**Autumn semester 2020-2021 academic years**

**on the educational program**

**“Actual Problems of International Economic Law”**

Exam questions

Vupsia (V) and Dazia (D) are both members of the World Trade Organization (WTO). Vupsia is a large, developed country, while Dazia is a small, developing country in Southeast Asia that is in transition from socialism to a market-based economy. Both countries produce catfish. Almost all Vupsian catfish comes from "fish farms" where the fish are raised in ponds, while a small portion of Vupsian catfish are wild and caught in rivers. Dazian catfish, however, are almost entirely wild and caught in rivers at this time, though Dazia is in the process of developing its catfish farming industry. There are three Dazian companies that export catfish, and the Dazian government is part-owner of all three.

All catfish are vertebrate bony fish that belong to the order Siluformes, to which belong more than twenty different families of catfish around the world. For example, the family of catfish found in Vupsia is Ictaluridae ("I" family), whereas the family of catfish found in Dazia is Sisoridae ("S family").

In the past ten years, Dazia's catfish exports to Vupsia have increased steadily. Consumer demand for catfish in Vupsia has doubled in the past five years. Yet despite the favourable market conditions for expansion, the Vupsian industry has shrunk, in part due to Vupsian environmental regulations adopted in 2008 that make it more expensive to farm catfish, and in part because a parasite has infested a substantial number of Vupsian catfish farms since 2009. Since 2008, 15% of Vupsian catfish farmers have gone bankrupt, and more are laying off workers and losing money.

The Vupsian government has taken a number of measures -- listed in detail below -- which affect Dazian catfish exports to Vupsia. Dazia has challenged each of these measures under the Dispute Settlement Understanding (DSU). You are an attorney representing the Dazian government in this dispute. Your assignment is to formulate the legal arguments you would make on behalf of the Dazian government before the panel. It would be wise to answer the following questions in the order they occur, since they are arranged chronologically.

1. During the Uruguay Round of tariff negotiations, Vupsia set its tariff rate on all catfish at 10% per kilo. In late 2009, Vupsia introduced two changes to its customs rules. First, it changed the basis of its tariff classification from the general order (Siluformes) to the specific family of catfish involved. Second, Vupsia reduced the tariff on some families of catfish, but retained the tariff on others at the prior level. In particular, the tariff on Ictaluridae ("I" family) catfish (such as is farmed in Vupsia) was reduced to 0, while the tariff on Sisoridae ("S family") catfish (such as is imported from Dazia) remains at 10%.
2. In early 2010, Vupsia passed a new law regulating the use of fish names. The law limits the use of the word "catfish" to fish belonging to the "I family" (Ictaluridae), which is the type of catfish produced in Vupsia. However, "S family" (Sisoridae) catfish, which is the type imported from Dazia, can no longer be called "catfish" when offered for sale in Vupsia, but must be called "river mud shark" instead. "Catfish" is the name that has historically been used by Vupsian consumers to designate fish

belonging to the Siluformes order. The name "river mud shark" is unfamiliar to Vupsian consumers, though not to ichthyologists (i.e., fish scientists) or to residents of Dazia.

3. In March 2010, Vupsia imposed countervailing duties on all catfish imports from Dazia, on the basis of findings by Vupsia's International Trade Commission (ITC) that the Dazian government had illegally subsidized Dazia's catfish industry. In particular, the ITC found that the following Dazian measure represented an illegal subsidy: The Dazian government provides free inland transportation for catfish caught in the rivers of its northern provinces, which are far from the ports from which export shipments are made.

Question 2

Recommended time: one hour

Discuss arguments that can be made in favour of and against including rules on exhaustion of domestic remedies in the dispute settlement provisions of bilateral investment agreements.

Part 1:

Ad 1)
a) Change of tariff classification: From general to detailed: Article XXVIII

* -  duty to negotiate? Contracting parties primarily concerned!
* -  need for compensatory adjustment?
* -  must regard the change of tariff classification and the reduction of tariffs for one of the

families as a whole, and take into account the detrimental effects for Dazia.

b) Reduction of tariffs on one of the families of catfish Article I

* -  base the argument on violation of prohibition of de facto discrimination under the MFN

clause (Art. I) – are the two families of catfish to be regarded as the “like product”? Need more information concerning the physical properties of the fish, competition in the market ++

* -  need more information concerning imports of the other family of catfish as opposed to the catfish imported from Dazia
* -  the probable counter argument that Vupsia is free to impose tariffs below the level set out in its schedule – Art. II applies only in cases of “less favourable treatment” than the one set out in the schedule

The issue of a possible non-violation nullification or impairment

Ad 2)
Change of name to “mud river shark” (unfamiliar Vupsian, familiar to Dazian consumers) GATT Art. III:4

* + -  Like products? Different issue here, broader range of products regarded as “like”?
	+ -  Less favourable treatment?
	+ -  De minimis? TBT Art. 2.1

- Discriminatory
GATT Art. IX – marks of origin

- MFN obligation in para. 1: according to the wording broader than just origin marking. TBT Art. 2.2
- Unnecessary restriction

Ad 3)
Safeguard measures

GATT art. XIX

* -  Unforeseen developments
* -  Cause or threaten serious injury to domestic producers
* -  Like or directly competitive products
* -  Procedural requirements – consultation

Safeguards Agreement: Art. 2: conditions + art. 4: serious injury + art. 5 application of measure

* -  Increase in quantities + injury + causation
* -  Sufficient level of damage? Need to know more about effects on domestic production and

fish farming!

* -  Due to consumer preferences (wild fish rather than farmed fish)?
* -  Rather caused by domestic environmental regulation
* -  Rather caused by preference for wild fish (need information)
* -  Need to assess the level of tariffs: too high? Art. 5: necessary to prevent or remedy the

injury and to facilitate adjustment – might seem excessive

o Possible counter argument: need to try and assess on the basis of experience. o Need to know more about the effects (estimated?) of the measure

- The requirement that the measure be “neutral” and not directed at one particular group of countries, see art. 2.2!

Ad 4)
a) Lawfulness of CVD GATT art. VI:

* -  The duty must correspond to the subsity
* -  Is there a subsidy? What kind of subsidy? SCM art. 1(a)(iii) “services other than general

infrastructure”

o free inland transportation for catfish caught in the rivers of its northern

provinces, which are far from the ports from which export shipments are made. o Needs to know more about the extent to which the subsidy is specific, cf. SCM

art. 2.
- VI:6(a): cause or threaten material injury / retard materially the establishment of a

domestic industry
o Needs to know more about the importance of the subsidy for the volume of

export and competition in the Vupsian market.

b) Was the subsidy illegal? SCM art. 3: export subsidy

* -  Not realistic claim
* -  Nothing to indicate that the subsidy is related to export performance