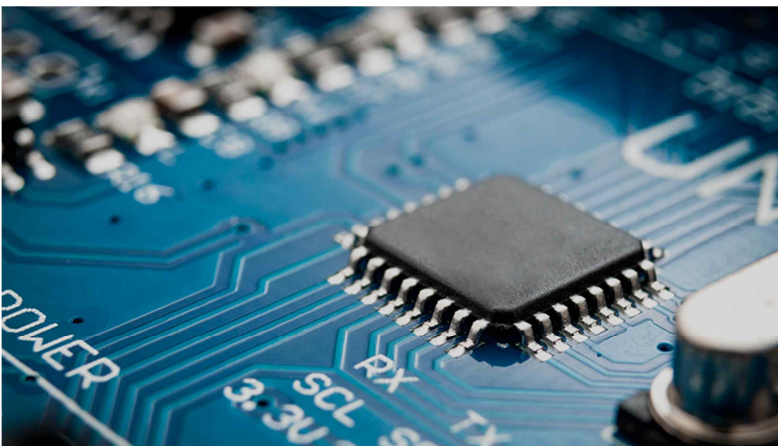


WTO Moot Court Problem

26 August 2019

Secudonia – Imposition of Additional Tariffs on Imported Semiconductors (complaint by Centrum)
(DS593)¹



Secudonia is located in the middle of the European continent. It is a Member of the World Trade Organization (“WTO”). Due to its large population and vibrant domestic economy, it has maintained one of the largest domestic market among the 164 Members of the WTO. Not surprisingly, Secudonia has become one of the most popular destinations of various goods and services of other Members.

Semiconductors are no exception. There are six major countries in the world, including Secudonia, that manufacture and export semiconductors. All of them are Members of the WTO. While they export their semiconductors to other countries and to each other, the Secudonian market has turned out to be the most lucrative and yet the most competitive battleground for these semiconductors. As the demand for semiconductors are growing recently due to the advent of data economy and Artificial Intelligence industry, the competition over semiconductors in the Secudonian domestic market is further intensifying.

¹ This moot court problem is a product of the imagination of its author and written for mooting purposes only.

There are two semiconductor manufacturers in Secudonia. They are Atom Avis (“AA”), and Blue Bird (“BB”). The two companies have long led the global semiconductor industry because of their technological development and aggressive R&D activities. But the two companies are struggling recently. Semiconductor manufacturers from other five countries have narrowed the gap and since 2010 they are expanding their market shares globally. Their market shares in Secudonia have also been growing rapidly, pushing AA and BB to the corner. Some industry reports are saying that after 3-4 years AA and BB will be pushed out of the market due to the failure to compete with foreign manufacturers. Other experts say that this is just a recent phenomenon, and AA and BB will be able to rebound soon after some restructurings of their businesses and more expenditure on R&D. In any event, the fact that AA and BB are seriously struggling seems to be a fact.

In particular, the Republic of Centrum (“Centrum”), one of the five other semiconductor manufacturers, is expanding its market share rapidly and aggressively both globally and in the Secudonian market. Centrum has two major manufacturers of semiconductors, Crown Crust (“CC”) and Diamond Dale (“DD”). Presumably supported by governmental subsidies, CC and DD have become dominant players in the global semiconductor markets. The two companies have now become the first and second largest market share holders in Secudonia. As of 2018, CC takes up 30% and DD does 20% of the market shares of semiconductors in Secudonia as of 2018. In contrast, AA and BB account for 5% and 8% respectively in 2018. 10 manufacturers from the remaining four countries are dividing up the remainder of the market shares in the Secudonian market.

Notably, the bilateral relationship between Secudonia and Centrum has been volatile. They are competing in many areas. Their confrontation has been observed in the maritime areas in the Pacific. They are also competing over the hegemony in the region of central Asia. In the areas of new technologies such as AI and their application to military hardware, the two countries have become archrivals. Cyber security and data protection are additional areas where the two countries are vying for global leadership.

In response to increasing market penetration, Secudonia has adopted many measures starting from 2011. Its domestic producers, AA and BB, filed petitions for antidumping investigations and countervailing investigations against imports from their foreign competitors in 2011. These investigations were all initiated and led to the imposition of high antidumping margins (10%) and countervailing duty margins (15%) against these foreign manufactures. And yet, the imports from the five countries still continued to increase. The antidumping and countervailing duty measures

expired at the end of 2014. In 2015, the domestic industry of Secudonia filed a petition for a safeguard investigation, which was initiated by the Secudonian government, leading to extra tariffs of 15%. Foreign exporters apparently overcame the safeguards investigations, however. Imports of semiconductors further increased in 2017, after a temporary setback in 2016. The safeguards measure expired at the end of 2017.

Finally, the Secudonian government explored and adopted a new measure in 2018. It was introduced in the form of a presidential decree on April 15, 2018. This measure imposes extra tariffs of 30% for three years on imported semiconductors. It also requires certain domestic manufacturers of Secudonia to use only domestically produced semiconductors for their products. The manufacturers covered by this domestic content requirement is listed in the presidential decree as well. This new measure of 2018 targets all semiconductors regardless of types, whether DRAMs, SRAMs or other types of new semiconductors to be developed in the future. It also imposed country specific quotas for three years. The quotas were allocated to the five countries. In short, the five countries were given quotas equivalent to 30% of the annual average of their respective exports to Secudonia for the past three years. As a result, the import of semiconductors into Secudonia has decreased drastically since April 2018. The confrontation between Secudonia and five exporting countries over this new measure has been intensifying. In particular, Secudonia and Centrum have been engaged in heated debates over the legality of this measure since then.

Against various claims of violation of WTO Agreements, the Secudonian government invokes Article XXI of the GATT 1994. In its proclamation of the measure in the government gazette, dated April 15, 2018, the Sedudonian government underscored the following:

1. Semiconductor manufacturers of Secudonia are on the verge of going out of business under the circumstances. If the current foreign import penetration continues, AA and BB will go out of business in the next five years, according to the injury report released by the Ministry of Commerce of Secudonia.
2. Semiconductors may be utilized for key military equipment and hardware, so their constant and reliable supply is critical for military operation at present and in the future. If the supply of semiconductors is hampered, military operation will face a serious problem as a result of malfunction or under-performance of the equipment and hardware.

3. Semiconductors can be imported from foreign sources, but their reliability in terms of both quality and quantity cannot be guaranteed at all times. Furthermore, one of the five exporting countries, Centrum, has been an archrival of Secudonia for many years now. Centrum is competing against Secudonia in many sectors at present, including military sectors as well. Relying on the supply of semiconductors from Centrum, therefore, will be politically and practically unrealistic and risky.
4. While there does not exist any specific indication of war or military confrontation in the region surrounding or involving Secudonia at the moment, no one or no country can guarantee that military conflicts will not take place in the near future, given the ever volatile situation of the global community.
5. At any rate, with respect to whether a situation justifies the invocation of Article XXI, it is the invoking Member that can determine the necessity, legitimacy and appropriateness of such invocation.

Needless to say, five exporting countries are highly critical of the measure. They argue that this measure is a disguised measure to achieve the import restriction of semiconductors, after having failed to achieve the goal through antidumping duties, countervailing duties and safeguard measures. So, according to the five states, this latest measure is simply commercially-motivated import restrictive measure which has nothing to do with national security. They underscore that the import restriction fails to satisfy the requirements of Article XXI of the GATT 1994 and thus violates other related WTO Agreements. Their arguments against the invocation of Article XXI are as follows:

1. There is no specific evidence that AA and BB will go out of business in the next five years. Such speculation does not provide a legitimate basis to justify a trade measure. Under the fast changing nature of the IT industry, it is still possible that AA and BB will come out as dominant players. So, the assumption of the Secudonian government about the industry forecast is weak and unfounded.
2. The belief that Secudonian domestic manufacturers of semiconductors are likely to lose in the competition vis-à-vis foreign imports does not provide a sufficient ground for the invocation of Article XXI. Even if that assumption is materialized, what happens is essentially a commercial risk or the outcome of commercial competition in the market. Such commercial consequences are not covered by any provision in Article XXI of the

GATT 1994. In short, there is no national security element here within the meaning of Article XXI.

3. Referring to the future unreliability of foreign imports as a reason for national security is unfounded. Importation of any goods, by definition, involves some sort of instability about the future. What Secudonia basically argues is the unpredictable nature of the future market of semiconductors. It, however, is an inherent nature of the semiconductor business or any business for that matter.
4. A possibility of military threat or military confrontation in abstract terms cannot provide a sufficient basis to prove the existence of an imminent threat to national security. It should be a warfare or some emergency situation equivalent to or tantamount to a warfare for the proper invocation of Article XXI.
5. In any event, whether all the conditions of Article XXI are met or not is a matter to be determined by a reviewing panel, as with any other dispute under the WTO Agreements. There is no reason that this particular provision should be somehow carved out from the scope of the review of the WTO panel.

As an initial legal action, Centrum requested, on May 15, 2018, consultations with Secudonia in accordance with Article 4 of the Dispute Settlement Understanding. Centrum raised the same points of the five exporting countries, outlined above. The consultations failed to reach a mutually acceptable solution. The WTO Dispute Settlement Body (“DSB”) established a panel for the dispute on September 23, 2018, which was later composed by appointing three panellists from third countries. Parties’ submissions are due by July 26, 2019. The oral hearing of the panel is scheduled to take place in Geneva on August 26, 2019. Two governments are now preparing legal briefs to be submitted to the panel. They are also preparing for the oral hearing in this dispute.
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