World Trade Organization Moot Court Problem

August 19, 2021

Esmond—Certain Measures on Personal Protective Equipment (PPE) (Complaint by Caspian)

Caspian, a rapidly developing country with a population of 300 million, has recorded immense economic growth ever since it joined the World Trade Organization (WTO) in 2001 and liberalized its market. Caspian benefits from the exportation of labor-intensive goods such as textiles, shoes, and face masks, and its government currently exercises export-oriented policies to encourage various domestic exporting firms to increase their global exports.

In 2009, COVID-09 caused a dramatic shortage in the supply of masks globally. In response, the Caspian government encouraged domestic mask manufacturing companies to increase the supply of masks to ensure that Caspian was well equipped to meet future needs in response to another potential pandemic.

Caspi-Medi (CM) is one of the major mask production companies in Caspian, and in 2010, its R&D team developed a new face mask, the CM-Mask. The CM-Mask is made of three layers and includes an outer hydrophobic non-woven layer, a middle melt-blown layer, and an inner soft absorbent non-woven layer.

[CM-Mask]

The CM-Mask is a disposable device that creates a physical barrier between the mouth and nose and potential viruses. It is designed to cover the mouth and nose loosely and is not sized for an individual fit. It does not provide complete protection from viruses because of the loose fit. Therefore, when the user of the mask inhales, leakage may occur around the edges of the mask.

Unlike ordinary face masks or surgical masks, the CM-Mask is intended to be used more than once but less than five times. The mask filters 85% of particles as small as 0.3 microns in size. (Although COVID-09 virus particles are about 0.1 microns in size by themselves, it is important to note that virus particles are usually attached to something bigger, such as respiratory droplets that are generated during speech.) The mask does not require the rigorous inspection that is set forth by the National Institute for Safety and Health in Caspian, but most Caspian civilians regard the CM-Mask as complete protection against potential pandemic viruses. The CM-Mask is popularly worn during allergy and flu seasons and prevents the inhalation of dust particles created by air pollution. Additionally, colored CM-Masks have recently appeared at the forefront of fashion trends among Caspian teenagers.

Esmond is a developed country with a population of 900 million and has been a champion of free trade across the world. It has been a founding member of both General Agreement on Tariffs and Trade (GATT) and the WTO, and has been on the forefront of global efforts geared toward greater trade integration. Esmond has a robust manufacturing industry and a technological innovation platform that has always dominated its global competitors.

Since 2010, Esmond has been importing face masks from two countries, Caspian and Moonbia. Esmond has been importing the CM-Mask from Caspian ever since CM invented the CM-Mask in 2010. Esmond has also been importing the MF-Mask from Moonbia. This mask has similar performance and functions as the CM-Mask except that the MF-Mask filters 90% of particles as small as 0.3 microns in size.

In response to potential pandemic viruses, Esmond recently decided to self-produce masks so that they have a sufficient supply. The Esmond government encouraged small and medium manufacturing companies to create mask factories that could produce high-performance masks equipped with advanced technology.

Esmond-Medi (EM) is one of the newly established mask production companies in Esmond, and in 2015, their R&D team developed a new face mask, the EM-Mask. Like the CM-Mask, the EM-Mask is also made of three layers and also includes an outer hydrophobic non-woven layer, a middle melt-blown layer, and an inner soft absorbent non-woven layer. Additionally, it has a plastic valve filter with advanced purification technology that is only available in Esmond. The technology allows the mask to filter 95% of particles as small as 0.3 microns in size. The valve filter also allows easier exhalation than traditional masks, helps prevent humidity, and reduces uncomfortable heat and carbon dioxide buildup inside the mask.

[EM-Mask]

The EM-Mask allows a tight fit thanks to elastic headbands and an adjustable metal seal over the nose that keeps the mask close to the surface of the facial skin. When properly fitted, minimal leakage occurs around the edges of the mask when the user inhales. The EM-Mask has undergone the rigorous inspection and certification set forth by the National Institute for Safety and Health in Esmond. The EM-Mask is intended to be used more than once but less than three times.

Since the invention of the EM-Mask in 2015, Esmond consumers now have a choice of three types of masks in their domestic market: the CM-Mask from Caspian, the MF-Mask from

Moonbia, and the self-produced EM-Mask. The EM-Mask is also usually worn during allergy and flu seasons and during days with severe yellow dust conditions. Most of the Esmond civilians regard the EM-Mask as the best protective equipment, but the Market Research Institutes in Esmond recently announced that a consumer's demand for the CM-Mask or MF-Mask increases when the price of the EM-Mask increases.

Esmond provided a significant contribution to the unification of Moonbia, which has been a divided country for more than 30 years. Both countries affirm the relationship with each other as 'the most important bilateral partnership' in their current foreign policy. At present, Moonbia is politically and economically dependent on Esmond. The relationship between Caspian and Esmond, on the other hand, has deteriorated rapidly and become unfriendly despite their geographical proximity. This is because Esmond joined the United Nations in condemning Caspian for human rights abuses against ethnic and cultural minorities reside in the southern part of Caspian.

To make matters worse, a new pandemic virus outbreak, COVID-19, occurred in 2019. COVID-19 has significantly higher case fatality rates than COVID-09 and uses a much smarter strategy than COVID-09 to attack the human cell. For example, COVID-19 actively uses and makes amino acids more robust, which makes it easier for it to completely hijack the human cell.

Based upon these facts, Esmond residents passionately believe that the EM-Mask and the CM-Mask are quite different products in terms of their functions and performance and that only the EM-Mask with its advanced technology can completely protect mask wearers from COVID-19. Although EM in Esmond has the technology to upgrade the functions of the CM-Mask to those of the EM-Mask, it is questionable whether the upgrade is necessary if the severity of COVID-19 and the time required for the upgrade (i.e., about 5 months) are considered together. Therefore, Esmond decided to increase the market shares of the EM-Mask in its domestic markets for its civilians by imposing the following various measures:

A. Esmond originally imposed custom duties of 5% equally on both MF-Masks and CM-Masks, but after a political fluctuation and the COVID-19 outbreak, the Esmond government maintained a 5% duty for the MF-Masks but immediately

increased the duty to 35% for the CM-Masks.

B. Two months before the COVID-19 outbreak, Esmond decided to impose a local education tax on imported medical devices, including face masks. As the COVID-19 outbreak began, Esmond imposed a local education tax of 3% on its domestically produced EM-Masks and imported MF-Masks but imposed a 23% tax on CM-Masks.

C. Esmond decided to run a special retail system where its domestically produced EM-Masks and MF-Masks can be sold in both convenient stores and drug stores while the CM-Masks can only be sold in drug stores.

D. Esmond previously imported 5 million CM-Masks from Caspian, but after the COVID-19 outbreak, Esmond limited the number to 3 million due to the fact that CM-Masks do not require the rigorous inspections set forth by the National Institute for Safety and Health in Caspian.

Caspian argued that the measures imposed by Esmond are discriminatory and trade-restrictive, which are clearly in violation of its obligations under GATT. In particular, Caspian claimed that the measures at issue are inconsistent with GATT Articles I, III and XI.

In response, Esmond countered that all the measures stated in A-D are neither discriminatory nor trade-restrictive and, even if they were, they are within the boundary of justification stipulated under GATT Article XX.

As an initial legal action, on February 6, 2021, Caspian requested consultations with Esmond in accordance with Article 4 of the Dispute Settlement Understanding. The consultations, however, failed to reach a mutually acceptable solution. The WTO Dispute Settlement Body established a panel for the dispute on April 7, 2021. The parties' submissions are due by July 22, 2021, and the oral hearing of the panel is scheduled to take place in Geneva on August 19, 2021. The two governments are now preparing legal briefs to be submitted to the panel. They are also preparing for the oral hearing in this dispute.