

Question 1 (12 points max.)

In 2009, ECOLOGICA, a customs union with 20 member states, adopted a ban on importing seal products or placing them on the market. ECOLOGICA argued that seal hunting was considered cruel and unacceptable by the vast majority of its member states' population.

In INUITIA there are several indigenous communities which have been engaged in seal hunting with traditional methods for centuries. They very much depend on selling their seal products in other countries, including the member states of ECOLOGICA.

INUITIA wants to challenge ECOLOGICA'S measure because of its detrimental effect on INUITIA'S economy and particularly its indigenous population.

INUITIA and all of ECOLOGICA'S member states are members of the WTO. In addition, INUITIA has concluded free trade agreements with all member states of ECOLOGICA.

a) Which options does INUITIA have to challenge ECOLOGICA'S ban on seal products? Which legal claims could ECOLOGICA¹ raise?

Required elements	Points awarded
Seal meat is a product, so the GATT applies. Inuitia can file a complaint against ECOLOGICA under WTO Dispute Settlement, because INUITIA and all of ECOLOGICA'S member states are members of the WTO and the dispute concerns a violation of a relevant WTO agreement (GATT) (Art. 1 DSU). There is a legal obligation under the DSU to bring WTO-law related disputes before the WTO Dispute Settlement Body (DSB). Legal claims before the DSB: INUITIA can claim a violation of Art. XI GATT, prohibiting quantitative restrictions (see, Tuna/Dolphin, Shrimp/Turtles and EC/Seal Products cases). The import ban is a quantitative restriction.	4 P
The Free Trade Agreement will most likely contain a dispute settlement mechanism. Typically, this will be an arbitration procedure (ICSID or UNCITRAL). INUITIA can bring claims to national courts within member states of ECOLOGICA arguing that there has been a violation of the respective free trade agreement (provided that national law allows for such a claim).	2 P

b) How can ECOLOGICA'S argument for imposing the ban be framed in international trade law?

Required elements	Points awarded
ECOLOGICA'S argument that seal hunting is considered cruel and unacceptable by the vast majority of the population refers to Art. XX(a) GATT, public morals (see EC/Seal Products). Each country can define its own level of protection/public morals (see EC/Asbestos, US/Gambling).	3 P

¹ Correction: The question should read INUITIA. However, exams have been graded the way the question has been understood by the students.

Required elements	Points awarded
<p>Explain why measures are necessary to protect public morals (see EC/Seal Products).</p> <p>Only up to 2 points were awarded for arguing with Art. XX(b) or (g) GATT.</p>	
<p>However, ECOLOGICA needs to further prove that the requirements of the chapeau of Art. XX GATT have been met:</p> <p>The Chapeau of Article XX requires that measures covered by an exception be not administered in a manner that would constitute:</p> <ol style="list-style-type: none"> 1. Arbitrary discrimination between countries where the same conditions prevail; 2. unjustifiable discrimination between countries where the same conditions prevail; or, 3. a disguised restriction on international trade. 	3 P

Question 2 (8 points max.)

Please name **two** key legal principles of international investment law and explain which obligations they impose on states.

Required elements	Points awarded
<p>Students were required to name two principles with their key elements, such as:</p>	4 P for each principle with a coherent explanation, max. 8 P .
<p>Fair and equitable treatment (e.g. NAFTA 1105): National treatment, including non-discrimination and most favored nation treatment. Additionally, States must guarantee transparency and predictability (international minimum standard).</p>	
<p>Full protection and security: States must refrain and protect from attacks against investors and their investments including staff and facilities.</p>	
<p>Expropriations are only allowed if conducted with a public purpose, in a non-discriminatory manner and following due process.</p> <p>Expropriations have to be compensated at fair market value and the compensation has to be prompt, adequate and effective (Hull-Formula).</p>	

Question 3 (12 points max.)

After the collapse of several textile factories, which killed thousands of workers, several countries, including RESPONSA, have launched initiatives to make sure that clothes are produced in a socially sustainable way. For this purpose, RESPONSA has introduced a responsible shirt law. The law requires producers to conduct independent labour inspections in their factories and to obtain a “fair shirt” label issued by the government of RESPONSA to certify that no labour standards had been violated in the making of shirts. Only shirts that carry the “fair shirt” label may be sold in RESPONSA.

SHIRTY is a garment producer with its international headquarters in COTTONIA. SHIRTY has been present in RESPONSA since 2008 with several factories. Today, 60 per cent of its global T-shirt production takes place in RESPONSA. Since the new law has been implemented in RESPONSA, production costs for SHIRTY have increased by 30 per cent. SHIRTY is concerned that it may lose significant market shares and no longer be competitive.

SHIRTY has been in touch with the government in its home country, COTTONIA. COTTONIA and SHIRTY are determined to take action and ask for your legal advice. RESPONSA and COTTONIA are members of the WTO and they have concluded a bilateral agreement to foster investments in 2008.

a) What are SHIRTY's options and on what legal grounds?

Required elements	Points awarded
SHIRTY is based in COTTONIA. This means that it can bring a claim against RESPONSA before an international arbitration tribunal based on the RESPONSA-COTTONIA-BIT. ICSID or UNCITRAL Rules may apply.	2 P
<p>Legal claims before the arbitration tribunal:</p> <ul style="list-style-type: none"> – SHIRTY can claim that it has been (creeping)ly expropriated by the new “responsible shirt law” introduced by RESPONSA. It needs to be explained what a creeping expropriation is and why SHIRTY has been affected. – SHIRTY can further allege that RESPONSA has violated fair and equitable treatment, due process and the international minimum standard (lack of transparency and predictability). <p>All arguments need to be linked to the facts of the case.</p>	<p>2 P</p> <p>2 P</p>
SHIRTY could also invoke domestic courts in RESPONSA and ask for compensation based on domestic law.	1 P

b) How could COTTONIA proceed and on what legal grounds?

Required elements	Points awarded
COTTONIA can bring a claim against RESPONSA before the WTO DSB, as they are both members of the WTO and the case refers to a potential violation of a relevant WTO agreement.	1 P
<p>Legal Claims before the DSB:</p> <ul style="list-style-type: none"> – COTTONIA can claim a violation of National Treatment (Art. III:4 GATT), because the “responsible shirt law” introduced by RESPONSA prevents (“like”) shirts without the “fair shirt” label from entering the market and may favour domestic producers. Three-tiers-test to define “likeness” or “unlikeness”. – COTTONIA could further argue that the measure is not justified under Art. XX(a) or (b) GATT (protection of public morals or human life or health) and arbitrary and discriminatory (Chapeau of Art. XX GATT). 	4 P

Question 4 (8 points max.)

What is the relevance of the theory of comparative advantage in the discussion on trade and labour rights?

Required elements	Points awarded
<p>Students were required to point out some of the key elements of the theory of comparative advantage and explain their relevance for the discussion on trade and labour rights. The full 8 points were awarded for a coherent argument, which</p> <ul style="list-style-type: none">– identifies the relevant aspects of the theory of comparative advantage,– explains its relevance to the trade and labour debate,– names the key milestones in the debate, i.e. the WTO Singapore Ministerial Declaration 1996, the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization.	<p>8 P</p>
<p>Potentially relevant aspects of the theory of comparative advantage and their relevance to the trade and labour debate include:</p> <ul style="list-style-type: none">– Risk of a “race to the bottom”, which means that (especially developing) countries will lower their labor standards in order to lower production costs and be able to compete with other countries (regulatory competition).– This can lead to lower social standards (social dumping).– Labour standards developed by the ILO as the competent international organisation may be used for protectionist purposes and diminish developing countries’ comparative advantage.– Vice versa, trade liberalisation may undermine labour standards. Therefore, the introduction of a social clause was discussed during the negotiations in the Uruguay round with no consensus being reached.– The events at the Singapore WTO Ministerial Conference 1996 reflect the tension between protectionism and the protection of labour standards.– The ILO Declaration 2008 finally addresses both aspects of the debate.	