing of references prices.¹² Without each of these administrative steps, the country’s tariff rates could not vary.¹³ Despite the fact that Peru’s price range system was not self-executing, the Appellate Body still reasoned that it was inherently variable.¹⁴ These administration steps were the result of the rules and formulas imposed by the price range system, not discrete legislative action.¹⁵

Additionally a border measure does not have to modify the tariff rate with every transaction to be considered “variable.”¹⁶ In *Peru—Agricultural Products*, the Appellate Body found that Peru’s price range system was inherently variable even though the tariff rates were only altered biweekly and the government sometimes extended the previous tariff rates through a subsequent period.¹⁷ While the frequency of the variation may shed light on whether the border measure is inherently variable, no specific amount of variation is required.¹⁸ The focus of the analysis must be on the *cause* of the variation rather than how often the tariff levels actually change.¹⁹

⁷ *Peru—Agricultural Products (AB)*, *supra* note 6 at ¶ 5.33 n.119 (quoting Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶ 7.288, WTO Doc. WT/DS/457/R (adopted July 31, 2015) [hereinafter *Peru—Agricultural Products (Panel)*]).

⁸ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 233.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Peru—Agricultural Products (Panel)*, *supra* note 7, at ¶¶ 7.317, 7.319.

¹² *Id.* at ¶ 7.317.

¹³ *Id.* at ¶¶ 7.317, 7.319.

¹⁴ *Peru—Agricultural Products (AB)*, *supra* note 6, at ¶ 5.52.

¹⁵ *Id.* at ¶ 5.49.

¹⁶ *Peru—Agricultural Products (AB)* at ¶ 5.46.

¹⁷ *Id.*

¹⁸ *Id.*; *Chile—Price Band System (AB)* at ¶ 232.

¹⁹ *Peru—Agricultural Products (AB)* at ¶ 5.46.

Here, Khindira's Flexible Tariff Administration varies automatically and continuously. The Committee is required to review Khindira's tariff rates on the 15th of every month and modify those rates based on a number of factors.²⁰ Similar to price range system in *Peru—Agricultural Products*, this review occurs automatically. The Flexible Tariff Administration mandates that the Committee set new tariff rates monthly,²¹ leaving the Committee was no individual authority over whether or when to review the country's tariffs. While the Committee does have some leeway over the tariffs ultimately imposed, it is required to consider a number of factors.²² These factors include price trends, planting decisions, harvest forecasts, demand estimates, and current supplies.²³ The Flexible Tariff Administration's requirements for the timing and scope of the review eliminate much of the Committee's discretion over the tariff rates, making the system more akin to a formula than independent legislative action. The fact that the Committee must take some administrative steps to modify Khindira's tariffs does not prevent the Flexible Tariff Administration from being inherently variable.

Furthermore, the tariffs imposed by Khindira are continuously changing. The Committee reviews the country's tariff rates every single month,²⁴ just like the Peruvian government in *Peru—Agricultural Products* reviewed its tariff rates every other week. These frequent reviews result in frequent changes to Khindira's tariff rates. On average, the Committee varies the tariffs for rice, wheat, and coarse grains every 1.2, 2.8, and 3.2 months, respectively.²⁵ Although the tariffs on some agricultural products rarely change, frequent variation is just one factors in determining whether a border measure is inherently variable. The factors that the Committee considers in determining the tariffs will naturally effect some products more than others, leaving the tariffs on the latter relatively consistent. The fact that Khindira's flexible tariff has a major effect on only a few agricultural products does not redeem the system as a whole.

- b. Khindira's Flexible Tariff Administration has additional characteristics that undermine the purpose of Article 4 and the Agreement on Agriculture.

²⁰ R. at ¶ 5-6.

²¹ R. at ¶ 5.

²² R. at ¶ 6.

²³ *Id.*

²⁴ R. at ¶ 5.

²⁵ R. at ¶ 7.

In addition to fluctuating automatically and continuously, variable import levies must also possess “additional features that undermine the object and purpose of Article 4.”²⁶ These additional features may include characteristics that make the measure less predictable or transparent than ordinary customs duties.²⁷

The Agreement on Agriculture was enacted “to establish a fair and mark-oriented agricultural trading system.”²⁸ One of the ways that it sought to establish a fair trading system was by eliminating protectionist measures²⁹—policies designed to protect domestic suppliers from foreign competition.³⁰ Article 4.2 contributes to this goal by preventing countries from enacting non-tariff border measures that restrict the importation or distort the price of foreign agricultural products.³¹ Article 4.2 requires Members to convert all of their non-tariff border measures to “ordinary customs duties,”³² which are both more transparent and more predictable than non-tariff measures, thereby granting increased market access for foreign importers.³³ By its clear language, Article 4.2 “envisioned that ordinary customs duties would, in principle, become the only form of border protection.”³⁴

Khindira’s Flexible Tariff Administration directly circumvents this purpose. By varying the tariff imposed on agricultural imports from month to month, Khindira unfairly protects its domestic suppliers at the expense of foreign trade. The Committee is able to modify the country’s tariffs so that rates are high when there is a large domestic supply and rates are low when the domestic supply is depleted. This practice artificially restricts the demand for foreign products when doing so will increase the consumption of domestic goods, while continuing to allow foreign imports when domestic supplies are not sufficient to satisfy demand. By definition the Flexible Tariff Administration “restrict[s] the volume [and] distort[s] the price of imports of agricultural products,” contrary to the purpose of Article 4.2.³⁵

²⁶ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 234.

²⁷ *Id.*

²⁸ Agreement on Agriculture, *supra* note 1, at Preamble.

²⁹ See Raj Bhala, *World Agricultural Trade in Purgatory*, 79 N.D. L. REV. 691, 694 (2003); Dale E. McNiel, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41, 47 (2000).

³⁰ *Protectionism*, *Black’s Law Dictionary* (10th ed. 2014).

³¹ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 200; Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 4.251, WTO Doc. WT/DS26/R/USA (adopted Aug. 18, 1997) [hereinafter *EC—Hormones (Panel)*].

³² Agreement on Agriculture, *supra* note 1, at art. 4.2.

³³ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 200.

³⁴ *Id.*

³⁵ *Id.*

The Act's legislative history further supports the conclusion that the Flexible Tariff Administration was designed to circumvent the purpose of Article 4.2. Mr. Kassan, a Member of Parliament for one of Khindira's rural districts, stated that he was supporting the Act because it would offer relief to domestic farmers that cannot adequately compete on an instable market.³⁶ Similarly, the Minister of Agriculture explained that the purpose of the Act was to "shield our farmers from some of the volatility of international prices."³⁷ These statements indicate that the Act was enacted as a protectionist measure that would give Khindira's domestic farmers an unfair advantage in an otherwise highly competitive market. Such protectionist measures are exactly what Article 4.2 was designed to prevent.

Importantly, the Committee's review process is neither predictable nor transparent. Although the Committee is required to consider certain factors, it does not describe what weight is given to each of those factors or whether additional factors are ever considered. The Committee does not release its rationale for varying the tariffs to the public, and it does not explain its decision-making process to its trading partners. This opaque process leaves foreign countries utterly unaware of whether the tariffs on their agricultural products will be raised or lowered on any given month. A number of Khindira's trading partners have expressed concerns to the WTO about the lack of predictability and transparency in Khindira's tariff system.³⁸ Since they cannot determine what tariffs Khindira will impose from month to month, these trading partners are not able to adequately estimate the demand for their products. 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,"³⁹ the Flexible Tariff Administration denies foreign importers appropriate access to the Khindira market.

Since the Flexible Tariff Administration is both inherently variable and undermines the purpose of Article 4, it is a variable import levy explicitly prohibited by footnote 1.

2. *Khindira's Flexible Tariff Administration is a border measure similar to a variable import levy.*

Even if Khindira's flexible tariff does not constitute a variable import levy under Article 4.2, it is still a "similar border measure" prohibited by footnote 1. Footnote 1 contains a non-exhaustive list of the border measures that Members must convert to ordinary customs

³⁶ R. at ¶ 1.

³⁷ R. at ¶ 3.

³⁸ R. at ¶ 8.

³⁹ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 234.

duties under the Agreement on Agriculture.⁴⁰ In addition to those enumerated measures, Footnote 1 also prohibits all “similar border measures other than ordinary customs duties.”⁴¹ A border measure is “similar” to those listed in footnote 1 if it “has a resemblance or likeness to” or is “of the same nature and kind” as at least one of the border measures enumerated.⁴² This is a fairly lenient standard. There is no requirement that the border measure be identical to those explicitly listed in footnote 1⁴³ nor share any fundamental characteristics⁴⁴ to be prohibited.

Although ordinary customs duties tend to be expressed as *ad valorem* or specific rates, a border measure may still be similar to a variable import levy even if it ultimately results in an *ad valorem* tariff. As explained in *Chile—Price Band System*, “the mere fact that the duties resulting from the application of a measure take the form of *ad valorem* . . . does not, alone, imply that the underlying measure or scheme constitutes ordinary customs duties and cannot be similar to one of the categories of measures explicitly identified in footnote 1.”⁴⁵ Rather, the Panel must determine whether a border measure is similar to those enumerated in footnote 1 by conducting a comparative analysis of the two measures and deciding whether they are of the same likeness or kind.⁴⁶

In this case, even if Khindira’s Flexible Tariff Administration is not *identical* to a variable import levy, it is still a *similar* border measure prohibited under footnote 1. As explained above, Khindira’s Flexible Tariff Administration shares many of the features of a variable import levy. First, Khindira’s tariff rates are modified automatically and continuously by a Committee that has little discretion over the rate ultimately imposed. The Committee is required to review the country’s tariff rates on a specific date,⁴⁷ and it must consider a number of specified factors in its analysis.⁴⁸ This review occurs every month,⁴⁹

⁴⁰ Agreement on Agriculture, *supra* note 1, at art. 4.2 n.1; Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products—Recourse to Article 21.5 of the DSU by Argentina*, ¶ 149, WTO Doc. WT/DS207/AB/RW (adopted May 7, 2007) [hereinafter *Chile—Price Band System (Article 21.5)*]

⁴¹ Agreement on Agriculture, *supra* note 1, at art. 4.2 n.1

⁴² *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 226.

⁴³ *Chile—Price Band System (Article 21.5)*, *supra* note 31, at ¶ 163.

⁴⁴ *Id.* at ¶ 226.

⁴⁵ *Chile—Price Band System (Article 21.5)*, *supra* note 31, at ¶ 164; *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 216.

⁴⁶ *Chile—Price Band System (AB)*, *supra* note 6, at ¶ 226, 228.

⁴⁷ R. at ¶ 5.

⁴⁸ R. at ¶ 6.

⁴⁹ R. at ¶ 5.

and the Committee has been known to modify the tariffs on the country's major agricultural products every few months.⁵⁰

Second, Khindira's Flexible Tariff Administration undermines the purpose of Article 4 by restricting imports and distorting market prices in an unpredictable and nontransparent manner. While the Committee is required to consider certain factors in its analysis, Khindira does not release the weight given to those factors or whether other factors are ever considered. This lack of transparency and predictably restricts market access for foreign products because exporters are unlikely to ship to a market where they cannot accurately estimate the tariffs imposed. Furthermore, a number of Khindira's trading partners have actually expressed concerns about the unpredictability of the system.⁵¹ Despite their attempts to ask Khindira's to clarify its decision-making process, Khindira has yet to release any further detail about how it determines its tariff rates.⁵²

The fact that Khindira's Flexible Tariff Administration ultimately results in an *ad valorem* tariff similar to an ordinary customs duty does little redeem the entire system. The inherent variability along with the unpredictability and nontransparent nature of the system make the Flexible Tariff Administration much more similar to a variable import levy than an ordinary customs duty of the type envisioned by the Agreement on Agriculture. Since Khindira's Flexible Tariff Administration possesses many, if not all, of the features of a variable import levy, it is a similar border measure prohibited by footnote 1.

B. Khindira's Price Support for Rice and Wheat is Inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture.

When the domestic support, measured by Current AMS, provided by Khindira to its rice and wheat industries is properly calculated in K£, the support is in excess of the allowable the *de minimis* levels under Article 6.4 of the Agreement on Agriculture for the market years of 2012–13, 2013–14, and 2014–15. Thus it is inconsistent with Articles 7.2(b), 6.3, and 3.2 of the Agreement on Agriculture. First, Khindira's use of USD rather than K£ for its calculations is inappropriate, even in light of Article 18.4. Second, because Khindira's AMS is in excess of the 10% *de minimis* levels for both rice and wheat, its support must be included in its calculation of Current Total AMS for the relevant marketing years. Third, Khindira has not properly availed itself of the benefits of the Bali Decision. Finally, Khindira exceeded its commitment levels with respect to rice and wheat for each of the relevant years.

⁵⁰ R. at ¶ 7.

⁵¹ R. at ¶ 8.

⁵² *Id.*

1. *Khindira's AMS should be calculated in K£, rather than USD.*

A WTO Committee on Agriculture document on reviewing notifications states that with respect to Table DS:1, a reviewing body should look at whether the Member reported its Current Total AMS in the same currency as its commitment, and if not, “to consider the reason why.”⁵³ Khindira sought to manipulate its numbers to conceal that it had gone so egregiously over its commitment levels. Khindira could have submitted its notifications of overages with respect to both wheat and rice for each of market years 2012–13, 2013–14 and 2014–15 in order to properly avail itself of the Bali Decision, but it did not. Instead it chose to inappropriately change the currency in which it did its notifications in an effort to minimize its overages.

New Zealand submitted a paper expressing concern about exactly this practice, arguing that “[m]odifying external reference prices can substantially influence the value of market price support and therefore current AMS.”⁵⁴ One particular tactic of modification addressed by New Zealand was that of using a different currency to express external reference price.⁵⁵ “The Agriculture Agreement does not provide for such modifications. . . . Members, when calculating market price support, are required to use the figures supplied in their AGST documents.”⁵⁶ New Zealand notes that the same currency should be used even when inflation leads to an increased price gap, as Article 18.4 exists to provide some relief.⁵⁷ However, Article 18.4 does not apply here, as Khindira’s inflation does not warrant special treatment.

a. *Article 18.4 does not justify the use of USD.*

Khindira points to Article 18.4 of the Agreement on Agriculture to justify its use of USD in its 16 April 2016 notification. Article 18.4 states that “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.”⁵⁸ However, Article 18.4 does not lead to the conclusion that USD is appropriate, particularly when Khindira itself submitted its Schedule in K£. Khindira’s inflation does not rise to the level of “excessive” within the purpose of

⁵³ Cairns Group, WTO Committee on Agriculture, *What to Look for When Reviewing Notifications*, 12 https://www.wto.org/english/tratop_e/agric_e/cairns_group_paper.pdf.

⁵⁴ New Zealand, Committee on Agriculture, *Implementation Issues Regarding Domestic Support*, at 1, WTO Doc. G/AG/W/34 (1998).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Agreement on Agriculture, *supra* note 1, at art. 18.4.

Article 18.4. Additionally, as a developing country Khindira should have considered inflation risk and used USD if it did not want to subject itself to such risk.

In interpreting a treaty, “[w]e begin with the ordinary meaning of the terms. . . in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the *Vienna Convention*.”⁵⁹ “Excessive” is defined as “more than is necessary, normal or desirable.”⁶⁰ Some inflation is desirable in an economy, as opposed to zero or negative inflation⁶¹ Now, 17 central banks have adopted programs for targeting a given inflation rate.⁶² Most banks target a low, steady inflation rate. For example, the Federal Reserve for the United States generally targets an inflation rate of around 2%.⁶³

The average exchange rate from 1986–88 was \$1 USD to 12 K£.⁶⁴ The exchange rate shifted to \$1 USD to 42 K£ in 2012–13, 43 K£ in 2013–14, and 47 K£ in 2014–2015.⁶⁵ The shift from 12 K£ to \$1 USD to 47 K£ to \$1 USD represents a total change of \$291.67%. However, that change in value took place over the course of almost 30 years. Assuming, for purposes of calculation, that the 12 K£ average exchange rate was consistent from 1996 to 1998, the exchange rate shifted upwards from 1996 to 2015 at a rate of only a little bit more than 10% per year. While 10% per year might be more than the standard target inflation rate, it is not so high that it justifies special treatment under the Agreement on Agriculture, especially when the levels of support so dramatically exceed the *de minimis* level. While Khindira’s currency did weaken against the dollar from the mid-1980s to 2015, it did not weaken enough to warrant special treatment under Article 18.4.

However, a higher inflation rate does not necessarily indicate the level of economic distress to warrant special treatment, particularly in developing countries. In a study of data from 140 developed and developing countries in the mid- to late-1990s,⁶⁶ “[T]he threshold rate of inflation is fairly low—around 1-3 percent for industrial countries, and 11-12 percent

⁵⁹ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 96, WTO Doc. WT/DS161/AB/R (adopted Dec. 11, 2000) [hereinafter *Korea—Measures Affecting Beef (AB)*].

⁶⁰ *Excessive*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/excessive> (last visited Jan. 13, 2018).

⁶¹ *Inflation*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Inflation> (last visited Jan. 13, 2018).

⁶² Sarah Anwar, Anis Chowdhury & Iyanatul Islam, *Inflation targeting in developing countries revisited*, VOX, <http://voxeu.org/debates/commentaries/inflation-targeting-developing-countries-revisited>; Sarwat Jahan, *Inflation Targeting: Holding the Line*, IMF (updated July 29, 2017), <http://www.imf.org/external/pubs/ft/fandd/basics/target.htm>.

⁶³ Board of Governors of the Federal Reserve System, *Why does the Federal Reserve aim for 2 percent inflation over time?* Federal Reserve (updated Jan. 26, 2015), https://www.federalreserve.gov/faqs/economy_14400.htm.

⁶⁴ R. Annex 1.

⁶⁵ *Id.*

⁶⁶ Anwar *et al.*, *supra* note 47.

for developing countries.”⁶⁷ Above that threshold rate, inflation begins to “significantly slow growth.”⁶⁸ Still, even the United States has experienced many years of inflation in excess of 3%, and even more than 10%, numerous times in its history without need to resort to submitting notifications in a different currency.⁶⁹

Further, developing countries face a greater inflation risk than their developed counterparts. “This is consistent with the empirical findings of Fraga et al. (2004), Bowdler and Malik (2005), and Petursson (2008) that developing economies have more volatile inflation than advanced ones.”⁷⁰ Khindira, as a developing country should have been aware of these economic risks, and still made the decision to submit its Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules in K£.⁷¹

2. *Khindira’s support for rice and wheat exceeds the 10% de minimis level allowable under Article 6.4.*

Price support is explicitly listed as a form of trade-distorting support, or an “Amber Box” measure that must be included in a country’s calculation of Current Total AMS and be subject to reduction commitments where that support exceeds the allowable *de minimis* level set out in Article 6.4 of the Agreement on Agriculture.⁷²

Article 6.4 states that developing Members are not required to include in their calculation of Current Total AMS or to reduce product-specific domestic support that does not exceed 10% of the Member’s “total value of production of [the] basic agricultural product [in question] during the relevant year.”⁷³ The value of production for a given product is the administered price multiplied by the amount of domestic production eligible to receive that price.⁷⁴ “[P]rice support is generally measured by multiplying the gap between the applied administered price and a specified fixed external reference price (‘world market price’) by the quantity of production eligible to receive the administered price.”⁷⁵

⁶⁷ Mohsin S. Khan, Abdelhak Senhadji & Bruce D. Smith, *Inflation and Financial Depth*, (IMF, Working Paper No. 01/44, 2006).

⁶⁸ *Id.*

⁶⁹ Kimberly Amadeo, *U.S. Inflation Rate by Year: 1929 - 2020*, The Balance (Dec. 13, 2017), <https://www.thebalance.com/u-s-inflation-rate-history-by-year-and-forecast-3306093>.

⁷⁰ Rahul Anand, Eswar S. Prasad & Boyang Zhang, *What Measure of Inflation Should a Developing Central Bank Target?*, 16 (IMF, Working Paper No. 15/205, 2015).

⁷¹ R. Annex 2.

⁷² WTO, DOMESTIC SUPPORT, https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm (last visited Jan. 11, 2017).

⁷³ Agreement on Agriculture, *supra* note 1, at art. 6.4(a)–(b).

⁷⁴ WTO, DOMESTIC SUPPORT, https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm (last visited Jan. 11, 2018).

⁷⁵ *Id.*

The external reference price for rice for each of the years of 2012–13, 2013–14, and 2014–15 is \$230 and for wheat in the same years is \$160 in USD (2760 and 1920 in K£ respectively).⁷⁶ However, in the notification by Khindira dated 16 April 2016, Khindira reported that its levels for wheat and rice in the marketing years of 2012–13, 2013–14, and 2014–15 were, in fact, \$146, \$180, \$187, and \$119, \$170, and \$193 per tonne in USD respectively (taking into account the varying exchange rates, the equivalent values in K£ are 6132, 7740 and 8789 for wheat, and 4998, 7310, and 9071 for rice).⁷⁷ The amount of support above the listed commitment level exceeds the Article 6.4 *de minimis* allowance of 10% of production value of a given agricultural product for both wheat and rice for each of 2012–13, 2013–14, and 2014–15 when the calculations are done, as they should be, in K£. Even USD is used, Khindira’s price support is still above the *de minimis* level with respect to wheat for the years 2013–14 and 2014–15.

The value of wheat production for 2012–13 is \$187,610,000 in USD, thus the *de minimis* level is \$18,761,000.⁷⁸ The administered price for 2012–13 is less than the external reference price, thus the support does not exceed the *de minimis* allowance under Article 6.4 for that year. However, if the calculation is done in K£ rather than USD, the price support will exceed allowable levels, due to inflation decreasing the value of K£ from \$1 USD to 42 K£, up from 12 K£. The value of production is 7,879,620 K£, with a *de minimis* level of 787,962 K£. The value of the support rendered is 5,412,420 K£.

The value of wheat production for 2013–14 is \$247,680,000 in USD, thus the *de minimis level* is \$24,768,000. The AMS for wheat in this year is \$27,520,000, which is larger than the 10% *de minimis* value allowed by Article 6.4. The value of wheat production for 2014–15 is \$267,784,000 in USD, thus the *de minimis* level is \$26,778,400. The AMS for wheat in this year is \$38,664,000, in excess of the 10% *de minimis* value allowed by Article 6.4. Since the support exceeds the allowable levels when calculated in USD, the support will exceed the levels by even more when calculated in K£ due to high rates of inflation decreasing the value of K£ from \$1 USD to 12 K£, to \$1 USD to 43 K£ for the relevant year.

Similarly, Khindira’s support for wheat in the market year 2014–15 exceeds the allowable *de minimis* 10% when calculated in USD, thus it will also exceed when calculated in K£, as the exchange rate increased from \$1 USD to 12 K£, to \$1 USD to 47 K£. The value of wheat production for 2014–15 is \$267,784,000 in USD, thus the *de minimis* level is

⁷⁶ R. Annex 1.

⁷⁷ R. Annex 1.

⁷⁸ *See id.*

\$26,778,400.⁷⁹ The AMS for wheat in this year is \$38,664,000, which is larger than the 10% *de minimis* value allowed by Article 6.4.

The administered price for rice for each of 2012–13, 2013–14, and 2014–15 expressed in USD is less than the external reference price;⁸⁰ thus, if expressed in USD, the product support provided by the Khindiran government is not in excess of the 10% *de minimis* level provided by Article 6.4, and is indeed not contrary to the Agreement on Agriculture. However, if the administered price for rice is properly expressed in K£, then Khindira’s price support for rice violates the Agreement on Agriculture and exceeds the Article 6.4 *de minimis* exemption of 10% as a result of inflation of the K£.

The value of rice production for 2012–13 is 9,331,266 K£, thus the *de minimis* level is 933,126.6 K£. The value of the support is 4,178,346 K£, in excess of the *de minimis* level.⁸¹ The value of rice production for 2013–14 is 14,495,730 K£, thus the *de minimis* level is 1,449,573 K£. The value of support is 9,022,650 K£, far in excess of the *de minimis* allowable level.⁸² The value of rice production for 2014–15 is 19,738,496 K£, thus the *de minimis* level is 1,973,849.6 K£. The actual value of support is 13,732,736 K£, almost 12 million K£ in excess of the *de minimis* level.⁸³

Using USD as the basis for the calculation, Khindira exceeded its support in favor of domestic wheat in market years 2013–14 and 2014–15. Using K£, price support for wheat exceeds the specified commitment level in all three years. Support for rice is not in excess of Khindira’s specified commitment levels if the calculation is done in USD, but if the calculation is done in K£, as it properly should be, price support for rice also exceeded the commitment levels for all three market years. Khindira provided support in favor of domestic products in excess of the allowable *de minimis* levels for 2012–13, 2013–14, and 2014–15 for rice and wheat when that support is calculated, as it should be, in K£. Thus, the price support provided for rice and wheat must be included in the calculation of the Current Total AMS for Khindira.

3. *Khindira’s price support for rice and wheat is inconsistent with Articles 7.2(b), 6.3, and 3.2 of the Agreement on Agriculture.*
 - a. Khindira’s price support for rice and wheat is inconsistent with Article 7.2(b) of the Agreement on Agriculture.

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

Article 7.2(b) states that “[w]here 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.”⁸⁴ There is no Total AMS commitment in Part IV of Khindira’s Schedule, thus Khindira is limited by Article 7.2 to the 10% *de minimis* level dictated in Article 6.4. As explained in Part A.1.a and A.1.b above, when calculated in K£, Khindira’s price support exceeds the 10% *de minimis* level for rice and wheat for each of the years 2012–13, 2013–14, and 2014–15. Even if calculated in USD, Khindira is still in violation of Article 7.2 via exceeding the *de minimis* level with respect to wheat for the years of 2013–14 and 2014–15.⁸⁵ Thus, Khindira’s support for rice and wheat is inconsistent with Article 7.2(b).

- b. Khindira’s price support for rice and wheat is inconsistent with Article 6.3 of the Agreement on Agriculture.

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 favor 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 Schedule.” Total Aggregate Measurement of Support (Total AMS) is “the sum of all domestic support provided in favor of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product specific aggregate measurements of support and all equivalent measurements of support for agricultural products.”⁸⁶ Current Total AMS is defined in Article 1 as “the level of support actually provided during any year of the implementation period and thereafter.”⁸⁷ The “Annual and Final Bound Commitment Levels” represent “the maximum support permitted to be provided during any year of the implementation period or thereafter,”⁸⁸ the implementation period being, in relevant part, “the six-year period commencing in the year 1995.”⁸⁹

When calculated properly in K£, Khindira’s Current Total AMS for wheat is in excess of its final bound commitment levels for each of marketing years 2012–13 (6132 K£ < 1920 K£), 2013–14 (7740 K£ < 1920 K£), and 2014–15 (8789 K£ < 1920 K£).⁹⁰ Similarly the

⁸⁴ Agreement on Agriculture, *supra* note 1, at art. 7.2.

⁸⁵ *See supra* Part B.2.

⁸⁶ Agreement on Agriculture, *supra* note 1, at art. 1(h).

⁸⁷ *Id.* at art. 1(h)(ii).

⁸⁸ *Id.* at art. 1(h)(i).

⁸⁹ *Id.* at 1(f).

⁹⁰ *See supra* Part B.2.

Current Total AMS with respect to rice in K£ is in excess of its final bound commitment levels for each of marketing years 2012–13 (4998 K£ < 2760 K£), 2013–14 (7310 K£ < 2760 K£), and 2014–15 (9071 K£ < 2760 K£).⁹¹ Thus, Khindira’s price support for both rice and wheat for each of the relevant marketing years are inconsistent with Article 6.3.

- c. Khindira’s price support for rice and wheat is inconsistent with Article 3.2 of the Agreement on Agriculture.

Article 3.2 states that “[s]ubject to the provisions of Article 6, a Member shall not provide support in favour of domestic products in excess of the commitment levels specified in Section I of Part IV of its Schedule.”⁹² Article 6.4 allows developing countries to exceed their commitment levels by 10%.⁹³ When calculated in properly in K£, Khindira’s price support for both rice and wheat are more than 10% in excess of its commitment levels for each of marketing years 2013–13, 2013–14 and 2014–15.⁹⁴ Because Khindira’s support for rice and wheat exceed the allowable 10% *de minimis* level above their commitments under Article 6.4,⁹⁵ the support for both wheat and rice are inconsistent with Article 3.2.

Even if calculated in USD, Khindira’s price support for wheat still exceeds its 10% *de minimis* allowance in marketing years 2013–14 and 2014–15. Since Khindira has not properly availed itself of the benefits of the Bali Decision,⁹⁶ at minimum its price supports for wheat in those years are subject to reduction.

4. *Khindira has not availed itself of the Bali Decision.*

The Bali Decision⁹⁷ establishes an “interim mechanism” in which “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 [7 December 2013].”⁹⁸ Support provided by the developing Member must be “consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of this Decision.”⁹⁹

⁹¹ *Id.*

⁹² Agreement on Agriculture, *supra* note 1, at art. 3.2.i

⁹³ *Id.* at art. 6.4.

⁹⁴ *See supra* Part B.2.

⁹⁵ *See supra* Part B.2.

⁹⁶ *See supra* Part B.4.

⁹⁷ World Trade Organization, Ministerial Decision of 7 December 2013, WTO Doc. WT/MIN(13)/38, WT/L/913 (2013) [hereinafter Bali Decision].

⁹⁸ *Id.* at ¶ 2.

⁹⁹ *Id.*

Additionally, developing Members must meet certain criteria in order to take advantage of the protections set out by the Bali Decision's interim mechanism, including notification and transparency requirements. Developing Members benefitting from the Decision are required to, in relevant part, "have notified the Committee on Agriculture that it is exceeding . . . either or both of its Aggregate Measurement of Support (AMS) limits . . . as a result of the programmes mentioned above."¹⁰⁰

Khindira has not properly availed itself of the Bali Decision because (1) Khindira's notification on 16 April 2016 does not cover domestic support provided after July 2015, and (2) Khindira is in violation of the Agreement on Agriculture by providing domestic support in excess of its commitments for not only wheat but also rice. Price supports go "against the spirit of the free trade talks, which generally aim to reduce – not increase – government intervention in the marketplace."¹⁰¹ Price supports for Khindiran farmers will lead to stockpiles of the agricultural products being supported jeopardize the agricultural sectors of other developing countries. Khindira should not be allowed to benefit from the Bali Decision when it has not taken the proper steps necessary to do so, and has instead attempted to manipulate the system through the use of different currencies. Further, Khindira's economic circumstances do not rise to the level needed to justify special treatment forgiving these problems.

- a. Khindira's notification on 16 April 2016 does not fulfill the requirements under the Bali Decision.

Khindira's notification dated 16 April 2016 is not sufficient to place Khindira in compliance with the Bali Decision notification requirements as it does not cover domestic support provided after July 2015.¹⁰²

Khindira submitted a notification on 1 June 2017 to the Committee on Agriculture declaring it was at risk of exceeding its AMS limit with respect to wheat in accordance with the notification and transparency requirements of the Bali Decision.¹⁰³ The notification and transparency requirements also require that the developing Member benefitting from the decision must "have fulfilled and continue to fulfill its domestic support notification requirements under the AoA . . . as specified in the Annex."¹⁰⁴ Khindira's notification dated

¹⁰⁰ *Id.*

¹⁰¹ Paige McClanahan, *Why the WTO agreement in Bali has finally helped developing countries*, *The Guardian* (Dec. 6, 2013), <https://www.theguardian.com/global-development/poverty-matters/2013/dec/06/wto-agreement-bali-helped-developing-countries-india>.

¹⁰² R. Annex 1.

¹⁰³ Bali Decision, *supra* note 97, at ¶ 3(a).

¹⁰⁴ *Id.* at 3(b).

16 April 2016 was submitted in accordance with Section 1 of the template attached to the Bali Decision, which is contained in the Annex. Section I specifies that the developing Member submit “[f]actual information confirming that DS:1 notifications and relevant supporting tables for the preceding 5 years are up-to-date.”¹⁰⁵ DS:1 is under the category of domestic support notifications and is comprised of one table and nine supporting tables, related to the Current Total AMS.¹⁰⁶

The requirement under the Bali Decision is that notification and relevant supporting tables for the preceding 5 years must be up-to-date; however, Khindira’s submission does not cover the preceding 5 years before the 1 June 2017 notification. Khindira’s notification only covers the time period through July 2015. Thus, Khindira has not met its notification obligations under the Bali Decision and is not eligible to benefit from the Decision.

Though both developed and developing Members have expressed difficulties with the notification requirements under the WTO, and several Members have not met their notification requirements,¹⁰⁷ “Members have made clear that the rules and disciplines on domestic support are crucially important for good functioning of the world agricultural trading system, and therefore, timely and transparent notifications are vitally important.”¹⁰⁸ Thus, Khindira’s inadequate notifications preclude it from benefiting from the Bali Decision.

b. Khindira’s notifications are insufficient with respect to rice and wheat.

Khindira’s submitted to the Committee on Agriculture on 1 June 2017 a notification intended to fulfill the notification and transparency requirements for benefit from the Bali Decision. However, the notification only declared that Khindira was at risk of exceeding its AMS limit with respect to wheat¹⁰⁹ when Khindira has also exceeded its AMS limit with respect to rice. For the period covered by the notification, Khindira’s domestic support was in excess of its commitments with respect to rice by more than the allowable *de minimis* 10% when calculated in K£. The calculation for Khindira’s compliance must be done in K£ rather than USD because Khindira expressed the external reference price in K£ when it submitted its Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the

¹⁰⁵ *Id.* at Annex Section 1.

¹⁰⁶ Cairns Group, *supra* note 53, at 9.

¹⁰⁷ WTO, Note of the Secretariat, Compliance with Notification Obligations, at 7, WTO Doc. G/AG/GEN/86/Rev.28 (2017).

¹⁰⁸ United States, Committee on Agriculture, Review of Domestic Support Notifications, at 1, WTO Doc. G/AG/W/105 (2012).

¹⁰⁹ R. Annex 1.

Schedules at the conclusion of the Uruguay Round¹¹⁰ and because it is not entitled to special treatment under Article 18.4.¹¹¹

Khindira is in violation of the Agreement on Agriculture with respect to both wheat and rice. Because Khindira did not submit a notification to the WTO Committee on Agriculture with respect to rice, it has not properly availed itself of the protections of the Bali Decision. In the absence of such protection, Khindira's lack of compliance with the Agreement on Agriculture must be remedied.

C. Khindira's Continued Provision of Export Subsidies on Rice is Inconsistent with the Nairobi Decision on Export Competition.

1. *Khindira's budgetary outlays with respect to rice are inconsistent with Article 9.2 of the Agreement on Agriculture.*

Article 9.2(a) states that the export subsidy commitment levels specified in a Member's Schedule for each year of the implementation period represent, for budgetary outlay reduction commitments are "the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product[s] concerned." With respect to export quantity reduction commitments, they are "the maximum quantity of an agricultural product[s], in respect of which such export subsidies may be granted in that year."¹¹² The implementation period is defined as, in relevant part, "the six-year period commencing in the year 1995."¹¹³

Khindira's export subsidies and quantities benefitting from those subsidies are within the maximum amounts allowable in its Schedule. However, Khindira's continued use of export subsidies with respect to rice is inconsistent with the Nairobi Decision.

2. *Khindira's budgetary outlay and quantity commitment levels with respect to rice are inconsistent with the Nairobi Decision.*

In addition to Khindira's budgetary outlay commitment levels being in excess of those allowed by Article 9.2(b)(iv), Khindira's continued provision of export subsidies for rice into 2018 is inconsistent with the language and purpose of the Ministerial Decision on Export Competition adopted at the Nairobi Ministerial on 19 December 2015 (Nairobi Decision).¹¹⁴ Finally, Khindira is must to meet its obligations under the Nairobi Decision, as otherwise the Decision would be rendered moot.

¹¹⁰ R. Annex 2.

¹¹¹ See Part B.1.a.

¹¹² Agreement on Agriculture, *supra* note 1, at art. 9.2(a).

¹¹³ *Id.* at art. 1(f).

¹¹⁴ World Trade Organization, Ministerial Decision of 19 December 2015, WTO Doc. WT/MIN(15)/45, WT/L/980 (2015) [hereinafter Nairobi Decision].

- a. Khindira’s continued use of export subsidies is inconsistent with the language of the Nairobi Decision.

Under the historic Nairobi Decision, in relevant part, “[d]eveloping country Members shall eliminate their export subsidy entitlements by the end of 2018.”¹¹⁵ This requirement contains an exception in Footnote 5, which states that despite Paragraph 7, developing country Members “shall eliminate its export subsidy entitlements by the end of 2022 for products or groups of products for which it has notified export subsidies in in one of its three latest export subsidy notifications examined by the Committee on Agriculture before the date of adoption of this Decision.”¹¹⁶ While Khindira submitted export subsidy notifications prior to the adoption of the Nairobi Decision on 19 December 2015, none of the three notifications leading up to the Decision contained export subsidies for rice.¹¹⁷ Khindira’s continued use of export subsidies is does not fit into the exception, so Khindira must eliminate export subsidies by the end of 2018.

Khindira’s continued use of export subsidies for rice through 2018—the final outlay commitment level for 2018 being \$8,114,000 USD and the final quantity commitment level being 4,538 tonnes¹¹⁸—is directly inconsistent with the Nairobi Decision requirement that export subsidy entitlements should be eliminated “by” the end of 2018. The word “by” is defined as “indicating a deadline or the end of a particular time period”¹¹⁹ or “not later than.”¹²⁰ Common usage also supports the interpretation. Thus, Khindira’s use of export subsidies should be completely eliminated “not later than” the end of 2018. Since Khindira’s use of export subsidies is intended to be ongoing at the end of 2018, those subsidies are inconsistent with the language of the Nairobi Decision.

Further, under the Nairobi Decision, “Members shall not apply export subsidies in a manner that circumvents the requirement to reduce and eliminate all export subsidies”¹²¹ and, importantly, “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.”¹²² Finally, in addition to imposing more stringent requirements on export subsidies, this decision cannot “be construed to give any Member the right to provide, directly or indirectly, export subsidies

¹¹⁵ *Id.*

¹¹⁶ *Id.* at Footnote 5.

¹¹⁷ R. Clarifications at ¶ 10.

¹¹⁸ R. Annex 4.

¹¹⁹ *By*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/by> (last visited Jan. 13, 2018).

¹²⁰ *By*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/by> (last visited Jan. 13, 2018).

¹²¹ *Id.*

¹²² *Id.*

in excess of the commitments specified in Members' Schedules, or to otherwise detract from the obligations of Article 8 of the Agreement on Agriculture."¹²³

Khindira's continued use of export subsidies are inconsistent with the requirement 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."¹²⁴ The use of the conjunctive "and" in the language of the Decision imposes the requirement—"shall" meaning that Members "must"¹²⁵ and "ensure" meaning "[m]ake certain that (something) will occur or be the case"¹²⁶—not only on having minimal trade-distorting effects, but also on not displacing or impeding another Member's exports. This interpretation is consistent with the interpretation of "and" in *EC–Sugar*, where the Appellate Body stated "the use of the conjunctive 'and' [in Article 3.3]. . . suggest[s] that the drafters of the Agreement intended that both types of commitments [budgetary outlays and quantity commitments] must be specified in a Member's Schedule." Thus, Khindira is required to ensure its export subsidies do not displace or impede the exports of another Member. Khindira's export subsidies are inconsistent with this requirement, as the export subsidies in question will, or pose a significant risk of, displacing and impeding the exports of Sutan, as Khindira's rice exporters are in direct competition with Sutan's exporters in many third-country markets.¹²⁷

- b. Khindira's continued use of export subsidies is inconsistent with the purpose of the Nairobi Decision.

The Nairobi Decision renewed the commitment, pursuant to 2013 Bali Ministerial Declaration on Export Competition, to "exercise utmost restraint with regard to any recourse to all forms of export subsidies and to all export measures with equivalent effect."¹²⁸ In doing so, the Decision marked a final step in the WTO's move toward eliminating export subsidies that began years earlier.¹²⁹ The decision to entirely eliminate agricultural export subsidies "ensures that countries will not resort to trade-distorting export subsidies and thereby levels the playing field for agricultural exporters. It is particularly meaningful for farmers in poor

¹²³ *Id.*

¹²⁴ Nairobi Decision, *supra* note 114, at ¶ 11.

¹²⁵ *Shall*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/shall> (last visited Jan. 13, 2018).

¹²⁶ *Ensure*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/ensure> (last visited Jan. 13, 2018).

¹²⁷ R. at ¶ 22.

¹²⁸ Nairobi Decision, *supra* note 114, at ¶ 1.

¹²⁹ *See, e.g.*, World Trade Organization, Ministerial Decision of 7 December 2013, WTO Doc. WT/MIN(13)/40, WT/L/915 (2013).

countries who cannot afford to compete with rich countries which artificially boost their exports through subsidization.”¹³⁰

The Nairobi Decision cannot “be construed to diminish . . . the existing commitments contained in the Marrakesh Ministerial Decision of April 1994 on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-importing Developing Countries and the Ministerial Decision of 14 November 2001 on Implementation-related Issues and Concern.”¹³¹ Thus, the Marrakesh Decision establishing the WTO¹³² can be used to inform the purpose of the Nairobi Decision. “The primary purpose of the WTO is to open trade for the benefit of all.”¹³³ In light of that purpose, the Marrakesh Decision was implemented, “[b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”¹³⁴

There are no WTO definitions of ‘developed’ and ‘developing’ countries. Members announce for themselves whether they are ‘developed’ or ‘developing’ countries.” Other Members may challenge a Member’s decision to identify as “developing” and to benefit from the provisions available to help developing countries.¹³⁵ Khindira a poor and developing country, but the actions it is taking are detrimental to Sutan, which is also developing and is thus also in the group of countries the Nairobi Decision was intended to protect. Khindira and Sutan compete in many third-country markets, thus Khindira’s continued use of export subsidies will directly and negatively affect Sutan’s farmers. In light of the negative effect Khindira’s export subsidies will have on other developing Members, allowing Khindira to continue its use of said export subsidies would be contrary to the purpose of the Nairobi Decision.

c. Khindira must comply with the Nairobi Decision.

Khindira claims that “the Nairobi decision is merely a political document and hence imposes no legal obligation on its own, and that, in submitting the draft schedule, it has gone

¹³⁰ WTO, Briefing note: Agricultural issues, https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm#exportcompetition (last visited Jan. 11, 2018).

¹³¹ Nairobi Decision, *supra* note 114, at ¶ 3.

¹³² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

¹³³ WTO, The WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Jan. 13, 2018).

¹³⁴ Marrakesh Agreement, *supra* note 137, at Preamble.

¹³⁵ WTO, Who are the developing countries in the WTO?, https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Jan. 13, 2018); WTO, GUIDE TO THE URUGUAY ROUND AGREEMENTS, 235 n.518 (1999).

as far as it can to implement the decision.” However, Khindira must fully comply with the Nairobi Decision. A Ministerial Conference is “[t]he topmost decision-making body of the WTO” that “brings together all members of the WTO.”¹³⁶ Under the Marrakesh Agreement, “The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement”¹³⁷

Importantly, the Nairobi Decision is a “decision” rather than a “declaration.” In *US—Lead and Bismuth II*, “the Panel noted that a Declaration lacks the ‘mandatory authority’ of a Decision and considered that the Declaration does not impose any obligations on the Panel.”¹³⁸ And the Appellate Body came to a similar conclusion, “noting that the Declaration at issue was ‘couched in hortatory language,’ as it used the words ‘Ministers recognize ...’ and that it did not specify any action to be taken.”¹³⁹ Further, flexibility for developing Members throughout WTO documents “takes on added importance in the Marrakesh Agreement because WTO members cannot opt out of any of the wide-ranging individual agreements or *decisions* contained within it,” except for the Plurilateral Trade Agreements, which are not at issue here.¹⁴⁰ As the Nairobi Decision is a decision rather than a declaration, indicates Members must fulfill their obligations under it.

Khindira’s use of export subsidies must be brought into conformity with the Nairobi Decision for several reasons. First, allowing Khindira to avoid its obligations under the Nairobi Decision would render the Decision moot. Second, Khindira is trying to avail itself of the Bali Decision while at the same time trying to avoid its obligations under the Nairobi Decision. As the Nairobi Decision is binding on Khindira and Khindira’s continued use of export subsidies with respect to rice is directly inconsistent with both the language and purpose of the Nairobi Decision, Khindira must be brought into compliance.

¹³⁶ WTO, Ministerial Conferences, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan. 14, 2018).

¹³⁷ Marrakesh Agreement, *supra* note 132, at art. IV ¶ 1.

¹³⁸ WTO Dispute Settlement: One-Page Case Summaries, *US—Lead and Bismuth II*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds138sum_e.pdf; Panel Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DIS138/R/Corr.2 (Feb. 25, 2000).

¹³⁹ WTO Dispute Settlement: One-Page Case Summaries, *US—Lead and Bismuth II*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds138sum_e.pdf; Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DIS138/AB/R (May 10, 2000).

¹⁴⁰ WTO, Guide to the Uruguay Round Agreements 235–36 (1999) (emphasis added).

- i. Allowing Khindira to Avoid its Obligations Under the Nairobi Decision Would Render it moot.

Allowing Khindira to avoid its obligations under the Nairobi Decision would render the Decision moot. Though very few countries still use export subsidies, “[i]n times of low prices, [] countries often resort to export subsidies – and history has shown that once one country does so, others would quickly follow suit.”¹⁴¹ The Nairobi Decision is intended to eliminate that risk. Khindira’s continued use of export subsidies, despite the Nairobi Decision, would open the door for any other country to similarly ignore the Nairobi Decision and implement export subsidies to benefit its own people at the expense of its allies. If one country is an exception than every country can be an exception. If the Decision is not binding, than no country would have to follow it. In either case the Nairobi Decision would be moot. The WTO Members would not reach such a decision with the intent that it be pointless.

- ii. Khindira is seeking to avoid obligations under the Nairobi Decision while seeking benefit from the Bali Decision

Khindira is trying to avail itself of the Bali Decision but avoid obligations of the Nairobi Decision.¹⁴² Khindira is viewing equal decisions unequally in order to create the best outcome for itself with no regard for the detrimental effects its policies have on other developing countries that are supposed to be protected. Khindira on one had wishes to benefit from the privileges of the Bali Decision, while simultaneously undermining the authority of the Nairobi Decision.

D. Conclusion

Khindira's Flexible Tariff administration violates Article 4.2 because it is either a variable import levy or a border measure similar to a variable import levy. Second, Khindira’s price supports for rice and wheat are above the *de minimis* level allowed under Article 6.4, and as such are inconsistent with Articles 3.2, 6.3, and 7.2(b). Khindira has not properly availed itself of the Bali Decision and as such is not entitled to its benefits. Third, Khindira should be made to eliminate its remaining export subsidies for rice, as Khindira’s supports are inconsistent with both Article 9.2 and the Nairobi Decision.

¹⁴¹Briefing note: Agricultural issues, *supra* note 130.

¹⁴² Compare Part B.4 with Part C.2

REQUEST FOR FINDINGS

For the foregoing reasons, the Complainant respectfully requests the Panel to find that:

1. Khindira's Flexible Tariff Administration violates Article 4.2 of the Agreement on Agriculture.
2. Khindira's price support with respect to both rice and wheat in each of marketing years 2012–13, 2013–14, and 2014–15 are inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture.
3. Khindira's use of export subsidies with respect to rice are inconsistent with both Article 9.2 of the Agreement on Agriculture and the Nairobi Decision.