

## 2017 Asian WTO Moot Court Competition

### Problem

#### ***Klingon – Measures Affecting Certain Plastic Bags from Romulan***

1. Both Klingon and Romulan are members of the World Trade Organization (WTO). Both countries are also parties to the Xanadu Agreement on Climate Change (the Xanadu Agreement) which came into force on January 1, 2015 and which aims to regulate, among others, the carbon footprint of major industrial products. Two-thirds of signatories to the Xanadu Agreement are WTO members. The WTO Trade and Environment Committee was actively involved in the negotiation process. Main provisions of the Xanadu Agreement are as follows.

#### The Xanadu Agreement on Climate Change

(...)

##### Article 20 (Carbon Footprint)

A Party to the Agreement shall ensure that the total amount of CO<sub>2</sub> (“carbon footprint”) incurred to manufacture such products as listed in Annex A may not exceed 0.5 g per unit of production.

##### Article 21 (Disclosure)

A Party to the Agreement shall require a producer or importer of products listed in Annex A to identify and disclose the carbon footprint under Article 20.

##### Article 22 (Product Ban)

A Party shall consider adoption of various measures to prevent any product whose carbon footprint exceeds the level stipulated in Article 20 from being manufactured, marketed, imported or distributed, provided that such measures do not constitute unnecessary restriction on trade.

##### Article 23 (Domestic Procedure)

A Party to the Agreement may establish any domestic procedures that it deems necessary to implement the Agreement.

(...)

##### Annex A

(...)

- Plastic and plastic products, including cups, bags and toys.

(...)

2. Article VI of the Klingon Constitution reads that “a valid and effective international treaty can be deemed to hold the same legal effect as a domestic law.” In addressing

the direct invocability of other international treaties, the Supreme Court of Klingon held that “even if an international treaty holds the same legal effect as a domestic law, it would not guarantee that such a treaty can be invoked by a private party at all times as a statutory basis for claiming a legal right in a domestic court proceeding.” A prevailing scholarly commentary on the above ruling of the Supreme Court is that whether or not a private party can invoke an international treaty provision as the basis of its legal right in the domestic court proceedings will depend on the nature of the international treaty at issue.

3. In pursuit of the Xanadu Agreement, the Klingon government has recently formulated an internal administrative guideline according to which it can verify whether an imported product meets the requirements under Article 20 of the Agreement. This internal guideline has been made available on the Klingon government website, which is written in the “Klingonese” language only. This verification requirement has been imposed exclusively on imported plastic bags. The Klingon government has exempted domestic plastic bag makers from the same verification requirement for an initial period of 5 years with the possibility of further extension. The Klingon government justifies such exemption on the grounds that it has monitored carbon footprints of all domestic plastic bag factories for the past decade. According to the Klingon government, all Klingon plastic bag makers have maintained their carbon footprints below the 0.5 g per unit level for the past decade. In the meantime, the Klingon government’s internal guideline provides that the carbon footprint verification should be conducted in designated facilities within the Klingon territory. The Klingon government believes that its verification technology is far advanced than other countries and also fears biased verification results if conducted in the territory of exporting countries.

4. Romulan, a neighboring country of Klingon, exports plastic bags to Klingon. The price of Romulan plastic bags was only a half of the price of Klingon plastic bags, though the former held the nearly same quality to the latter. The Klingon government examined the carbon footprint of Romulan plastic bags in one of Klingon verification facilities. The result ranged between 0.6 and 1.0 g per unit. Consequently, the Klingon government banned the import of Romulan plastic bags in accordance with Article 22 of the Agreement. Indeed, the “Green Consumers Organization (GCO),” an NGO representing 60% of the entire Klingon consumers announced its official support of the ban. Meanwhile, on the basis of its own monitoring results for the past decade, the Romulan government certified that the carbon footprint of its domestic plastic bags was below the threshold (0.5 g per unit) set by Article 20 of the Agreement.

5. The Romulan government requested the Klingon government to accept the former’s certification result and thus resume the import of Romulan plastic bags. The Romulan government highlighted the fact that the “Green Scientists Alliance (GSA),” a world’s leading expert group on the environment and climate change acknowledged its administrative competence in monitoring carbon footprints of various products. However, the Klingon government refused to discuss such possibility on the grounds that its verification outcome is more reliable than that conducted by the Romulan government, which was also endorsed by another group of experts led by two Novel

Prize laureates. In the past, the two countries established various cooperative arrangements in other regulatory areas such as tax and securities.

6. On 19 December 2015, Romulan requested consultations with Klingon pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and other relevant WTO Agreements. The consultations concerned the verification requirement and the related ban imposed by Klingon on imports of plastic bags from Romulan. Klingon and Romulan held consultations on 14 February 2016. These consultations failed to resolve the dispute.

7. Romulan claimed that Klingon measures violated Article III:4 of GATT 1994, and Articles 2.1, 2.2, 5.1, 5.2, 6.1 and 6.2 of the Agreement on Technical Barriers to Trade, among others.

8. On 9 March 2016, Romulan requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and other pertinent WTO Agreements.