

MOCK DISPUTE SESSION

A. FACTS:

Utopia and Meluha are members of the World Trade Organization since 1995.

Utopia imposes certain export restraints in the form of export quotas and export duties on specific kinds of bauxite, coke, fluorspar, magnesium and silicon metal (“raw materials”).

Under the Utopian *Foreign Trade Law* (Article 19), the Department of Customs has the authority to restrict or prohibit the exportation of goods through export quotas and subject these goods to an export quotas administration. It is also responsible for “formulating, adjusting and publishing” the catalogue listing all goods subject to export quota and for determining and announcing the total amount of annual export quota for each covered product, by the relevant measure, by October 31 of the previous year.

Utopia allocates quotas either directly or through a quota bidding system. Enterprises that are approved to export under the quotas are issued a certificate of quota. The Department of Customs *vide* its *Export Quota Administration Measures* (Article 22), applies export quotas to bauxite, coke, fluorspar, magnesium and silicon metal.

Bauxite and coke are allocated through quotas ‘directly’ and such allocation is done by the Export Division of the Department of Commerce. The *Customs Catalogue* (2012) of Utopia mentions the criteria that are taken into account when allocating an export quota ‘directly’, namely:

- (i) Export performance of the particular good; and
- (ii) Utilization rate of the export quota.

Additionally, the Export Division also looks into the operational capacity and the management structure of the applicant. This criterion is however not published in the *Customs Catalogue* and the details of the parameters employed by the Export Division in its evaluation are not available publically.

Fluorspar, magnesium and silicon metal are allocated quotas through a quota bidding process. The rules and procedures governing the quota bidding process are set out in the *Export Quota Bidding Measures*, in conjunction with *Export Quota Bidding Implementation Rules*. Any exporter that wishes to export through quota bidding must submit a bidding price and bidding quantity to Utopia’s Bidding Office. The bidding price represents the amount per metric tonne that a bidding enterprise is willing to pay for the right to export. The bidding price and quantity multiplied together are bid winning-price. The winning bidders are determined based on highest bid prices. Enterprises that are awarded a portion of the quota must pay the balance bid winning price and a security deposit. An enterprise may pay the full award price where it wishes to export the full allocation or a proportionate amount where it wishes to export less than full allocation. The Bidding Office will refund the corresponding bid price but not refund the security deposit which is 20% of the total award price.

The total amount and procedure for the allocation of fluorspar and magnesium is published in the *Official Gazette* of Utopia, the *Customs Catalogue* as well as the website of the Department of Commerce.

Meluha alleges that Utopia's imposition of export quotas on the exportation of raw materials are in violation with Utopia's obligations under the General Agreement on Tariffs and Trade, 1994 (GATT).

On November 23, 2013, Meluha requested consultations with the Government of Utopia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GATT, with respect to Utopia's imposition of quotas on the exportation from Utopia of certain kinds of raw materials. Meluha held consultations with Utopia on December 02, 2013 and January 05-06, 2014. Those consultations unfortunately did not resolve the dispute. Meluha now seeks to request establishment of a panel to examine the matter.

B. EXERCISE:

1. Establishment of Panel: As trade advisors to the government of Meluha, draft a request for the establishment of a Panel on behalf of Meluha to look into the above matter, in light of Article 6.2 of the DSU.
2. First Written Submission: After the establishment of Panel and at the stage of First written submissions of the parties, Meluha wants to raise a new claim relating to Utopia's imposition of *export duties*. Will such a request be entertained by the Panel? Alternatively, can Meluha raise new arguments in support of a claim already raised and progressively clarify the same at different stages of the panel proceedings?
3. Burden of Proof: As a defense to claims raised by Meluha, Utopia wishes to invoke the exception in Article XX(g) of GATT "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". How do the rules with respect to burden of proof apply in this case?

Annexure

Relevant Treaty Text

I. General Agreement on Tariffs and Trade 1994

Article VIII

*Fees and Formalities connected with Importation and Exportation**

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
- (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).
- (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*
2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.
3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:
 - (a) consular transactions, such as consular invoices and certificates;
 - (b) quantitative restrictions;
 - (c) licensing;
 - (d) exchange control;
 - (e) statistical services;

- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

Article X

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3.
 - (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
 - (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.
 - (c) The provisions of subparagraph (b) of this paragraph shall not require the

elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

*Article XI**

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:
 - (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
 - (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
 - (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph © of this paragraph shall give public notice of the total quantity or value of the

product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

Ad Article VIII

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 (a) of Article XV fully safeguard its position.
2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

Ad Article XI

Paragraph 2(c)

The term “in any form” in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last subparagraph

The term “special factors” includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- ...
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

II. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

Article 6: Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.(5)

(footnote origina) 5 If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.