

**TENTH GNLU INTERNATIONAL MOOT COURT COMPETITION 2018**

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**IN THE WORLD TRADE ORGANIZATION PANEL**



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

**WT/DSxxx**

**KINGDOM OF SUTAN  
(COMPLAINANT)**

**v.**

**KHINDIRA  
(RESPONDENT)**

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**MEMORANDUM ON BEHALF OF RESPONDENT**

## TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS</b> .....	5
<b>INDEX OF AUTHORITIES</b> .....	7
<b>STATEMENT OF FACTS</b> .....	10
<b>MEASURES AT ISSUE</b> .....	12
<b>SUMMARY OF PLEADINGS</b> .....	13
<b>LEGAL PLEADINGS</b> .....	16
<b>A.    Khindira’s Flexible Tariff Administration is Consistent with Article 4.2 of the Agreement on Agriculture</b> .....	16
1. <i>Khindira’s Flexible Tariff Administration is an ordinary customs duty</i> .....	16
2. <i>Khindira’s Flexible Tariff Administration is not a variable import levy within the meaning of footnote 1</i> .....	20
a.    The Flexible Tariff Administration is not inherently variable.....	20
b.    The Flexible Tariff Administration supports the purpose of Article 4 and the Agreement on Agriculture.....	22
3. <i>Khindira’s Flexible Tariff Administration is not a border measure similar to a variable import levy</i> .....	24
<b>B.    Khindira’s price support for rice are not inconsistent with Articles 3.2, 6.3, and 7.2(b) and for wheat are protected by the Bali Decision</b> .....	25

1. *Khindira's support for the rice industry does not exceed the 10% de minimis level set out in Article 6.4 of the Agreement on Agriculture.* 25
2. *USD is an appropriate measure of Khindira's price support.*..... 27
  - a. Article 18.4 of the Agreement on Agriculture supports the conclusion that calculations of Khindira's price support should be done in USD..... 27
3. *Khindira's price support is only inconsistent with Articles 3.2, 6.3, and 7.2(b) with respect to wheat in marketing years 2013–14 and 2014–15.* ..... 29
4. *Khindira's price support is protected from challenge under the Bali Decision.*..... 30
  - a. Khindira's notification on 16 April 2016 fulfills its notification requirements under the Bali Decision..... 31
  - b. Khindira should be allowed to benefit from the Bali Decision based on the decision's purpose..... 33

**C. Khindira's Provision of Export Subsidies on Rice is not Inconsistent with Article 9.2 of the Agreement on Agriculture or the Nairobi Decision**..... 34

1. *Khindira's budgetary outlays are not inconsistent with Article 9.2 of the Agreement on Agriculture.*..... 34
2. *Khindira should not be required to eliminate its remaining export subsidies.*..... 35
  - a. Khindira has done all it can to implement the Nairobi Decision..... 36

- b. Khindira’s continued use of export subsidies for rice is not inconsistent with the purpose of the Nairobi Decision..... 37
- c. The Nairobi Decision is a political document imposing no legal obligation on its own..... 39

**D. Conclusion..... 39**

**REQUEST FOR FINDINGS..... 40**

## 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
Sutan	Kingdom of Sutan
U.S.	United States
USD	United States Dollar
WTO	World Trade Organization

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## STATEMENT OF FACTS

Khindira and the Kingdom of Sutan (“Sutan”) are both developing countries and founding members of the World Trade Organization (“WTO”). In 2012, Khindira began experiencing a major food security crisis. Extreme weather patterns, volatile market prices, and increased production costs caused many of the country’s farmers to spiral into debt. These events lead to an unprecedented rate of farmer suicides and an extreme decrease in domestic agricultural supplies. The effects of these events also radiated into the country’s cities, where unemployment rates ran high and the urban poor struggled to feed their children. Because of the mounting crisis, the Parliament of Khindira needed to devise a plan to restore food security to the country.

On September 27, 2012, Parliament came up with a solution to the country’s problems. It enacted the Agricultural Livelihoods and Food Security Act (“Act”), which was designed to stabilize the county’s agricultural supplies. The Act had two major provisions: Section 2’s Flexible Tariff Administration and Section 3’s price supports. Together, these provisions worked to decrease farmers’ debts while increasing the food available to the poor.

Section 2 of the Act devised the Flexible Tariff Administration, which created a Committee for the Administration of Agricultural Tariffs (“Committee”) within Khindira’s Ministry of Agriculture. The Committee is charged with reviewing and setting the tariffs on the country’s agricultural imports. The Committee meets once a month to review the country’s tariffs, considering factors such as price trends, planting decisions, harvest forecasts, demand, and existing stock. The Committee has significant discretion over the tariff levels ultimately imposed; it does not follow any specific formula for determining the tariffs rates. Instead, the Committee takes an ad hoc approach, enacting tariffs that comply with the current economic and market landscape.

The Flexible Tariff Administration requires the Committee to act “within the framework of Khindira’s international obligations,” including its obligations as a member of the WTO. The Committee has never raised Khindira’s tariffs over its bindings, and it has only imposed *ad valorem* duties. Furthermore, the Committee rarely modifies the tariffs on most of the country’s agricultural products. Rather, the Committee has focused its efforts on those few agricultural products that have the greatest effect on the Khindira’s food security: rice, wheat, and coarse grains.

In addition to the Flexible Tariff Administration, the Act also created a system of price supports for Khindira’s agricultural staple foods. Section 3 of the Act granted subsidies

on certain staple foods purchased by the country's poor in order to combat the rising rates of malnourishment. To stimulate supply for these products, the Khindiran government needed to increase the price supports available for its agricultural staples. The government increased its price supports for rice by 43% and wheat by 23%, and notified the WTO accordingly.

Khindira also enacted its rights under the Ministerial Decision on Public Stockholding for Food Security Purposes (the "Bali Decision"). On June 1, 2017, Khindira notified the WTO Committee on Agriculture that it may exceed its Aggregate Measurement of Support ("AMS") limit on wheat. After Khindira submitted its notification, Sutan sent comments expressing its opinion that Khindira had not complied with the requirements of the Bali Decision. Sutan claimed that Khindira's notification did not reference price supports provided after July 2015 and that Khindira exceeded its Aggregate Measure of Support ("AMS") limit on rice based on the Khindiran Lira.

Khindira replied that its notification record is similar to that of many other WTO Members. Furthermore, Khindira argued that it should not be deprived of the benefits of the Bali Decision merely because it had a minor delay in submitting its notifications. Finally, Khindira noted that Article 18.4 requires WTO Members to consider the effect of inflation on the ability of a Member to comply with its AMS commitments.

The price supports were so successful in increasing the supply of agricultural food staples that Khindira found itself with excess stocks. Rather than let these stocks go to waste, Khindira decided to support its farmers and wholesalers in exporting the excess to foreign countries. Khindira enacted a series of export subsidies on rice, wheat, and coarse grains, and requested certification of its revised schedule from the WTO. Sutan objected to this certification.

Based its opinion that the Act and these export subsidies violated the Agreement on Agriculture, Sutan filed a request for the establishment of a panel to the WTO Dispute Settlement Body.

## **MEASURES AT ISSUE**

- A. Whether Khindira's Flexible Tariff Administration Is Consistent with Article 4.2 of the Agreement on Agriculture.**
  
- B. Whether Khindira's Price Support for Rice and Wheat is Consistent 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 Consistent 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 Is Consistent with Article 4.2 of the Agreement on Agriculture.**

Khindira's Flexible Tariff Administration is consistent with Article 4.2 of the Agreement on Agriculture for three reasons. First, the Flexible Tariff Administration is an ordinary customs duty of the type explicitly permitted by Article 4.2. Considering the term's ordinary meaning and context, an ordinary customs duty is an *ad valorem* or specific rate tariff on the importation of goods that is relatively transparent, predictable, and comparable. The Flexible Tariff Administration satisfies this standard. The tariffs imposed by the Committee have always been in the form of *ad valorem* duties. Furthermore, the Flexible Tariff Administration explicitly informs Khindira's trading partners of a number of the factors the Committee considers in setting the country's tariff rates as well as when, if at all, Khindira will change its tariff rates. These features make the Flexible Tariff Administration transparent and predictable, allowing Khindira's trading partners to make rational trading decisions.

Second, the Flexible Tariff Administration is not a variable import levy prohibited by footnote 1 to Article 4.2. A variable import levy is a tariff on the importation of goods that is 1) inherently variable and 2) possesses additional features that undermine the purpose of Article 4. The Flexible Tariff Administration does not satisfy either of these requirements. The Flexible Tariff Administration is not inherently variable because it does not implement a scheme or formula that automatically and continuously modifies the country's tariffs. Rather, the Committee acts through discrete legislative action, retaining a significant amount of discretion in determining Khindira's tariff rates. Additionally, the Flexible Tariff Administration supports the purpose of Article 4 by being transparent and predictable, granting its trading partners sufficient access to the Khindiran market.

Third, the Flexible Tariff Administration is also not a similar border measure prohibited by footnote 1 because it is not of the same nature or kind as a variable import levy. The Flexible Tariff Administration is fundamentally distinct from a variable import levy because it does not implement a scheme or formula for modifying Khindira's tariffs, and it furthers the purpose of Article 4. Based on these three points, Khindira's Flexible Tariff Administration is consistent with Article 4.2.

**B. Khindira's Price Support for Rice is Consistent with Articles 3.2, 6.3, or 7.2(b) and its Support for Wheat is Protected by the Bali Decision.**

When calculated properly in USD, Khindira's administered price for rice in all three year and for wheat in 2012–13 is below the external reference price, thus is not violative of Articles 3.2, 6.3, or 7.2(b). Khindira's price support for wheat is only inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture for marketing years 2013–14 and 2014–15. This is because Khindira's AMS for only wheat exceeds the 10% *de minimis* increase over its commitment levels allowed under Article 6.4 for 2013–14 and 2014–15 when calculated in USD.

USD is the appropriate currency in which to calculate Khindira's AMS even though Khindira's Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules was submitted at the conclusion of the Uruguay Round in K£, as Khindira has experienced "excessive" inflation in the years between its post-Uruguay submission and its notification on 16 April 2016. This inflation entitles Khindira to special consideration under Article 18.4.

Article 3.2 states that Members are not to provide support for its domestic products in excess of the commitment levels set out in Part IV of its schedule. When calculated in USD, Khindira's price support only exceeds its commitment levels for each relevant market year by more than the 10% *de minimis* level with respect to wheat, thus Khindira's price support is inconsistent with Article 3.2 only for wheat. 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—the level of support actually provided in a given year of the implementation period or after—is in excess of its final bound commitment levels by more than the allowable 10% with respect to only wheat for 2013–14 and 2014–15. Finally, Article 7.2(b) states that when there is no Total AMS commitment in Part IV of a Member's Schedule, the Member's provision of domestic support must not exceed the Article 6.4 *de minimis* level. Khindira's Schedule contains no Total AMS; however Khindira's price supports exceed the 10% level, inconsistent with 7.2(b), for only wheat in marketing years 2013–14 and 2014–15.

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. Khindira submitted a notification in on 16 April 2016 to the WTO Committee on Agriculture with the price support in USD for marketing years 2012–13, 2013–14, and 2014–15. Though imperfect, this notification is consistent with that of other

Members and fulfills Khindira's notification requirements under the Bali Decision. Further, Khindira should benefit from the Bali Decision based on the purpose of the Decision. As such, Khindira's price supports for wheat in the relevant marketing years are entitled to protection from challenge by other Members, such as Sutan.

**C. Khindira's Provision of Export Subsidies on Rice is Consistent with Article 9.2 of the Agreement on Agriculture and the Nairobi Decision.**

Khindira's export subsidies with respect to rice are consistent 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. Khindira's export subsidies are within its commitment levels for each product.

The Nairobi Decision requires, among other things, that developing Members eliminate export subsidies by the end of 2018. Though Khindira is continuing to use export subsidies with respect to rice, those commitments are significantly reduced below its commitment levels at the conclusion of the implementation period, and the remaining subsidies are critical to the wellbeing of the poor and malnourished in the country. Khindira should not be required to eliminate its few remaining subsidies as they are not inconsistent with the purpose of the Nairobi Decision, their elimination would be devastating to the Khindiran population, and because the Nairobi Decision is a political document that does not independently impose legal obligation.

## LEGAL PLEADINGS

### A. **Khindira’s Flexible Tariff Administration Is Consistent with Article 4.2 of the Agreement on Agriculture**

Article 4.2 of the Agreement on Agriculture allows Members to impose ordinary customs duties on the importation of foreign agricultural products, while prohibiting the enactment of certain non-tariff border measures.<sup>1</sup> 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.”<sup>2</sup> Footnote 1 to this Article enumerates the border measures required to be converted to ordinary customs duties.<sup>3</sup> These measures are “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.”<sup>4</sup> While a country may impose ordinary customs duties on agricultural imports, it cannot implement those measures explicitly prohibited under footnote 1.

Here, Khindira’s Flexible Tariff Administration is consistent with the requirements of Article 4.2 and footnote 1. First, the Flexible Tariff Administration is an ordinary customs duty within the ordinary meaning of the term. Second, the Flexible Tariff Administration is not a variable import levy under footnote 1 because it is not inherently variable and it does not circumvent the purpose of Article 4. Third, the Flexible Tariff Administration is not a border measure similar to a variable import levy because it is not of the same nature or kind. Therefore, Khindira’s Flexible Tariff Administration is in compliance with Article 4.2 of the Agreement on Agriculture.

1. *Khindira’s Flexible Tariff Administration is an ordinary customs duty.*

Khindira’s Flexible Tariff Administration is consistent with Article 4.2 because it is an ordinary customs duty. Under Article 4.2, Members are explicitly allowed to enact “ordinary customs duties” on the importation of foreign agricultural products.<sup>5</sup> Despite this clear endorsement, the term “ordinary customs duties” is not defined in Article 4 or the Agreement

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

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at art 4.2 n.1

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at art. 4.2.



on Agriculture. Since “ordinary customs duties” is not defined, the Panel must interpret the term according to its ordinary meaning, context, and purpose.<sup>6</sup>

To determine the ordinary meaning of a term, the Panel must first consult its dictionary definition. The term “ordinary” is defined as “not uncommon or exceptional,” “routine,” and “normal.”<sup>7</sup> The term “customs” is defined as “duties, tolls, or imposed by the sovereign law of a country on commodities imported into or exported from the country.”<sup>8</sup> Finally, the term “duty” is defined as “a sum paid as a tax on an import.”<sup>9</sup> Taking these words together, an ordinary customs duty must be a routine tax on imports imposed by a sovereign government.

Unfortunately, this definition does little to distinguish “routine” customs duties from “non-routine” customs duties. To clarify this definition, therefore, the Panel must consider the context in which the term is used.<sup>10</sup> Article 4.2 is accompanied by footnote 1, which lists six border measures that were required to be converted into ordinary customs duties during the Uruguay Round.<sup>11</sup> These border measures are quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, and voluntary export restraints.<sup>12</sup> Since these border measures had to be converted into ordinary customs duties, they necessarily cannot *be* ordinary customs duties. Therefore, the border measures enumerated in footnote 1 must have characteristics that distinguish them from ordinary customs duties.

While these border measures are different in kind, they all have a common effect: they restrict the volume of agricultural imports while disconnecting domestic prices from international prices.<sup>13</sup> These border measures therefore “frustrate a key objective of the Agreement on Agriculture—to achieve improved market access conditions for imports of agricultural products.”<sup>14</sup> Since ordinary customs duties are not included in this prohibited list of border measures, they must have a different effect on global market access. In other words,

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<sup>6</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31 [hereinafter Vienna Convention].

<sup>7</sup> Webster’s Third New International Dictionary, 1589 (Philip Babcock Grove, ed. 1993).

<sup>8</sup> *Id.* at 559.

<sup>9</sup> *Id.* at 705.

<sup>10</sup> Vienna Convention, *supra* note 6, at art. 31.

<sup>11</sup> Agreement on Agriculture, *supra* note 1, at art. n.1.

<sup>12</sup> *Id.*

<sup>13</sup> Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 227, WTO Doc. WT/DS207/AB/R (adopted Sept. 23, 2002) [hereinafter *Chile—Price Band System (AB)*].

<sup>14</sup> 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)*]

they must be more transparent, more predictable, and more easily compared between trading partners than those border measures listed in footnote 1.<sup>15</sup>

In addition to footnote 1, Article 4.2 is also modified by Annex 5 to the Agreement on Agriculture.<sup>16</sup> Annex 5 and the Attachment to Annex 5 explain how to calculate “tariff equivalents” that would result in ordinary customs duties.<sup>17</sup> In contemplating this process, the Attachment to Annex 5 specifies that these tariff equivalents should be “expressed as *ad valorem* or specific rates.”<sup>18</sup> This statement implies that ordinary customs duties must be either *ad valorem* or specific rate tariffs, calculated based on the value or volume of the imported goods. The Panel in *Chile—Price Band System* supported this conclusion, recognizing that, “[a]s an empirical matter, . . . Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties.”<sup>19</sup> While the Appellate Body ultimately held that *ad valorem* duties are not necessarily ordinary customs duties, it did maintain that ordinary customs duties must be expressed in terms of either *ad valorem* or specific rates.<sup>20</sup>

Although Annex 5 indicates that ordinary customs duties must be in the form of either *ad valorem* or specific rates, a border measure may still be an ordinary customs duty even if the country considers exogenous factors in its enactment. In *Chile—Price Band Systems*, the Appellate Body held that Members could take into account exogenous factors when setting their tariff rates.<sup>21</sup> These exogenous factors may include international and domestic price trends, as well as other global economic and market considerations.<sup>22</sup> In coming to this conclusion, the Appellate Body opined that “a decision to apply a duty at less than the bound rate will always be based on exogenous factors.”<sup>23</sup> Since the WTO has a general policy of encouraging Members to lower their tariff rates,<sup>24</sup> the Agreement on Agriculture did not mean to adopt a definition of ordinary customs duties that prohibited Members from considering exogenous factors.

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<sup>15</sup> *Chile—Price Band System (AB)*, *supra* note 14, at ¶ 200.

<sup>16</sup> Agreement on Agriculture, *supra* note 1, at art. 4.2.

<sup>17</sup> *Id.* at Annex 5.

<sup>18</sup> *Id.*

<sup>19</sup> Panel Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ VII.452, WTO Doc. WT/DS207/R (adopted May 3, 2002) [hereinafter *Chile—Price Band System (Panel)*].

<sup>20</sup> *Chile—Price Band System (AB)*, *supra* note 14, at ¶ 277; *Chile—Price Band System (Article 21.5)*, *supra* note 15, at ¶ 164.

<sup>21</sup> *Chile—Price Band System (AB)*, *supra* note 14, at ¶ 278.

<sup>22</sup> *Id.* at ¶ 273.

<sup>23</sup> *Id.* at ¶ 270.

<sup>24</sup> Agreement on Agriculture, *supra* note 1, at Preamble.

Combining the ordinary meaning with context, ordinary customs duties must be *ad valorem* or specific rate tariff assessed by a sovereign government on the importation of goods. These tariffs must be relatively transparent, predictable, and easily compared between trading partners. Furthermore, a tariff meeting these requirements may be an ordinary customs duty even if the country evaluates exogenous factors when setting the tariff rate.

The Flexible Tariff Administration satisfies this standard. The tariffs imposed by the Committee have always been in the form of *ad valorem* duties. Additionally, these duties are transparent, predictable, and comparable. The Flexible Tariff Administration lists a number of the factors that the Committee considers when deciding the tariff rates for the next period.<sup>25</sup> These factors include price trends, planting decisions, harvest forecasts, demand estimates, and existing stocks.<sup>26</sup> Most of this information is publicly available and can be readily determined by Khindira's trading partners. If Khindira's trading partners need to know whether Khindira's customs duties will increase or decrease during a specific period, they can simply analyze those factors laid out in the Flexible Tariff Administration using basic market analysis.

Once Khindira has officially announced the tariff rates for the upcoming month, its trading partners can easily compare these rates to those imposed by other governments, just as they could compare any other *ad valorem* duty. These rates will remain unchanged for at least one month,<sup>27</sup> granting Khindira's trading partners sufficient time to make rational trading decisions. While some of the factors the Committee considers are exogenous, this is irrelevant in determining whether the country's tariffs are ordinary customs duties. Khindira must analyze these factors to decide whether to impose a tariff lower than its bound rate. Since the Committee imposes *ad valorem* duties that are relatively transparent, predictable, and comparable, these duties must be ordinary customs duties.

2. *Khindira's Flexible Tariff Administration is not a variable import levy within the meaning of footnote 1.*

Additionally, Khindira's Flexible Tariff Administration does not meet the requirements necessary to be a variable import levy under footnote 1. As with "ordinary customs duties," the term "variable import levy" is not defined in Article 4.2 or the Agreement on Agriculture. Turning to its ordinary meaning, a variable import levy is typically defined as a duty on the

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<sup>25</sup> R. at ¶ 6.

<sup>26</sup> *Id.*

<sup>27</sup> R. at ¶ 5.

importation of goods that has the tendency to fluctuate over time.<sup>28</sup> While the ordinary meaning of a variable import levy is fairly broad, the Appellate Body has enforced a narrower definition. In *Chile—Price Band Systems*, the Appellate Body held that a variable import levy must be both 1) inherently variable and 2) have additional characteristics that undermine the purpose of Article 4.<sup>29</sup> Without these two features, a border measure is not a variable import levy even if it occasionally changes over time.

a. The Flexible Tariff Administration is not inherently variable.

To be a variable import levy, the border measure must be inherently variable.<sup>30</sup> A border measure is inherently variable if it incorporates a scheme or formula that changes the tariff rates “automatically and continuously” without additional legislative or administrative action.<sup>31</sup> This scheme or formula is what differentiates variable import levies from ordinary customs duties.<sup>32</sup> As a general rule, Members are permitted to vary their ordinary customs duties as long as they do so through discrete legislative action.<sup>33</sup>

Inherent variability is indicated by the *cause* of variation, not the frequency.<sup>34</sup> In *Peru—Agricultural Products*, the Appellate Body held that frequent changes in the country’s tariff rates are not sufficient to establish inherent variability absent a scheme or formula that causes the tariff rates to change automatically and continuously.<sup>35</sup> If the modifications are the result of discrete legislative action, they do not indicate that the border measure is a variable import levy.

While a border measure does not need to be self-executing to be inherently variable, the Panel should distinguish between administrative steps taken to *implement* the new tariff and those taken to *determine* the new tariff. In *Peru—Agricultural Products*, the Appellate Body held that Peru’s price range system was similar to a variable import levy even though the government had to take some administrative steps to impose the new tariffs.<sup>36</sup> These steps included the creation of customs tables and the publishing of reference prices.<sup>37</sup> All of the administrative steps required by Peru’s price range system were merely necessary to

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<sup>28</sup> *Chile—Price Band System (AB)*, *supra* note 14, at ¶ 232.

<sup>29</sup> *Id.* at ¶¶ 233-34.

<sup>30</sup> *Id.* at ¶ 233.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶ 5.46, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru—Agricultural Products (AB)*].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at ¶¶ 5.44-5.46; *see also* Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 7.319-7.321, WTO Doc. WT/DA457/R (adopted July 31, 2015) [hereinafter *Peru—Agricultural Products (Panel)*].

<sup>37</sup> *Peru—Agricultural Products (Panel)*, *supra* note 34, at ¶ 7.317.

implement the new tariff rates.<sup>38</sup> The government did not take any action to actually determine the tariffs, leaving that task to a mathematical formula.<sup>39</sup> Therefore, Peru's price range system was inherently variable because the changes were the result of a formula even though they were implemented through administrative action.

In this case, Khindira's customs duties are not altered automatically nor continuously, but rather through discrete legislative action. The Flexible Tariff Administration is not self-executing; the Committee must manually review each tariff to implement any changes.<sup>40</sup> The Committee does not follow any precise formula in its review.<sup>41</sup> Rather, it takes a holistic approach by considering a number of factors and deciding on an ad hoc basis whether the particular tariff should be modified.<sup>42</sup> Unlike a formula that automatically adjusts the tariffs with each trade, Khindira's system functions like a legislature occasionally making changes to its tariffs to reflect the current market landscape.

It is irrelevant that some of Khindira's customs duties are modified fairly frequently. As the Appellate Body held in *Peru—Agricultural Products*, the focus of the analysis must be on the scheme or formula, not the frequency of the variation. Here, the Flexible Tariff Administration does not implement any scheme or formula for varying Khindira's tariffs.<sup>43</sup> The Flexible Tariff Administration simply requires the Committee review the country's tariffs once a month, considering some specified factors.<sup>44</sup> It does not require the Committee to change the country's tariffs, give a particular weight to any of these factors, or prohibit the Committee from considering additional factors. The Committee is granted a significant amount of discretion over the tariffs ultimately imposed, unlike a formula which can be applied automatically and continuously.

Furthermore, the Flexible Tariff Administration is fundamentally different from the price range system in *Peru—Agricultural Products*. The Committee does not just implement the new tariffs, it actually determines them. The Committee is charged with reviewing the current tariffs, completing a holistic market analysis, and setting new tariff rates.<sup>45</sup> Unlike the price range system in *Peru—Agricultural Products*, the Committee does not rely on a

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<sup>38</sup> *Id.* at ¶ 7.321.

<sup>39</sup> *Id.*

<sup>40</sup> R. at ¶ 5.

<sup>41</sup> R. at ¶ 6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> R. at ¶¶ 5-6.

<sup>45</sup> *Id.*

mathematical formula in its analysis.<sup>46</sup> In sum, the steps taken by the Committee are necessary for both the implementation and determination of Khindira's tariffs.

- b. The Flexible Tariff Administration supports the purpose of Article 4 and the Agreement on Agriculture.

In addition to inherent variability, variable import levies must also possess additional characteristics that undermine the purpose of Article 4.<sup>47</sup> The Agreement on Agriculture was enacted to "establish a fair and market-oriented agricultural trading system" by increasing market access for foreign agricultural imports and exports.<sup>48</sup> However, from the beginning of the Uruguay Round Members such as South Korea, India, Jamaica, and Egypt expressed concerns that "fair" trading practices for developed countries are not necessarily fair for developing countries.<sup>49</sup> Developing countries face unique trading challenges due to their relative lack of resources and economic volatility.<sup>50</sup> Based on these vocal objections, the Agreement on Agriculture incorporated a number of exceptions for developing countries.<sup>51</sup> For example, developing countries were allowed that to reduce their tariff bindings by just 24% a year, rather than the 36% a year requirement for developed countries.<sup>52</sup> These provisions express an intent to treat developing and developed countries differently where necessary to foster a fair trading environment.

Article 4 of the Agreement on Agriculture contributes to a fair trading environment by requiring Members to convert their non-tariff border measures into ordinary customs duties.<sup>53</sup> Although ordinary customs duties are inherently protectionist, they are superior to non-tariff border measures because they are more transparent and predictable.<sup>54</sup> This allows Members to easily compare the tariff rates imposed by one country against those imposed by another and make rational trading decisions based on this analysis.<sup>55</sup>

Khindira's Flexible Tariff Administration supports both the general purpose of the Agreement on Agriculture and the more specific goals of Article 4. The Flexible Tariff Administration allows Khindira to fairly compete in the global marketplace. Khindira enacted the Flexible Tariff Administration in response to an unprecedented number of farmer

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<sup>46</sup> R. at ¶ 6.

<sup>47</sup> *Chile—Price Band System (AB)*, *supra* note 14, at ¶ 234.

<sup>48</sup> Agreement on Agriculture, *supra* note 1, at Preamble.

<sup>49</sup> Carmen Gonzalez, *Institutionalizing Inequality*, 27 COLUM. J. ENVTL. L. 433, 451 (2002).

<sup>50</sup> *See id.* at 435-36.

<sup>51</sup> *Id.* at 451-52.

<sup>52</sup> *Id.* at 453.

<sup>53</sup> Agreement on Agriculture, *supra* note 1, at art. 4.

<sup>54</sup> *Chile—Price Band System*, *supra* note 14, at ¶ 200.

<sup>55</sup> *Id.*

suicides.<sup>56</sup> These suicides were the result of extreme weather patterns, volatile market prices, and increased costs which led to significant amounts of indebtedness among the country's farmers.<sup>57</sup> As a developing country with few resources, Khindira began experiencing a food security crisis. The deaths of its farmers created a shortage of domestic food supplies and led to extreme rates of malnutrition in the country's cities.<sup>58</sup> The only way for Khindira to combat this crisis was to modify its import tariffs to better reflect the global marketplace. In doing so, its farmers would gain increased security on the domestic marketplace and its urban poor would maintain ready access to food supplies.

Even in its attempt to halt a food security crisis, Khindira measured its need to protect its citizens against the global policy of increasing market access. Khindira ensured that its Flexible Tariff Administration was both transparent and predictable by explicitly listing the factors that the Committee considers when reviewing the country's current customs duties.<sup>59</sup> These factors include price trends, planting decisions, harvest forecasts, demand estimates, and existing stocks.<sup>60</sup> All of these factors reference publicly available information which can be easily analyzed by Khindira's trading partners. Additionally, the Committee announces its official tariff rates on the 1st of each month and those rates will remain unchanged for at least thirty days.<sup>61</sup> This consistency from month-to-month allows Khindira's trading partners to easily predict when—if at all—Khindira's customs duties will change.

This high level of transparency and predictability is actually unusual for ordinary customs duties. When ordinary customs duties are modified through discrete legislative action, the country's trading partners are typically left with no notice or explanation for the change. Here, on the other hand, Khindira informs its trading partners of many of the factors it considers when modifying its tariff rates.<sup>62</sup> It also has a strict timeline for any modifications, allowing its trading partners to plan accordingly.<sup>63</sup> This transparency and predictability encourages market access and a fair trading regime.

3. *Khindira's Flexible Tariff Administration is not a border measure similar to a variable import levy.*

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<sup>56</sup> R. at ¶ 1.

<sup>57</sup> *Id.*

<sup>58</sup> R. at ¶ 2.

<sup>59</sup> R. at ¶ 6.

<sup>60</sup> *Id.*

<sup>61</sup> R. at ¶ 5.

<sup>62</sup> R. at ¶ 6.

<sup>63</sup> R. at ¶ 5.

Finally, the Flexible Tariff Administration is also not a border measure similar to a variable import levy. In addition to prohibiting variable import levies, footnote 1 also prohibits “similar border measures other than ordinary customs duties.”<sup>64</sup> A border measure is similar to a variable import levy if it “has a resemblance or likeness to” or is “of the same nature and kind.”<sup>65</sup> To determine whether the Flexible Tariff Administration is similar to a variable import levy, the Panel must perform an empirical and comparative analysis of the two measures.<sup>66</sup>

The Flexible Tariff Administration is fundamentally distinct from a variable import levy. As previously mentioned, the Flexible Tariff Administration is neither inherently variable nor interferes with the purpose of Article 4. Khindira modifies its tariffs through discrete legislative action. It does not implement either a scheme or formula that automatically and continuously changes its tariff rates; rather, the Committee maintains significant discretion over this process.<sup>67</sup> Additionally, the Flexible Tariff Administration is relatively transparent and predictable, even compared to other ordinary customs duties. The Flexible Tariff Administration explicitly lists a number of the factors that the Committee considers in its review of the country’s tariffs, and it indicates exactly when, if at all, any changes will occur.<sup>68</sup> Any similarity between the Flexible Tariff Administration and a variable import levy is due merely to the fact they are both border measures, not because they are of the same nature or kind.

**B. Khindira’s Price Support for Rice is Consistent with Articles 3.2, 6.3, or 7.2(b) and its Support for Wheat is Protected by the Bali Decision.**

When properly calculated in USD, Khindira’s domestic support for the rice industry, measured by Current AMS, is not in excess of the allowable *de minimis* levels under Article 6.4 of the Agreement on Agriculture for any of the marketing years 2012–13, 2013–14, or 2014–15. Additionally, its domestic support for wheat is only in excess of the allowable *de minimis* level for marketing years 2013–14 and 2014–15. Because Khindira is protected by the Bali Decision with respect to its support overages for wheat in 2013–14 and 2014–15, Khindira’s price support is protected from challenge. Khindira’s Current AMS should be calculated in USD rather than K£. Article 18.4 of the Agreement on Agriculture supports the conclusion that the calculation in USD rather than K£ is appropriate.

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<sup>64</sup> Agreement on Agriculture, *supra* note 1, at art. 4.2 n.1.

<sup>65</sup> *Chile—Price Band System*, *supra* note 14, at ¶ 226.

<sup>66</sup> *Id.*

<sup>67</sup> R. at ¶ 6.

<sup>68</sup> R. at ¶¶ 5-6.



1. *Khindira's support for the rice industry does not exceed the 10% de minimis level set out in Article 6.4 of the Agreement on Agriculture.*

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."<sup>69</sup> The value of production for a given product is the administered price multiplied by the amount of domestic production eligible to receive that price. "[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."<sup>70</sup>

Khindira is a developing country thus entitled to the 10% *de minimis* level allowable under Article 6.4. "There are no WTO definitions of 'developed' and 'developing' countries. Members announce for themselves whether they are 'developed' or 'developing' countries."<sup>71</sup> Other Members may challenge a Member's decision to identify as "developing" and to benefit from the benefits available to developing countries. Khindira's self-identification as a developing country has not been challenged.

Khindira's listed external reference price for rice for 2012–13, 2013–14, and 2014–15 is \$230.<sup>72</sup> The external reference price for wheat in the same years is \$160 in USD.<sup>73</sup> However, in light of changing economic circumstances and other domestic difficulties, Khindira was unable to meet its external reference price for wheat in 2013–14 and 2014–15. In Khindira's notification dated 16 April 2016, Khindira reported that its levels for in the marketing years of 2012–13, 2013–14, and 2014–15 were \$146, \$180, \$187 for wheat and \$119, \$170, and \$193 for rice per tonne in USD respectively.<sup>74</sup> When the calculation of Current AMS is done in USD, the amount of price support in excess of the corresponding commitment level is greater than 10% of production value for wheat alone, and only in 2013–14 and 2014–15.

In 2012–13 the administered price for wheat is less than the external reference price, so the support is within the commitment levels and does not exceed the *de minimis*

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<sup>69</sup> Agreement on Agriculture, *supra* note 1, at art. 6.4.

<sup>70</sup> WTO, *Domestic Support*, [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro03\\_domestic\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm) (last visited Jan 13, 2018).

<sup>71</sup> WTO, Who are the developing countries in the WTO?, [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Jan. 13, 2018); WTO, Guide to the Uruguay Round Agreements, 236.518 (1999).

<sup>72</sup> R. Annex 1.

<sup>73</sup> R. Annex 1.

<sup>74</sup> *Id.*

allowance.<sup>75</sup> Difficult circumstances forced Khindira's to increase its price support to rise above the *de minimis* level in 2013–14 and 2014–15. However, Khindira's domestic support with respect to wheat was only slightly in excess of the *de minimis* levels allowed by Article 6.4. The value of wheat production for 2013–14 is \$247,680,000 in USD, thus the *de minimis level* is \$24,768,000. However, the AMS for wheat in that year was only \$27,520,000. Similarly, the value of wheat production for 2014–15 was \$267,784,000 in USD, thus the *de minimis level* is \$26,778,400 while the AMS for wheat was only \$38,664,000.<sup>76</sup>

The administered price for rice for each of 2012–13, 2013–14, and 2014–15 is less than the corresponding external reference price. As such, the product support provided by the Khindiran government is not in excess of the 10% *de minimis* level and is consistent with the Agreement on Agriculture.<sup>77</sup>

2. *USD is an appropriate measure of Khindira's price support.*

Khindira's use of USD compares favorably with those of other Member countries. Many Member countries, both developing and developed have opted to use USD for their notifications.<sup>78</sup> In addition, at least one Member has changed the currency in which its notifications are submitted. For the reporting period of 2005–06 to 2011–12, Malawi submitted its notifications in USD.<sup>79</sup> Subsequently, for the reporting period of 2015–16 and 2016–17, Malawi submitted its notifications in Malawian kwacha.<sup>80</sup> Additionally, a WTO Committee on Agriculture document on reviewing notifications says that, with respect to Table DS:1, a reviewing body should ask whether the Member reported its Current Total AMS in the same currency as its commitment, and if not, "to consider asking the reason why".<sup>81</sup> Since the WTO clearly contemplated a situation where a Member may change its reporting currency, this supports the idea that that Members may change the currency in which they make their notifications. Additional support for the ability of Members to change the currency in which they submit notifications is found in Article 18.4

- a. Article 18.4 of the Agreement on Agriculture supports the conclusion that calculations of Khindira's price support should be done in USD

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<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.*, WTO, Peru, Notification on Domestic Support, WTO Doc. G/AG/N/PER/15 (Dec. 14, 2016); WTO, India, Notification on Domestic Support, WTO Doc. G/AG/N/IND/11 (July 12, 2017).

<sup>79</sup> WTO, Malawi, Notification on Domestic Support, WTO Doc. G/AG/N/MWI/4 (Mar. 15, 2013).

<sup>80</sup> WTO, Malawi, Notification on Domestic Support, WTO Doc. G/AG/N/MWI/9 (Mar. 17, 2017).

<sup>81</sup> 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](https://www.wto.org/english/tratop_e/agric_e/cairns_group_paper.pdf).

Article 18.4 of the Agreement on Agriculture provides support for Khindira’s use of USD to calculate its AMS rather than K£. 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.”<sup>82</sup> In addition to fitting the language of Article 18.4, Khindira’s economic situation is exactly what Article 18.4 was intended to protect.

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*.”<sup>83</sup> The term “excessive” is defined as “more than is necessary, normal or desirable.”<sup>84</sup> While some inflation is desirable in an economy, “[t]he threshold level of inflation beyond which inflation significantly hinders growth is estimated to be in the 3-6 percent range.”<sup>85</sup> To manage inflation, 17 central banks have adopted programs for targeting a given inflation rate.<sup>86</sup> 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%.<sup>87</sup> The average inflation rate in India over the last 20 years has been 6.72% with inflation at 2.23% in 2016.<sup>88</sup> Khindira’s inflation rate has been significantly higher.

The economic and other domestic conditions in Khindira, particularly its high levels of inflation, make it the perfect candidate for special consideration under Article 18.4. In Khindira, the average exchange rate from 1986–88 was \$1 USD to 12 K£. That exchange rate shifted to \$1 USD to 42 K£ in the 2012–13, 43 K£ in 2013–14, and 47 K£ in 2014–2015.<sup>89</sup> The shift from 12 K£ to \$1 USD to 47 K£ to \$1 USD represents a total increase of \$291.67%. From 1986 to 2015, the average yearly inflation rate is more than 10%. Compared to inflation of currency like the USD in the same time frame—\$1 USD in January 1986 is \$2.18 in July

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<sup>82</sup> Agreement on Agriculture, *supra* note 1, at art. 18.4.

<sup>83</sup> 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)*].

<sup>84</sup> *Excessive*, Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/excessive> (last visited Jan. 13, 2018).

<sup>85</sup> Mohsin S. Khan, Abdelhak Senhadji & Bruce D. Smith, *Inflation and Financial Depth*, 17 (IMF, Working Paper No. 01/44, 2006).

<sup>86</sup> 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* (updated July 29, 2017), <http://www.imf.org/external/pubs/ft/fandd/basics/target.htm>; *Inflation Targeting*, Wikipedia, [https://en.wikipedia.org/wiki/Inflation\\_targeting#Countries](https://en.wikipedia.org/wiki/Inflation_targeting#Countries) (last visited Jan. 13, 2018).

<sup>87</sup> 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](https://www.federalreserve.gov/faqs/economy_14400.htm).

<sup>88</sup> See Historic inflation India – CPI Inflation, Inflation.eu, <http://www.inflation.eu/inflation-rates/india/historic-inflation/cpi-inflation-india.aspx> (last visited Jan 13, 2018).

<sup>89</sup> R. Annex 1.

2015, equaling inflation of 118%<sup>90</sup>—Khindira’s inflation rate is far more than is “necessary, normal, or desirable.” Article 18.4 is critically important, especially for developing countries like Khindira, as the effects of inflation can be extremely detrimental to a currency, particularly regarding purchasing power.

In light of the high rate of inflation and other domestic problems that Khindira has experienced in the years between submission of its Supporting Tables Relating to Commitments on Agricultural Products in Part IV of its Schedules and its notification to the WTO Committee on Agriculture on 16 April 2016,<sup>91</sup> its use of USD rather than K£ should be accepted.

3. *Khindira’s price support is only inconsistent with Articles 3.2, 6.3, and 7.2(b) with respect to wheat in marketing years 2013–14 and 2014–15.*

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.”<sup>92</sup> Because Khindira’s domestic support for rice in market years 2012–13, 2013–14, and 2014–15 and wheat in 2012–13 are not in excess of the *de minimis* level allowable under Article 6.4,<sup>93</sup> the support provided for those agricultural goods in those years does not need to be included in the calculation of Current Total AMS. Khindira’s support in those years is not in excess of its commitment levels specified in Section I of Part IV of its Schedule. Only with respect to wheat in marketing years 2013–14 and 2014–15 is Khindira’s support inconsistent with Article 3.2.

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.”<sup>94</sup> Under the Article 1 definition, Total Aggregate Measurement of Support (‘Total AMS’) means “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.”<sup>95</sup> Current Total AMS is defined in

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<sup>90</sup> See Bureau of Labor Statistics, CPI Inflation Calculator, U.S. Dep’t of Labor, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm).

<sup>91</sup> See R. at ¶¶ 1, 2.

<sup>92</sup> *Id.* at art. 3.2.

<sup>93</sup> See *supra* Part B.1.

<sup>94</sup> *Id.* at art. 6.3.

<sup>95</sup> *Id.* at art. 1(h).

Article 1 as “the level of support actually provided during any year of the implementation period and thereafter.”<sup>96</sup> The “Annual and Final Bound Commitment Levels” represent “the maximum support permitted to be provided during any year of the implementation period or thereafter,”<sup>97</sup> the implementation period being, in relevant part, “the six-year period commencing in the year 1995.”<sup>98</sup> Khindira’s domestic support “in favor of agricultural producers expressed in terms of Current Total AMS” exceeds “the corresponding annual or final bound commitment level specified in Part IV of [Khindira’s] Schedule” only with respect to wheat in marketing years 2013–14 and 2014–15, inconsistent with Article 6.3.

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.”<sup>99</sup> 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 in Article 6.4. As demonstrated in Part B.1 above, when calculated in USD, Khindira’s price support exceeds the 10% *de minimis* level only for wheat and only in the market years 2013–14, and 2014–15. However, Khindira’s price supports for wheat are protected from challenge by the Bali Decision.

4. *Khindira’s price support is protected from challenge under the Bali Decision.*

The Bali Decision 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].”<sup>100</sup> 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.”<sup>101</sup>

Developing members must meet certain criteria in order to take advantage of the Bali Decision’s benefits, 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

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<sup>96</sup> *Id.* at art. 1(h)(ii).

<sup>97</sup> *Id.* at art. 1(h)(i).

<sup>98</sup> *Id.* at art. 1(f).

<sup>99</sup> Agreement on Agriculture, *supra* note 1, at art. 7.2(b).

<sup>100</sup> World Trade Organization, Ministerial Decision of 7 December 2013, WTO Doc. WT/MIN(13)/38, WT/L/913 ¶ 2 (2013) [hereinafter Bali Decision].

<sup>101</sup> *Id.*

Measurement of Support (AMS) limits . . . as a result of the programmes mentioned above.”<sup>102</sup> Many developing Members have submitted incomplete or late notifications.<sup>103</sup> Khindira, as a developing country, faces many difficulties with notifications, including limited administrative capacity.<sup>104</sup> Further, Khindira is the type of country the Bali Decision was designed to benefit, so Khindira should be allowed to benefit from the decision.

- a. Khindira’s notification on 16 April 2016 fulfills its notification requirements under the Bali Decision.

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<sup>105</sup> in accordance with the notification and transparency requirements of the Bali Decision.<sup>106</sup> The notification and transparency requirements also entail 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.”<sup>107</sup> 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.”<sup>108</sup> 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.<sup>109</sup>

Many Members, particularly developing Members, have expressed difficulty meeting the notification requirements contained throughout the Agreement on Agriculture, which have not been updated since 1995.<sup>110</sup> According to Results of the Survey on the Improvement of Timeliness and Completeness of Notifications under Existing Procedures, “[a]pproximately three-quarters of respondents, the great majority of which are developing countries, confirm having experienced problems while preparing their notifications prior to their submission to the Committee on Agriculture.”<sup>111</sup> Members have cited difficulties including a “shortage of human resources and unavailability of properly-trained technical

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<sup>102</sup> *Id.* at ¶ 3.a.

<sup>103</sup> *See infra* Part B.4.a.

<sup>104</sup> *See* R. at ¶ 17.

<sup>105</sup> R. at ¶ 12.

<sup>106</sup> Bali Decision, *supra* note 100, at ¶ 3(a)

<sup>107</sup> *Id.* at ¶ 3(b)

<sup>108</sup> *Id.* at Annex § 1.

<sup>109</sup> 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](https://www.wto.org/english/tratop_e/agric_e/cairns_group_paper.pdf).

<sup>110</sup> United States, Committee on Agriculture, Review of Domestic Support Notifications, at 1, WTO Doc. G/AG/W/105 (2012) [hereinafter Review of Domestic Support Notifications].

<sup>111</sup> WTO, Note of the Secretariat, Results of the Survey on the Improvement of Timeliness and Completeness of Notifications under Existing Procedures, at 6, WTO Doc. G/AG/GEN/85 (June 15, 2009) [hereinafter Notification Survey].

staff for compiling and processing information,” a “complex and time-consuming” preparation process, and “insufficient time frames provided for in the current procedures,” particularly with respect to domestic support measures.<sup>112</sup> In support of this proposition, the United States issued a paper noting the required notifications for domestic support, particularly “the eleven distinct tables contained in a Table DS:1 notification[,] often have lengthy, complex and inter-related numbers” and “current notification ‘requirements’ in G/AG/2 still include . . . widely-agreed unrealistic 90-day submission deadlines for domestic support notifications.”<sup>113</sup>

Developing countries in particular have cited the “absence of dedicated agriculture notification desks,” formatting problems with the notifications, and a “lack of experience in identifying domestic trade-distorting measures . . . and structuring the programmes in accordance with WTO rules and notification formats.”<sup>114</sup> The implementation of agricultural policy reforms such as the Act has also had an affect on “timeliness and completeness of notifications.”<sup>115</sup> These problems often spill over from the preparation phase to the submission phase.<sup>116</sup>

Unsurprisingly, a significant number of countries, particularly developing countries, have outstanding notifications with respect to domestic support.<sup>117</sup> From 1995 to 2015, “there are 790 Table DS:1 notifications outstanding, the highest percentage of outstanding notifications from the group, which represents 36% of the total DS:1 notifications expected for this period. . . . There are 25 Members (19%) with 100% compliance, and 31 Members (23%) with compliance rates at 0%.”<sup>118</sup> The number of countries with domestic support notifications listed as “outstanding,” including countries that historically have issued notifications, has increased over time, particularly since around 2011.<sup>119</sup>

Khindira is a developing country,<sup>120</sup> a classification demonstrating the least ability to completely and timely submit its required notifications and simultaneously the most need to benefit from the Bali Decision. Still, Khindira’s notification dated 16 April 2016 was submitted in accordance with Section 1 of the template attached to the Bali Decision, which

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<sup>112</sup> *Id.* at 5.

<sup>113</sup> Review of Domestic Support Notifications, *supra* note 110, at 1.

<sup>114</sup> Notification Survey, *supra* note 111, at 7.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.* at 10.

<sup>117</sup> *See generally* WTO, Note of the Secretariat, Compliance with Notification Obligations, WTO Doc. G/AG/GEN/86/Rev.28 (2017).

<sup>118</sup> *Id.* at 7.

<sup>119</sup> *Id.* at 13–17.

<sup>120</sup> *See supra* Part B.1.

is contained in the Annex.<sup>121</sup> Khindira should not be penalized for problems with its notification in light of all of the difficulties experienced by both developed and developing Members. This conclusion finds support in the purpose of the Bali Decision.

- b. Khindira should be allowed to benefit from the Bali Decision based on the decision's purpose.

The Bali Decision arose because “some developing countries fear[ed] they [w]ould breach the limits they have agreed on trade-distorting domestic support.”<sup>122</sup> The manner in which support is calculated makes it increasingly difficult for developing Members to stay within their limits.<sup>123</sup> “And they say this is important for them when their stockpiling under the Amber Box is in programmes that also include supplying the stocked produce to low-income consumers.”<sup>124</sup> How best to handle these issues remains a point of contention in the WTO. The Bali Decision is an interim decision; a compromise that represents an effort to aid developing countries struggling under the AMS limits as they stand.<sup>125</sup> The fact that an interim decision was agreed to while a permanent solution was sought, rather than simply waiting for a permanent decision while leaving no recourse for developing countries evidences the importance of these protections. Additionally, the WTO's prioritization of food security is a critical element of the decision, evidenced by the leniency for developing countries with respect to their domestic support for programs related to food security.

Khindira has experienced a veritable humanitarian crisis in recent years as a result of the high costs for agricultural supplies, unpredictable weather, and highly volatile domestic and international prices.<sup>126</sup> Each of these factors has contributed to a massive amount of indebtedness in the farming population so extreme that many have committed suicide as an escape.<sup>127</sup> At the same time, significant portions of the poor urban population are starving and the farmers cannot afford to produce enough desperately needed food.<sup>128</sup> The price supports under the Act are critical to accomplish the provision of affordable food.<sup>129</sup> Price supports will allow farmers to maintain the steady income needed to overcome the difficult

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<sup>121</sup> Bali Decision, *supra* note 100, at Annex.

<sup>122</sup> WTO, The Bali decision on stockholding for food security in developing countries (updated Nov. 27, 2014), [https://www.wto.org/english/tratop\\_e/agric\\_e/factsheet\\_agng\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm).

<sup>123</sup> WTO, Briefing Note: Agriculture negotiations—the bid to ‘harvest’ some ‘low hanging fruit’, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/brief\\_agneg\\_e.htm#stockholding](https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_agneg_e.htm#stockholding) (last visited Jan. 13, 2018).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> R. at ¶ 1.

<sup>127</sup> *Id.*

<sup>128</sup> R. at ¶¶ 1–2.

<sup>129</sup> R. at ¶ 3.



circumstances they face and produce food for the country. Without the price support provided by the Khindiran government, the needed food supply will not be met, farmers will remain unable to support themselves or produce food, and the urban population will remain starving.<sup>130</sup> Khindira's price supports not only enable farmers to produce the food, but allow the food to be sold to the poor urban population at affordable prices.

Khindira's price support is directly consistent with the Bali Decision's purpose to ease the difficulty for developing countries in adhering to their AMS limits under the Agreement on Agriculture. Khindira's struggle with solving its food crisis while staying within its AMS limits has proven insurmountable; Khindira has increased its price supports, not to create a trade-distorting international situation, but to adequately meet the basic needs of both its rural and urban populations. The Bali Decision was designed with circumstances exactly like Khindira's in mind, thus Khindira should be allowed to enjoy the benefits of the Bali Decision.

**C. Khindira's Provision of Export Subsidies on Rice is not Inconsistent with Article 9.2 of the Agreement on Agriculture or the Nairobi Decision.**

1. *Khindira's budgetary outlays are not 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."<sup>131</sup> The implementation period is defined as, in relevant part, "the six-year period commencing in the year 1995."<sup>132</sup> Khindira's annual and final outlay commitment levels and final quantity commitment levels for rice, wheat, and coarse grains, were each less than the corresponding annual and final outlay commitment levels and annual and final quantity commitment levels at the conclusion of the implementation period. Thus, Khindira's export subsidies are in line with Article 9.2(a).

Additionally, under Article 9.2(b), "[i]n any of the second through fifth years of the implementation period, a Member may provide export subsidies . . . in a given year in excess

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<sup>130</sup> R. at ¶¶ 1–3.

<sup>131</sup> Agreement on Agriculture, *supra* note 1, at art. 9.2(a).

<sup>132</sup> *Id.* at art. 1(f).

of the corresponding annual commitment levels” for products specified in Part IV of the Member’s schedule,<sup>133</sup> if, in relevant part, “the [developing] Member’s budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than [76] per cent and [86] per cent of the 1986-1990 base period levels, respectively.”<sup>134</sup> Khindira’s export subsidies and quantities for each product at the end of the implementation period were less than 76% and 86% respectively of the base levels. Thus, Khindira’s annual and final outlay commitments and quantity commitments are not inconsistent with Article 9.2(b)(iv).

2. *Khindira should not be required to eliminate its remaining export subsidies.*

At the closing of the 10<sup>th</sup> Ministerial Conference held in Nairobi, Kenya in 2015, the ministers adopted the Nairobi Package, “a series of six Ministerial Decisions on agriculture, cotton and issues related to LDCs.”<sup>135</sup> In relevant part, the Nairobi Package contains the Nairobi Decision.<sup>136</sup> The Nairobi Decision is an effort to “level the playing field for agricultural exporters,” particularly from poor and developing countries, by reaffirming a commitment to limiting trade-distorting export subsidies. This goal was accomplished through the eventual elimination of export subsidies under the decision. Khindira is a poor and developing country that has suffered devastating economic circumstances in recent years<sup>137</sup>—exactly the group for whom the field should be leveled, not leveled against.

Khindira is a developing country whose continued use of minimal export subsidies with respect to rice is critical to the maintenance of a basic standard of living for Khindira’s poor and malnourished population.<sup>138</sup> In keeping its export subsidies below its final commitment levels set at the conclusion of the implementation period and in submitting a notification containing its draft schedule, Khindira has done as much as it can to implement the Nairobi Decision. Additionally, despite Khindira’s continued use of export subsidies for rice, is not inconsistent with the purpose of the Nairobi Decision and the WTO more generally. Finally, even if Khindira’s subsidies are inconsistent with the Nairobi Decision, the Nairobi Decision is a political document that imposes no legal obligation on its own.

a. *Khindira has done all it can to implement the Nairobi Decision.*

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<sup>133</sup> *Id.* at art. 9.2(b).

<sup>134</sup> *Id.* at art. 9.2(b)(iv).

<sup>135</sup> WTO, Tenth WTO Ministerial Conference, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mc10\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm) (last visited Jan. 13, 2018).

<sup>136</sup> World Trade Organization, Ministerial Decision of 19 December 2015, WTO Doc. WT/MIN(15)/45, WT/L/980 (2015) [hereinafter Nairobi Decision].

<sup>137</sup> *See supra* Part B.4.b.

<sup>138</sup> *Id.*

Under the Nairobi Decision generally, Members “reaffirm[ed] their commitment . . . to exercise utmost restraint with regard to any recourse to all forms of export subsidies.”<sup>139</sup> The Nairobi Decision makes clear that it does not give Members the right to provide export subsidies in excess of their specified commitment levels<sup>140</sup> and stated 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.”<sup>141</sup> The most historic element of the Decision is the eventual elimination of export subsidies. Specifically, “[d]eveloping country Members shall eliminate their export subsidy entitlements by the end of 2018.”<sup>142</sup>

Though the government of Khindira has taken a cautious approach to implementing the Nairobi Decision,<sup>143</sup> it has done all it can to keep its practices in compliance. Pursuant to the Nairobi Decision, and in the face of extreme economic and domestic problems, Khindira has exercised “utmost restraint” regarding its use of export subsidies, having entirely eliminated export subsidies with respect to wheat and coarse grains and significantly diminishing export subsidies with respect to rice. Khindira’s minimization and elimination of its export subsidies keep it in compliance with its obligations under the Agreement on Agriculture. The export subsidies for rice are far below their corresponding final outlay and quantity commitment levels.<sup>144</sup> Further, Khindira’s remaining export subsidies with respect to rice are unlikely to have a trade-distorting effect or to displace or impede the exports of other Members—since the conclusion of the Uruguay Round, Khindira has not maintained a government policy for export subsidies, but has granted export subsidies only sporadically in exceptional cases, remaining well within its commitment levels.<sup>145</sup>

The greatly reduced export subsidies maintained for rice by the Khindiran government are critical to ensuring that the poor in its country continue to survive and be fed. Khindira has gone as far as it can to stay in conformity with the Nairobi Decision by drastically minimizing or eliminating entirely its export subsidies and by submitting a notification informing the WTO of its continued use of export subsidies for rice. Forcing Khindira to eliminate its remaining export subsidies at a faster pace would be counterproductive, as it would risk undoing the progress under the Act and ultimately prolonging the need for governmental support in the agricultural sector.

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<sup>139</sup> R. at ¶ 1.

<sup>140</sup> R. at ¶¶ 2, 3.

<sup>141</sup> R. at ¶ 11.

<sup>142</sup> R. at ¶ 7.

<sup>143</sup> R. at ¶ 20.

<sup>144</sup> R. Annex 4.

<sup>145</sup> R. Clarifications ¶ 28.

- b. Khindira's continued use of export subsidies for rice is not inconsistent with the purpose of the Nairobi Decision.

The "historic" Nairobi Decision serves the purpose of eliminating export subsidies in order to "level[] the playing field for agricultural exporters," particularly "for farmers in poor countries who cannot afford to compete with rich countries which artificially boost their exports through subsidization."<sup>146</sup>

Throughout the various WTO documents are protections for developing countries like Khindira.<sup>147</sup> These provisions support the idea that the rules and restrictions under the Decision are, at least in part, intended specifically to help developing countries. Specific examples of such flexibility are Article XVIII, which allows "flexibility in the use of trade measures to protect infant industries" and Part IV, which "states that developing countries are not expected to reciprocate trade barrier reduction commitments made by developed countries."<sup>148</sup> Notably, the Nairobi Decision itself contains leniency for developing countries. For example, developing Members were given a few more years than their developed counterparts to eliminate their export subsidies<sup>149</sup> and were granted an extension on the time in which a country may benefit from Article 9.4.<sup>150</sup> These provisions indicate an understanding of the difficulty developing countries face in eliminating their export subsidies. Further, the considerations for developing and least-developed countries ("LDCs") that permeates the WTO are strongly indicative of a policy decision that developing and least-developed countries require extra protection.

The Marrakesh Agreement established the WTO and thus informs the agreements, declarations, and decisions produced under it. According to Article IX of the Marrakesh Agreement, "[i]n exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements," if certain requirements are met.<sup>151</sup> The existence of this provision in the founding document of the WTO indicates just how deeply held the sense of leniency is in appropriate circumstances. Khindira represents exactly the kind of circumstance that warrants

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<sup>146</sup> WTO, Briefing note: Agricultural issues, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_agriculture\\_e.htm#exportcompetition](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm#exportcompetition) (last visited Jan. 11, 2018).

<sup>147</sup> See, e.g., Agreement on Agriculture, *supra* note 1, at art. 5; Agreement on Agriculture, *supra* note 1, at Annex 5; Bali Decision, *supra* note 100, at art. 5.

<sup>148</sup> WTO, Guide to the Uruguay Round Agreements 235 n.517 (1999).

<sup>149</sup> Compare Nairobi Decision, *supra* note 136 ¶ 6 with Nairobi Decision, *supra* note 136 ¶ 7.

<sup>150</sup> Nairobi Decision, *supra* note 136, at ¶ 8.

<sup>151</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. IX.3 [hereinafter Marrakesh Agreement].

leniency. The WTO makes clear that “[d]eveloping countries, particularly least-developed countries, are given more flexibility in implementing certain WTO rules,” a principle which should guide application of the Nairobi Decision to Khindira.<sup>152</sup>

Asking Khindira to eliminate its remaining export subsidies more quickly than it already is would be subjecting the Khindirian population, particularly its farmers, to an even graver reality than they already face. The farmers in Khindira have been unable to produce the agricultural goods needed to feed the poor urban population due to unpredictable weather, unscrupulous money launderers, and extremely far and volatile prices for supplies like seeds and fertilizers.<sup>153</sup> This combination of difficulties has driven many farmers to suicide to escape their crippling debt.<sup>154</sup> Causing Khindira to eliminate its significantly diminished export subsidies would not be shielding poor farmers in developing countries from their rich competitors or preventing massive trade-distorting effects, but would be taking away a critical piece of the Act, needed to protect Khindira’s poor farmers and affordably feed the population. As forcing Khindira to eliminate its remaining export subsidies would be counter to the purpose of the Nairobi Decision, Khindira should not be forced to eliminate its remaining subsidies.

- c. The Nairobi Decision is a political document imposing no legal obligation on its own.

Even if Khindira’s continued use of export subsidies is not consistent with the Nairobi Decision, the Nairobi Decision is a political document that imposes no legal obligation on its own. As evidence, the Ministerial Conferences—the highest decision-making body of the WTO that sets out the Ministerial Declarations and Decisions—meets every two years and “provide[s] *political direction* for the organization.”<sup>155</sup>

#### **D. Conclusion**

First, Khindira's Flexible Tariff Administration is in compliance with Article 4.2 because it is an ordinary customs duty. Second, Khindira’s price supports for rice are below the *de minimis* level allowed under Article 6.4, and as such are not inconsistent with Articles 3.2, 6.3, or 7.2(b). Khindira’s price supports with respect to wheat are only above the *de minimis* levels for market years 2013–14 and 2014–15, and those supports are protected from

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<sup>152</sup> WTO, WTO Legal Texts, S&D, [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Jan. 13, 2018).

<sup>153</sup> R. at ¶ 1.

<sup>154</sup> *Id.*

<sup>155</sup> WTO, Ministerial Declarations and Decisions, [https://www.wto.org/english/thewto\\_e/minist\\_e/min\\_declaration\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm) (last visited Jan. 13, 2018) (emphasis added).

challenge by the Bali Decision. Third, Khindira should not be made to eliminate its remaining export subsidies for rice, as Khindira's supports are critical to the wellbeing of the country and are significantly below the required levels under Article 9.2.

## REQUEST FOR FINDINGS

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

1. Khindira's Flexible Tariff Administration do not violate Article 4.2 of the Agreement on Agriculture.
2. Khindira's price support with respect to rice in each marketing year and wheat in marketing year 2012–13 are not inconsistent with Articles 3.2, 6.3, and 7.2(b) of the Agreement on Agriculture, and that Khindira's price supports for wheat in marketing years 2013–14 and 2014–15 are protected from challenge by the Bali Decision.
3. Khindira's use of export subsidies with respect to rice are not inconsistent with Article 9.2 of the Agreement on Agriculture, and should not be eliminated under the Nairobi Decision.