

TEAM CODE: 146C

BEFORE THE PANEL ESTABLISHED BY WTO DSB

**ASGARD: MEASURES CONCERNING POWDERED
INFANT FORMULA**

COMPLAINANT: AGATEA

WT/DSxxx

WRITTEN SUBMISSION FOR THE RESPONDENT

**SEVENTH GNLU INTERNATIONAL MOOT COURT
COMPETITION**

2015

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LIST OF ABBREVIATIONS

¶	PARAGRAPH
ADOH	ASGARD DEPARTMENT OF HEALTH
ADOL	ASGARD DEPARTMENT OF LAW AND JUSTICE
ANNEX.	ANNEXURE
APMA	AGATEAN PROCESSED FOOD MEMBERS ASSOCIATION
ART.	ARTICLE
CSCPHN	CIRCLE SEA CODE ON PUBLIC HEALTH AND NUTRITION
DSB	DISPUTE SETTLEMENT BOARD
EC	EUROPEAN COMMUNITY
ed.	EDITOR
edn.	EDITION
FSC	FOREIGN SALES CORPORATION
<i>Id.</i>	IBIDEM
I.L.M.	INTERNATIONAL LEGAL MATERIAL
ISO/IEC	INTERNATIONAL ORGANIZATION FOR STANDARDIZATION/ INTERNATIONAL ELECTROTECHNICAL COMMISSION
J. WORLD TRADE	JOURNAL OF WORLD TRADE
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
PaCE	PACKAGING OF COMMODITIES AND ITS ENFORCEMENT
PIF	POWDERED INFANT FORMULA
TBT	TECHNICAL BARRIERS TO TRADE
U.N.T.S.	UNITED NATIONS TREATY SERIES

WTO	WORLD TRADE ORGANIZATION
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STATEMENT OF FACTS

THE PARTIES

Asgard is a developing country, with a population of 10 million. It is a member of a group of nine islands in the Circle Sea. All the Circle Sea nations are members of the WTO. Agatea is a developed country located in the Indian sub-continent. Castle, Viking, Flora and Theos are four corporations located in Agatea that control 90% of the world market of dairy and health supplement products. They export Powdered Infant Formula (“**PIF**”) to Asgard under the names Rincewind, Linacre, Diamanda and Cementac. Prior to November 2014, all of Asgard’s requirements for PIFs were being met by imports from Agatea.

THE NINE REALMS SUMMIT

In January 2014, Asgard hosted the Nine Realms Summit 2014. On the final day, all the Circle Sea nations finalized the Circle Sea Code on Public Health and Nutrition (“**CSCPHN**”). Article 12 of the CSCPHN called on the parties to ensure that nutritious food was available within their jurisdictions at all times, along with information regarding the nutritious content of food.

SPIKE IN TYPE-1 DIABETES AMONG CHILDREN OF ASGARD

In June 2014, the Asgard Department of Health (“**ADOH**”) released the report of a study conducted to understand the reason behind the sudden increase in Type-1 diabetes among children below the age of 5. In its report, the ADOH observed that there had been a shift from breastfeeding to PIFs, as doctors had been recommending the latter for their nutritional value. The study of the four imported PIFs indicated that they contained high levels of corn syrup and sugar, which was not declared on their labels.

RESPONSE FROM THE GOVERNMENT OF ASGARD

The Asgard Department of Law and Justice (“**ADOL**”) prepared the draft Regulation No. 8/2014 *Packaging of Commodities and its Enforcement* (“**PaCE**”) in July, 2014. On July 25, 2014, the *Agatean Processed Food Members Association* (“**APMA**”), an organisation of the four importers, made a representation to ADOL to extend the deadline of October 31, 2014, to comply with the packaging requirements formulated by PaCE. The reasons for the request (which is publicly available on ADOL website) were that four months’ stock (around twenty million units) was already available in Asgard and the companies had already shipped stocks

for the next three months (around fifteen million units) to Asgard. If they were to recall these products, change the labels, and ship them back, it would result in a loss of around thirty million dollars, along with loss of time and reputation. Adequate facilities to change the packaging were not available in Asgard. APMA stated that they would make best efforts to comply with PaCE and also extended their support in conducting further scientific research to achieve the health objectives of Asgard. Despite this undertaking, the request was rejected by the ADOL without giving any reasons. PaCE was passed by the Parliament of Asgard on August 30, 2014. It required the producers to list out the ingredients and contents in terms of weights and percentage on the labels of the PIFs. During the discussions on PaCE in the Parliament of Asgard, Mr. Reid of the ruling party said that the objective of PaCE was to give the producers an opportunity to come out clean by declaring the ingredients of their products, until a conclusive link between the ingredients and Type-1 diabetes is established.

SEIZURE OF IMPORTED PIFs& ENTRY OF DOMESTIC PRODUCER

On June 26, 2014, ADOH approved Relicare's (an industrial company in Asgard) application for introducing its PIF in the Asgardian market. Relicare's chairman announced that the new PIF would be launched by the end of October 2014. The product, Likan, was launched on November 1, 2014. On the same day, ADOH officers conducted raids all across Asgard and seized all the imported PIFs since ostensibly they had not complied with PaCE. As a result, Likan registered brisk sales. Business journals hailed Likan's entry at such a critical time as the best product launch by any company in decades. In fact, the four importers had pasted stickers on the PIFs listing out the ingredients, in order to comply with PaCE. However, the Commissioner, ADOH refused to permit them to do so. The companies had appealed to the High Court of Krull, which dismissed the appeal, ordered the release of goods and left it to the discretion of the companies to repackage their products as per PaCE or dispose them in other world markets. The companies have, since March, 2015, complied with PaCE. However, their market share has been reduced to a meagre 40% from 100% before PaCE had been implemented.

REQUEST FOR ESTABLISHMENT OF PANEL

In late December 2014, Agatea requested consultations with Asgard under WTO Dispute Settlement Understanding (DSU), which were unsuccessful. Agatea, then, requested for the establishment of a WTO Panel. DSB established the panel in April 2015. The WTO Director General composed the panel in May 2015.

MEASURE OF ISSUES

- I. WHETHER PACE IS INCONSISTENT WITH ART. 2.1 OF THE TBT AGREEMENT?

- II. WHETHER PACE IS INCONSISTENT WITH ART. 2.2 OF THE TBT AGREEMENT?

- III. WHETHER PACE IS INCONSISTENT WITH ART. III:4 OF THE GATT, 1994?

SUMMARY OF PLEADINGS

I. PACE IS INCONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. 2.1 OF THE TBT AGREEMENT

- A measure is said to be inconsistent with Art. 2.1 when it is a technical regulation, the imported and domestic products in question are like in nature, and the measure accords less favourable treatment to the imported products.
- PaCE is a regulation passed by the Parliament of Asgard, and is, hence, a document which is applicable to a group of products i.e. PIFs. It lays down labelling requirements which qualify as product characteristics. Compliance to PaCE has been made mandatory. Hence, PaCE satisfies the three main elements of a 'technical regulation' within the meaning of Annex 1.1 of the TBT Agreement.
- The physical characteristics, end use, consumer taste and preference, and tariff classification with respect to imported PIFs and Likan, the domestic PIF, are similar. Therefore, the products are like in nature.
- PaCE is a governmental measure and a genuine relationship between PaCE and an unfavourable impact on competitive opportunities for imported PIFs exists. It modified the conditions of competition to the detriment of imported PIFs.
- Even though PaCE seems to be *prima facie* origin-neutral, it subjected imported PIFs to *de facto* discrimination. Legal necessity of choosing Likan was imposed as a result of PaCE. Imported PIFs were denied the advantage of favourable sales condition in Asgard's market.
- PaCE did not stem from a legitimate regulatory distinction. The measure was not applied even-handedly to both imported PIFs and Likan and the inherent objective of PaCE was protectionism in order to promote the domestic brand of PIF.
- The usage of stickers by imported PIFs fulfilled the requirements of PaCE. It would have achieved the objective of enabling the public to make an informed choice. The action of Asgardian government to seize imported PIFs in spite of them using stickers to comply with PaCE was arbitrary in nature.
- Therefore, PaCE accorded less favourable treatment to PIFs imported from Asgard than that accorded to domestic PIF, Likan. Consequently, it is inconsistent with Asgard's obligations under Art. 2.1 of the TBT Agreement.

II. PACE IS INCONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. 2.2 OF THE TBT AGREEMENT

- A measure is said to be consistent with Art. 2.2 when it seeks to achieve a legitimate objective and is not more trade-restrictive than necessary to fulfil that objective, taking account of the risks arising from non-fulfilment.
- The real objective of PaCE is not protection of health of the children. It is a disguised restriction on international trade. It seeks to protect the domestic producer of PIF. Thus, PaCE does not pursue a legitimate objective.
- Assuming but not conceding that it aims to achieve a legitimate objective, PaCE is more trade restrictive than necessary to achieve the objective. It does not make any contribution to the objective as the sales of a like product, Likan are still high.
- PaCE has also altered the competitive opportunities to the detriment of imported PIFs. These products were denied permission to extend the deadline and to use stickers which met the labelling requirements under PaCE. As a result, the market share of these products declined to mere forty percent in March 2015.
- Non-fulfilment of the objective will not lead to any grave consequences as its implementation has also failed to make any contribution to the legitimate objective. Reasonable and less trade-restrictive alternatives are also available.
- Hence, PaCE is an unnecessary obstacle to international trade, violating Art. 2.2 of the TBT Agreement.

III. PACE IS INCONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ARTICLE III:4 OF THE GATT

- A measure is said to be inconsistent with GATT, if the imported and domestic products are like in nature, the measure is within the ambit of Art. III:4 of the GATT and the measure accords less favourable treatment to the imported products.
- The domestic PIF and the imported PIFs are like products as they satisfy the traditional test of likeness. The physical characteristics, end uses, consumer tastes and preferences of the products are similar. They fall under the same tariff classification.
- The provisions of PaCE, a law, affect the internal sale, offering for sale, purchase, and distribution of the imported products. Hence, PaCE falls within the ambit of Art. III:4 of the GATT.

- The imported PIFs are accorded less favourable treatment as compared to Likan since the provisions of PaCE lead to satisfaction of asymmetric impact test. The burden arising of the measure is heavier for imports than for domestic products.
- Since Relicare had just begun its operations in the PIF market, it was able to comply with PaCE at no extra cost. On the other hand, the imported PIFs would have had to suffer loss of time, money and reputation for the same. Their market share also declined as a result of the labelling requirements imposed by PaCE.
- PaCE resulted in *de facto* discrimination between two like products. Therefore, it is inconsistent with Asgard's obligations under Art. III:4 of GATT.

LEGAL PLEADINGS

1. PACE IS INCONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. 2.1 OF THE TBT AGREEMENT

1. Regulation PaCE passed by the Parliament of Asgard, mandates that producers of PIFs declare the contents and ingredients of their products on the labels in order to help parents make an informed choice.¹ It is submitted that the regulation is inconsistent with obligations of Asgard under Art 2.1 of the TBT Agreement.

2. Art. 2.1 of the TBT Agreement seeks to ensure that no country imposes such technical regulations that treat imported products less favourably than like domestic products.² It is well established that for a measure to be inconsistent with Art 2.1, it must be proved that the measure is a *technical regulation* [1.1], the imported and domestic products are like in nature [1.2], and the measure accords less favourable treatment to the imported products [1.3].³ It is submitted that PaCE is a technical regulation that accords less favourable treatment to imported PIFs over domestic PIF, both of which are like products.

1.1. PACE IS A TECHNICAL REGULATION WITHIN THE MEANING OF THE TBT AGREEMENT

3. In order to apply Art. 2 of TBT Agreement, it must be established that the measure is a 'technical regulation'.⁴ Annex 1.1 of the TBT Agreement defines a technical regulation as:

“Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal

¹ Exhibit 1, Fact on Record.

² Agreement on Technical Barriers to Trade, art. 2.1, Jan. 1, 1995, 1868 U.N.T.S.120, 18 I.L.M. 1079.

³ Appellate Body Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 87, WT/DS406/AB/R (Apr. 24, 2012) [hereinafter *US-Clove* Appellate Body Report]; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 202, WT/DS381/AB/R (May 16, 2012) [hereinafter *US-Tuna* Appellate Body Report]; Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 267, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter *US-COOL* Appellate Body Report].

⁴ Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 175, WT/DS231/AB/R (Oct. 23, 2002) [hereinafter *EC-Sardines* Appellate Body Report]; *US-Clove* Appellate Body Report, *supra* note 3, ¶ 168; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications For Agricultural Products and Foodstuffs*, ¶ 7.445, WT/DS290/R (Apr. 20, 2005) [hereinafter *EC – Trademarks and Geographical Indications (Australia)* Panel Report].

*exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.*⁵

Therefore, for a measure to be termed as a technical regulation, it must be in the form of a document that applied to an identifiable product or group of products [1.1.1], it must lay down product characteristics [1.1.2] and compliance with it must be mandatory [1.1.3]. Additionally, it may also apply to “*terminology, symbols, packaging, marking or labelling, requirements*”.⁶ It is submitted that all these elements are satisfied in the present case.

1.1.1. PACE IS A DOCUMENT WHICH APPLIES TO AN IDENTIFIABLE GROUP OF PRODUCTS

1.1.1.1. PACE IS A DOCUMENT

4. A document is broadly defined as “*something written, inscribed, etc., which furnishes evidence or information upon any subject*”.⁷ It may also be “*any medium with information recorded on or in it*”.⁸ Regulations have been held to be technical measures, implying that they are documents.⁹ In the instant case, PaCE (Regulation No. 8/2014) has been drafted and published by ADOH, and thereafter passed by the Parliament of Asgard.¹⁰ It lays down specifications for retail packaging of PIFs.¹¹ Hence, PaCE is a document.

1.1.1.2. PACE APPLIES TO IDENTIFIABLE TO AN IDENTIFIABLE GROUP OF PRODUCTS

5. A technical regulation must identify the product, or group of products to which it is applicable.¹² The Statement of Objects and Reasons of PaCE identifies PIFs to be the group of products to which PaCE applies. Further, Art. 2 of PaCE also clearly defines the group of products to which it is applicable. PIF has been defined as a food, powdered in nature, which can completely or partially substitute human milk.¹³ Therefore, PaCE is a document that not only identifies the group of products to which it is applicable, but also defines them.

⁵ Agreement on Technical Barriers to Trade, annex. 1.1, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079.

⁶ *Id.*

⁷ 1 Shorter Oxford English Dictionary, 731 (A. Stevenson ed., 6th edn., 2007).

⁸ ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, *used in US-Tuna* Appellate Body Report, *supra* note 3, ¶ 185.

⁹ *US-Tuna* Appellate Body Report, *supra* note 3, ¶¶ 191,199.

¹⁰ ¶¶ 6, 10, Fact on Record.

¹¹ Art. 3, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

¹² Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 70, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos* Appellate Body Report]; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 179.

¹³ Art. 2, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

1.1.2. PACE LAYS DOWN PRODUCT CHARACTERISTICS

6. Annex 1.1 of TBT Agreement lists “*terminology, symbols, packaging, marking or labelling requirements*” as examples of product characteristics.¹⁴ This indicates that apart from intrinsic qualities of the product, related characteristics, like means of identification, are also considered to be product characteristics.¹⁵ Although Annex 1 of the TBT Agreement does not define ‘labelling requirements’, it has been stipulated that terms defined by sixth edition of the ISO/IEC Guide 2: 1991 would have the same meaning when used in the Annex as the definitions in the Guidelines, unless it has been otherwise provided in Annex 1. The term “*requirement*” has been defined in the ISO/IEC Guide as “*a provision that conveys criteria to be fulfilled*”.¹⁶

7. The Appellate Body has held label on a product to be a product characteristic.¹⁷ In the instant case, PaCE lays down labelling specifications for retail packaging of PIFs. The labelling requirements are imposed in a positive form,¹⁸ i.e. the packaging of PIFs must mention ingredients of the PIF and their content in the product in terms of weight in ‘grams’ or ‘milligrams’ per 100 grams of the serving. The format, including the font size and border specifications, for the labels, has also been provided in the regulations.¹⁹ Therefore, it is submitted that since the specifications laid down in PaCE relate to packaging and labelling requirements, they are product characteristics.

1.1.3. COMPLIANCE WITH PACE IS MANDATORY

8. Compliance is defined as an “*act in accordance with or with a request, command, etc.*”²⁰ A measure is said to be a technical regulation, if it *prescribes* or *imposes* one or more characteristics of the product in a binding fashion. The characteristic may be a feature of the product or any other distinguishing mark.²¹ Additionally, *mandatory* has been defined as

¹⁴ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 767.

¹⁵ *EC-Sardines* Appellate Body Report, *supra* note 4, ¶¶ 189, 193.

¹⁶ ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, ¶ 7.5 (8th edn., 2004) *cited in* Panel Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 4.714, WT/DS381/R (Sept. 15, 2011) [hereinafter *US-Tuna* Panel Report].

¹⁷ *EC – Trademarks and Geographical Indications (Australia)* Panel Report, *supra* note 4, ¶ 7.453; *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 67.

¹⁸ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 69; Panel Report, *European Communities – Trade Description of Sardines*, ¶ 7.44, WT/DS231/R (May 29, 2002) [hereinafter *EC-Sardines* Panel Report].

¹⁹ Art. 3, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

²⁰ 1 Shorter Oxford English Dictionary, 473 (A. Stevenson ed., 6th edn., 2007) *cited in* *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 185.

²¹ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 67.

being “*obligatory in consequence of a command, compulsory...*”²² A measure that ensures enforceability through sanctions is said to indicate mandatory compliance.²³

9. In the present case, Art. 9 of PaCE has mandated compliance with labelling requirements on retail packaging of PIFs of the product. It specified that the requirements were to be met by October 31, 2014, after which the government was empowered to take appropriate action in case of failure to meet these regulations. On November 1, 2014, the government seized PIFs of all imported brands that had failed to comply with PaCE.²⁴ This action of the Asgardian government shows that a mechanism was in place to ensure compliance with PaCE. Since PaCE ensured enforceability through sanctions, compliance with it is mandatory.

10. PaCE is a *document applicable to an identifiable set of products that lays down one or more product characteristics and makes compliance with the product characteristics mandatory*. Therefore, it is a technical regulation.

1.2. THE IMPORTED PIFs AND LIKAN ARE LIKE PRODUCTS

11. It is submitted that the imported PIFs and the domestic PIF are like products. Likeness of products is to be determined bearing in mind the physical characteristics of the products [1.2.1], their end uses [1.2.2], the consumer tastes and preferences in relation to the products [1.2.3], and their tariff classification [1.2.4]. In the instant case, the products are like on all four counts.²⁵ However, this is not a *closed list*. In this context, it was categorically stated by the Appellate Body in *EC-Asbestos* that “*the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence*”. Hence, another factor that can be examined here is the grouping of these products under Art. 2 of PaCE [1.2.5]. It is submitted that imported PIFs and Likan satisfy all of these criteria.

1.2.1. THE IMPORTED PIFs AND LIKAN HAVE SIMILAR PHYSICAL CHARACTERISTICS

12. ‘Characteristics’ of a product can be defined to include objectively definable features,

²² *EC - Trademarks and Geographical Indications (Australia)* Panel Report, *supra* note 4, ¶ 7.453.

²³ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 72.

²⁴ ¶ 11, Fact on Record.

²⁵ Report of the Working Party, *Border Tax Adjustments*, ¶ 18, L/3464 (Dec. 2, 1970); *US-Clove* Appellate Body Report, *supra* note 3, ¶ 168; *EC – Asbestos* Appellate Body Report, *supra* note 12, ¶ 101.

qualities, attributes or other distinguishing marks.²⁶ Moreover, as per the decision of the Appellate Body in *EC-Asbestos*, evidence of similar health risks caused by the products in question is pertinent to determination of likeness of a product to another and it should be evaluated under the criteria of physical characteristics.²⁷

13. In the instant case, Art. 2 of PaCE defines a PIF. Since both imported PIFs and Likan are infant food in powdered form, they satisfy this definition. The major ingredients of the products in question are also similar, i.e. corn syrup and sugar.²⁸ They are present in similar amounts, even though Likan may claim otherwise.²⁹ The claims of Relicare's Likan to be healthier than the imported PIFs were put in doubt by the report of *The New Asgard Times* which referred to Likan as Asgard's "own poison".³⁰ This implies that Likan is as harmful as the imported PIFs as the health risk of Type-1 diabetes arising from both the products are similar in nature. Therefore, it is submitted that the imported PIFs and Likan have similar physical characteristics.

1.2.2. THE END USES OF THE PRODUCTS IN QUESTION ARE SIMILAR

14. In order to determine the end uses of a product, its possible functions along with 'the extent to which the products in question are capable of performing the same or similar functions' must be examined.³¹

15. In the present case, both Likan and imported PIFs are used as substitutes for human milk for infants.³² The fact that Likan can also be used as a complete substitute for human milk is immaterial provided the products in question have *similar end uses*.³³ Additionally, a mere difference in flavour cannot negate the likeness or substitutability of two products if the end use is similar.³⁴ Hence, the existence of different flavours of Likan is of no consequence as they are all used as infant food. Since the products are capable of performing similar functions, it is submitted that the imported PIFs and Likan have similar end use.

²⁶ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 67.

²⁷ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶¶ 113, 115.

²⁸ See ¶ 14, Fact on Record.

²⁹ *Id.*

³⁰ ¶ 14, Fact on Record

³¹ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 117.

³² See Clarification no. 1, Fact on Record.

³³ *EC-Asbestos* Appellate Body Report, *supra* note 12, ¶ 117.

³⁴ *US-Clove* Appellate Body Report, *supra* note 3, ¶ 132.

1.2.3. THE CONSUMER TASTE AND PREFERENCES WITH RESPECT TO IMPORTED PIFs AND LIKAN
ARE THE SAME

16. The Appellate Body in *US-Clove*³⁵ held that the degree of substitutability between the products is the decisive factor affecting consumer tastes and habits. The courts have held that if the products are *highly substitutable* for some consumers then the products can be considered alike.³⁶

17. In the instant case, both imported PIFs and Likan are infant foods. It may be contended that the imported PIFs have variants, however, Likan is available in all these variants and additionally in carrot flavour as well.³⁷ The fact that imported PIFs recaptured forty percent of the market after the introduction of PaCE proves that Likan is capable of being substituted by the imported PIFs as well. Therefore, it is submitted that the consumer taste and preferences with respect to imported PIFs and Likan are the same.

1.2.4. THE PRODUCTS FALL UNDER THE SAME TARIFF CLASSIFICATION

18. The Harmonized Tariff Schedule of the World Customs Organization, *vide* tariff classification number 2106.90, provides the classification for “*food preparations not elsewhere specified or included*”. This is supplemented by Customs Ruling of Director of New York Seaport under which the tariff classification for ‘powdered infant formula’ was provided as 2106.90.6099 under the Harmonised Tariff Schedule of the United States.³⁸ This classification is analogous to the classification under the World Customs Organisation. Therefore, we submit that ‘powdered infant formula’ is classified under the label “*food preparations not elsewhere specified or included*”.

19. In the present case, the products of the Agatean companies and Relicare satisfy the definition of a PIF under Art. 2 of PaCE. Hence, both kinds of products fall under the same tariff classification.³⁹

³⁵ *US-Clove* Appellate Body Report, *supra* note 3, ¶ 142.

³⁶ *Id.*

³⁷ Exhibit 6, Fact on Record.

³⁸ Office of Director New York Seaport, Letter to Mr. Maraney regarding the tariff classification of infant formula preparation (1990) *available at* <http://rulings.cbp.gov/detail.asp?ru=857631&ac=pr>.

³⁹ World Customs Organization, Miscellaneous Edible Preparation, Ch. 21 (2012) *available at* <http://www.wcoomd.org/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Instruments%20and%20Tools/HS%20Nomenclature%20Older%20Edition/2002/HS%202002/0421E.ashx?db=web>.

1.2.5. THE PRODUCTS HAVE BEEN GROUPED UNDER THE SAME HEADING IN ART. 2 OF PACE

20. In the instant case, PaCE, *vide* Art. 2, defines a ‘powdered infant formula’. The definition includes within its ambit both the PIFs that completely substitute human milk as well as that do so partially.⁴⁰ In the case at hand, Likan is a complete substitute of human milk whereas imported PIFs are partial substitutes.⁴¹ It is submitted that the *factum* of incorporating both the PIFs under the same group attributes to them the label of likeness.

1.3. PACE ACCORDS LESS FAVOURABLE TREATMENT TO PIFs IMPORTED FROM AGATEA

21. A technical regulation is said to accord less favourable treatment to imported products if it modifies conditions of competition in the relevant market to the detriment of imported products or denies effective equality of opportunities for imported products [1.3.1] and if it does not stem exclusively from a legitimate regulatory distinction [1.3.2]. It is submitted that these elements are satisfied in the instant case.

1.3.1. THE CONDITIONS OF COMPETITION IN ASGARD’S MARKET WERE MODIFIED TO THE DETRIMENT OF PIFs IMPORTED FROM AGATEA

22. In order to prove that a measure modified the conditions of competition in the relevant market to the detriment of imported products, it must be proved that there exists a “*genuine relationship between the measure at issue and the unfavourable impact on competitive opportunities for imported products*”.⁴² It must also be established that the measure at issue is a governmental measure.⁴³ Moreover, *de facto* discrimination has been held to be violative of Art. 2.1 of the TBT Agreement.⁴⁴ A measure might be origin-neutral, but may still have a practical effect of treating imports less favourably by incentivising purchase of domestic products.⁴⁵

⁴⁰ Article 2, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

⁴¹ ¶ 5, Fact on Record.

⁴² *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 214; Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 134, WT/DS371/AB/R (Jul. 15, 2011) [hereinafter *Thailand-Cigarettes* Appellate Body Report]; Appellate Body Report, *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea-Beef* Appellate Body Report].

⁴³ *Korea – Beef* Appellate Body Report, *supra* note 42, ¶ 149.

⁴⁴ *US-COOL* Appellate Body Report, *supra* note 3, ¶ 286.

⁴⁵ *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 145; *US-COOL* Appellate Body Report, *supra* note 3, ¶ 288.

1.3.1.1 PACE SUBJECTS IMPORTED PIFs TO DE FACTO DISCRIMINATION

23. In the present case, PaCE was approved by the Asgardian Parliament, hence it is a governmental measure. Even though *prima facie* PaCE seems to be origin-neutral, it subjects the imported PIFs to *de facto* discrimination.⁴⁶ Relicare was yet to start the sales of Likan when PaCE was introduced. It was an infant industry and hence, it was convenient for it to comply with PaCE *at no additional cost*. On the other hand, the members of APMA had four months' stock available in Asgard and had shipped an additional three months' stock. As a result, they were subjected to constraints of cost, time and reputation. In order to comply with the new regulation, they would have had to recall these products, repackage them and ship them again. Moreover, Art. 9 of PaCE did not grant them sufficient time for compliance. The Asgardian government refused to grant them extra time without specifying *any* reason. Once the deadline for compliance had elapsed, the imported PIFs were seized and remained out of the market for the next four months.⁴⁷ PaCE did not affect the domestic producer in any way, but there was a drastic reduction of competitive opportunities for the imported PIFs.⁴⁸ Therefore, it is submitted that the imported PIFs were subjected to less favourable treatment, indicating *de facto* discrimination.⁴⁹

24. The Agatean companies were forthcoming in their compliance of PaCE, and they did so by using stickers. The stickers fulfilled the requirements of PaCE and the objective of its enforcement, which was to enable the public to make an informed choice.⁵⁰ Despite this, the imported PIFs were seized, thereby providing a crucial time for Likan to enter the Asgardian market. This suggests that the inherent objective of the Asgardian government behind PaCE was protectionism in order to favour Relicare.

1.3.1.2 PACE COMPELLED THE PARENTS TO CHOOSE LIKAN

25. The fact that the Asgardian consumers chose Likan for their children is of no importance here. It was held in *Korea-Beef*⁵¹ that a situation of unfavourable treatment would also arise when the legal necessity of making a choice was imposed by the measure itself. If private actors like consumers are induced to take a decision due to the incentives produced by

⁴⁶ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 225.

⁴⁷ Clarification no. 1, Fact on Record.

⁴⁸ *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 145.

⁴⁹ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, ¶ 71, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999); Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 8.119 – 8.121, WT/DS308/R (Mar. 24, 2006).

⁵⁰ Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

⁵¹ *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 146.

a measure, their decisions would not be considered to be ‘independent’ of that measure.⁵² Similarly, PaCE created a situation where the Asgardians were forced to choose only Likan. Their choice was restricted, as there was no other product in the market for four months. Moreover, in the opinion of experts, if the government had not passed PaCE, Likan would have been able to capture only five to ten percent of the market share.⁵³

1.3.1.3 LIKAN ENJOYED ADVANTAGES OF FAVOURABLE SALE CONDITIONS CREATED BY PACE

26. Additionally, in *US-Gasoline*, the Appellate Body held that if the imported products are denied benefits of the favourable sales condition in the market, it amounts to less favourable treatment.⁵⁴ In the instant case, since APMA’s request for extension of deadline was in the public domain, Relicare was aware that the imported PIFs would not be able to comply with requirements demanded by PaCE within the prescribed timeframe. Likan was scheduled to be launched by the end of October.⁵⁵ However, it was launched only on November 1, 2014, the day when ADOH had seized all the imported PIFs. Thus, Likan did enter the market at a critical time which could have been a strategic decision.⁵⁶ The entire market was at Likan’s disposal for four months. Even though the cost of Likan was generally ten percent higher than the imported PIFs, it was successful in capturing the entire market. Thus, only the domestic product had the advantage of favourable sale conditions. Therefore, it is submitted that PaCE a direct unfavourable impact on competitive opportunities for the imported PIFs.

1.3.2. PACE DID NOT STEM EXCLUSIVELY FROM A LEGITIMATE REGULATORY DISTINCTION

27. In order to show that a measure is inconsistent with Art. 2.1 of the TBT Agreement, it must be shown that the measure does not arise exclusively out of a legitimate regulatory distinction.⁵⁷ The *design, architecture, revealing structure and operation of the measure* have to be considered to determine its inconsistency. It must also be shown that the measure was not applied even-handedly⁵⁸ by establishing that the rationale for distinction was not related

⁵² *US-COOL* Appellate Body Report, *supra* note 3, ¶ 29.

⁵³ Exhibit 6, Fact on Record.

⁵⁴ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶¶ 6.10, 6.16, WT/DS2/R (Jan. 29, 1996) [hereinafter *US – Gasoline* Panel Report]; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 9, WT/DS2/AB/R (May 20, 1996) [hereinafter *US-Gasoline* Appellate Body Report].

⁵⁵ Exhibit 2, Fact on Record.

⁵⁶ ¶ 11, Fact on Record.

⁵⁷ *US-Clove* Appellate Body Report, *supra* note 3, ¶ 182; *US-COOL* Appellate Body Report, *supra* note 3, ¶ 294.

⁵⁸ *US-Clove* Appellate Body Report, *supra* note 3, ¶ 215; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 225.

to the pursuit of the objective.⁵⁹

28. In the instant case, even when the imported PIFs complied with the requirements mentioned under PaCE using stickers, the government refused to allow their sale in the market based on a mere technicality. It was ordered that compliance was necessary “*in print*” and stickers would not qualify as labels since they were ‘pasted’.⁶⁰ However, a label can mean any “*tag, brand, mark, pictorial or other descriptive matter that is attached to a container*”.⁶¹ The stickers that were *attached* on the containers of imported PIFs mentioned the ingredients along with their percentage and weight, as required by PaCE.⁶² This indicates the *bona fide* intention of the Agatean suppliers, who had extended their support to the efforts of the Asgardian government to protect the health of the infants. Yet, the use of stickers was considered to be short of the requirements of PaCE and the products were seized. By the time the imported PIFs complied with PaCE, their market share had decreased significantly by sixty percent in March 2015.⁶³ The rationale behind distinguishing between the products in question was not legitimate in nature and led to an unfavourable impact on the sales of imported PIFs.

29. Additionally, in the instant case, there is no nexus between the discrimination (among imported PIFs and Likan) and the pursuit of the objective of protecting infants’ health. This is because, merely specifying the content is not enough to protect health of the infants and fulfil the obligations under CSCPHN.⁶⁴ It has been reported that even Likan contains the same amount of corn syrup will which render it as “*poison*” for the infants.⁶⁵ In spite of this, parents continue to purchase PIFs for their children.⁶⁶ Therefore, the measure is not sufficiently effective to achieve its stated objective of protecting the health of infants. Therefore, it is submitted that, PaCE accorded less favourable treatment to PIFs imported from Agatea.

⁵⁹ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 225-227, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil-Tyres* Appellate Body Report].

⁶⁰ Exhibit 4, Fact on Record.

⁶¹ World Health Assembly Res. WHA34.22, International Code on Marketing of Breast-Milk Substitutes, art. 3, 34th Sess., May 21, 1981.

⁶² ¶ 12, Fact on Record.

⁶³ Clarification no. 1, Fact on Record.

⁶⁴ ¶ 2, Fact on Record

⁶⁵ ¶ 14, Fact on Record.

⁶⁶ Exhibit 6, Fact on Record.

2. PACE IS INCONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. 2.2 OF THE TBT

AGREEMENT

30. It is well established that for a measure to be consistent with Art 2.2 of the TBT Agreement, it must seek to achieve a legitimate objective [2.1] and it should not be more trade restrictive than necessary to fulfill that legitimate objective [2.2].⁶⁷ It is submitted that in the present case, PaCE does not fulfill either of the two conditions.

2.1. PACE DOES NOT SEEK TO ACHIEVE A LEGITIMATE OBJECTIVE

31. The first step in examining the legitimacy of the objective is in identifying it. The objective of a technical regulation can be determined by considering text of the statute, legislative history, and other evidence regarding the structure and operation of the measure.⁶⁸ The respondent member's characterisation of the objective can also be taken into account. However, the Panel is not bound by such characterisation. It may independently assess the legitimacy of the objective.⁶⁹ A 'legitimate objective' refers to "*an aim or target that is lawful, justifiable, or proper*".⁷⁰

32. In the present case, the respondent has stated that the objective of PaCE is to safeguard health of the children by allowing the parents to make an informed choice about PIFs.⁷¹ Admittedly, 'protection of human health' is a legitimate objective as postulated under Art 2.2 of TBT Agreement. However, it is submitted that the real objective of PaCE is not protection of human health. It is manifestation of disguised restriction on international trade.

33. PaCE has reduced the market share of the imported PIFs by sixty percent as of March 2015.⁷² This is in addition to the loss of profit during the four months when imported PIFs had been seized.⁷³ The domestic producer, Relicare was able to comply with PaCE "*without any significant costs*".⁷⁴ Likan registered high sales in spite of being a like product.⁷⁵ Section [1.3] above further establishes that PaCE accorded unfavourable treatment to the imported

⁶⁷ Panel Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 7.333, WT/DS406/R (Sept. 2, 2011) [hereinafter *US-Clove Panel Report*]; *US-Tuna* Appellate Body Report, *supra* note 3, ¶¶ 314, 318.

⁶⁸ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 314.

⁶⁹ *US-COOL* Appellate Body Report, *supra* note 3, ¶ 205.

⁷⁰ *US-COOL* Appellate Body Report, *supra* note 3, ¶ 370.

⁷¹ Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

⁷² Clarification no. 1, Fact on Record.

⁷³ See ¶ 1, Exhibit 6, Fact on Record.

⁷⁴ Exhibit 2, Fact on Record.

⁷⁵ Exhibit 2, Fact on Record.

PIFs. Additionally, the ADOH report on the causes of Type-1 diabetes was the background in which PaCE was formulated. However, the conclusive link between the contents of imported PIFs (high corn syrup and sugar) and Type-1 diabetes had not yet been established.⁷⁶ The strategic entry of Relicare,⁷⁷ its letter to the Minister of Health expressing support to PaCE after APMA request for extension of deadline,⁷⁸ suggest that the Government was acting in Relicare's interests.

34. Hence, operation of the measure indicates that it aims to protect the domestic producer of PIF. It seeks to modify the competitive relations between Likan and the imported PIFs to the detriment of imported PIFs. The objective of protection of domestic producer is not legitimate as it unjustifiable. Art. 2.1 of the TBT Agreement and Art. III:4 of the GATT prohibit favorable treatment to domestic products. Thus, PaCE does not seek to achieve a legitimate objective.

2.2. IN ANY CASE, PACE IS MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE OBJECTIVE

35. *In any case*, it is submitted that PaCE is more trade restrictive than necessary to fulfil the legitimate objective. The assessment of necessity of a measure requires 'weighing and balancing' factors such as the degree of contribution made by the measure at issue to the legitimate objective [2.2.1], the trade-restrictiveness of the measure [2.2.2], the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure [2.2.3].⁷⁹ This test is mainly used for assessment under Art. XX of the GATT. However, the jurisprudence of Art. XX of the GATT has been analogously applied to Art. 2.2 of TBT Agreement as well.⁸⁰ Additionally, a comparative analysis of the measure and the alternatives is also used to establish necessity

⁷⁶ See ¶ 4, Exhibit 3, Fact on Record.

⁷⁷ ¶ 11, Fact on Record.

⁷⁸ Exhibit 2, Fact on Record.

⁷⁹ *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 164; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 321; Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US - COOL*, 8 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 1, 11 (March 2013).

⁸⁰ *US-Clove* Panel Report, *supra* note 67, ¶ 7.368; Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.667, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter *US-COOL* Panel Report]; 3 Ludivine Tamiotti, *Article 2 TBT: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies in MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO - TECHNICAL BARRIERS AND SPS MEASURES* 219 (2007).

[4].⁸¹ It is submitted that since that PaCE does not satisfy either the relational analysis or the comparative analysis, it is more trade-restrictive than necessary to fulfil the legitimate objective.

2.2.1. PACE HAS NOT MADE ANY CONTRIBUTION TO THE LEGITIMATE OBJECTIVE

36. A measure is said to contribute to the achievement of the legitimate objective when there is ‘a genuine relationship of ends and means between the objective pursued and the measure at issue’.⁸² The degree of contribution can be determined from the *design, structure, and operation of the measure*.⁸³ A measure may be termed as necessary only when it makes a material contribution to the objective.⁸⁴

37. In the present case, the end or the objective as stated by the respondent is protection of health of the infants by helping parents make an informed choice. The means is the measure, PaCE, which requires producers to declare the contents and ingredients of PIFs on the labels. Evidently, this means has failed to achieve the end. The fact that the composition of Likan is similar to that of imported PIFs can be inferred from the report of *The New Asgard Times* where they put Relicare in the same category as the “Killer Four” importers.⁸⁵ Although Relicare, a like product, has declared the contents and ingredients on the labels, parents are still purchasing the harmful substitute for human milk. It registered brisk sales in the very first week of its entry into the market.⁸⁶ Even in March 2015, when the imported PIFs declared their ingredients and re-entered the market, the overall sales of PIFs did not reduce. While the information may now be available to the public, facts do not suggest that the public is better informed as a result. Meanwhile, the health of infants consuming this product continues to be at risk. This suggests that there is no relationship between the end and the means. Therefore, it is submitted that the measure did not make any contribution to the legitimate objective.

⁸¹ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 320; Yoshimichi Ishikawa, *Plain Packaging Requirements and Article 2.2 of the TBT Agreement*, 30 CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS 72, 88 (2012).

⁸² *Brazil-Tyres* Appellate Body Report, *supra* note 59, ¶ 210.

⁸³ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 317.

⁸⁴ *Brazil-Tyres* Appellate Body Report, *supra* note 59, ¶ 150.

⁸⁵ ¶ 14, Fact on Record.

⁸⁶ ¶ 11, Fact on Record.

2.2.2. PACE IS MORE TRADE-RESTRICTIVE THAN NECESSARY

38. The term ‘trade-restrictive’ refers to a measure “*having a limiting effect on trade*”.⁸⁷ In order to show that a measure is trade-restrictive, *actual impact on trade* need not be proved. A measure that causes restrictions on the competitive opportunities available to imported products is also said to be trade-restrictive.⁸⁸ It will not be considered necessary if there is an alternate less trade-restrictive measure which can contribute as effectively to the objective.⁸⁹

39. In the present case, the amount of time given to the producers to comply with PaCE is just two months. The Agatean producers had requested for an extension citing constraints related to money, time and reputation in shipping the products back to Agatea to change the labels.⁹⁰ However, the request was unreasonably denied. The reasons for this request were Further, the Government of Asgard did not permit them to use stickers instead of labels as a temporary measure.⁹¹ The imported PIFs were seized for four months. On the other hand, Relicare, an infant industry in terms of PIFs was able to comply with PaCE at no extra cost.⁹² This clearly indicates that the measure had a detrimental effect only on the imported products. They were denied competitive opportunities which led to a decline in their market share.⁹³

40. Additionally, it is submitted that there are less trade-restrictive measures which can achieve the same objective. For instance, if PaCE had been interpreted differently to permit the producers to use stickers temporarily or amended to extend the deadline, the measure would have been less trade-restrictive, while achieving the same objective. Alternatively, the government could have mandated the producers to run advertisement campaigns to make parents aware of the ingredients of their products. This would not have denied them competitive opportunities. These measures would have effectively contributed to the objective of protection of health of the infants by helping the parents make informed

⁸⁷ Panel Report, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.129, WT/DS90/R (Apr. 6, 1999); *US-COOL* Appellate Body Report, *supra* note 3, ¶ 375; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 214.

⁸⁸ *US-COOL* Panel Report, *supra* note 80, ¶ 7.572.

⁸⁹ *US-Tuna* Panel Report, *supra* note 16, ¶ 7.456.

⁹⁰ ¶ 9, Fact on Record.

⁹¹ Clarification no. 1, Fact on Record.

⁹² ¶ 6, Exhibit 2, Fact on Record.

⁹³ Clarification no. 1, Fact on Record.

decisions about using PIFs. Therefore, it is submitted that PaCE is more trade-restrictive than necessary.

2.2.3. NO GRAVE CONSEQUENCES ARISE FROM NON-FULFILLMENT OF THE OBJECTIVE

41. The third factor in relational analysis is that of the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure.⁹⁴

42. In the present case, although the nature of the risk at issue, i.e. the health of the infants is grave, the means through which it is sought to be minimized renders it insignificant. PaCE seeks to achieve the objective by informing parents about the ingredients of PIFs. However, the ‘diabetes-causing’ PIF have continued to register brisk sales. It has been shown in Section [2.2.1] that the measure has failed to make any impact. Hence, it is argued that even if PaCE is not implemented, it will not have any adverse consequences. The measure, in its present form, is not necessary to achieve the objective.

2.2.4. REASONABLE AND LESS TRADE-RESTRICTIVE ALTERNATIVES ARE AVAILABLE

43. The assessment of necessity requires a comparison of the measure at issue with a possible alternative measure on the basis on elements such as whether the alternatives are *less trade restrictive* than the challenged technical regulation, whether the alternatives would make an *equivalent contribution* to the legitimate objective, taking account of the risks non-fulfillment would create and whether the alternative is *reasonably available*.⁹⁵

44. It is submitted that the less trade-restrictive alternatives suggested above in Section [2.2.2] will contribute to the achievement of the objective to a greater extent. Moreover, the alternatives are reasonably available. The importers have already pasted stickers on the goods. It will also not be difficult for them to run advertisement campaigns. In the representation made by the importers to the ADOH on July 25, 2014, they had expressed their support for the welfare measure of the government. Hence, they are not likely to hesitate in complying with alternative less trade-restrictive measures.

45. Therefore, the measure at issue is more trade restrictive than necessary and it violates the obligation of Asgard under Art. 2.2 of the TBT Agreement.

⁹⁴ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 320; *US-COOL* Appellate Body Report, *supra* note 3, ¶ 377.

⁹⁵ *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 321.

**3. PACE IS INCONSISTENT WITH ASGARD’S OBLIGATIONS UNDER ARTICLE III:4 OF THE
GATT**

46. PaCE mandates all the producers of PIFs to declare the ingredients of their products on the labels in order to help parents make an informed choice. This was done in furtherance of the objective of protecting the infants against the risk of Type-1 diabetes. It is submitted that the measure is in violation of Article III:4 of the GATT.

47. For a measure to be inconsistent with Art. III:4 of the GATT, it must be proved that the imported and domestic products are like in nature [3.1], the measure is a “*law, regulation or requirement which is affecting the internal sale, offering for sale, purchase, transportation, distribution or use* (of the imported products)” and is therefore within the ambit of Art. III:4 of the GATT [3.2] and the measure accords less favourable treatment to the imported products [3.3].⁹⁶

3.1. THE IMPORTED PIFs AND LIKAN ARE LIKE PRODUCTS

48. In order to show that unfavourable treatment has been accorded to the imported products, it must be proved that the imported products and the domestic products are like in nature. In *EC-Sardines*, the Appellate Body observed that if the measure at issue is a technical regulation under TBT Agreement, the analysis of the claims put forth under TBT Agreement would precede the analysis under Article III:4 of the GATT.⁹⁷

49. In the present case, the measure at issue is PaCE. In Section 1.2 it has been shown that the imported products and Likan are like products. It is submitted that the same arguments shall apply for proving the likeness of products under Art. III:4 of the GATT as well.⁹⁸

**3.2. PACE IS A “LAW, REGULATION OR REQUIREMENT” WITHIN THE AMBIT OF ART. III:4 OF
THE GATT**

50. The word “*affecting*” in Art. III:4 of the GATT has been interpreted to have a wide scope of application. It encapsulates within itself the notion of impact on the imported product.⁹⁹ Further, in *Canada-Autos*, the panel categorically stated:

⁹⁶ *EC-Sardines* Panel Report, *supra* note 18, ¶ 7.16.

⁹⁷ *EC-Sardines* Panel Report, *supra* note 18, ¶ 7.16

⁹⁸ *Korea –Beef* Appellate Body Report, *supra* note 42, ¶ 133.

*“whether or not in practice motor vehicle manufacturers can easily meet the CVA requirements of the MVTO 1998 and the SROs on the basis of labour costs alone does not alter our finding that the CVA requirements affect the internal sale or use of products”*¹⁰⁰ (emphasis supplied)

Therefore, the mere fact that it is possible for the imported product to comply with the measure at issue, does not affect the impact of the measure on the competitive opportunities for the imported product in the domestic market.

51. In the present case, the measure at issue, PaCE was passed by the Parliament of Asgard on August 30, 2014.¹⁰¹ Clearly, it is a “*law, regulation or requirement*”. The products at issue here are PIFs produced by the members of APMA and that produced by Relicare. PaCE mandates all the producers of PIFs to label their products declaring the ingredients and contents of the PIFs.¹⁰² It will be shown in Section 3.3 that PaCE accords less favourable treatment to the imported PIFs. It denies them competitive opportunities by imposing an additional cost. This indicates that PaCE has an impact on the internal sale of the imported products. As a result, the financial might of the companies cannot be raised as a defence to the imposition of less favourable treatment.¹⁰³ Therefore, it is submitted that PaCE is a “*law, regulation or requirement which is affecting the internal sale, offering for sale, purchase, transportation, distribution or use (of the imported products) for the purposes of Art. III:4 of the GATT.*”

3.3. PACE ACCORDS LESS FAVOURABLE TREATMENT TO IMPORTED PIFs

52. It is submitted the provisions put forth under PaCE fall within the ambit of the *asymmetric impact test*. According to this test, a measure is said to accord less favourable treatment to the imports “*if the burden arising from the measure is heavier for imports than*

⁹⁹ This proposition was endorsed in *India-Autos* where the Panel interpreted the term “affecting” as “a measure that has an effect on”. See Panel Report, *India - Measures Affecting the Automotive Sector*, ¶ 7.306, WT/DS146/R, WT/DS175/R (Dec. 21, 2001).

¹⁰⁰ Panel Report, *Canada - Measures Affecting the Automotive Sector*, ¶¶ 10.80, 10.84, 10.85 7.306, WT/DS139/R, WT/DS142/R (Feb. 11, 2000) [hereinafter *Canada – Autos Panel Report*].

¹⁰¹ ¶ 10, Fact on Record.

¹⁰² Art. 3, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

¹⁰³ *Canada – Autos Panel Report*, supra note 99, ¶¶ 10.80, 10.84, 10.85.

that for domestic products”.¹⁰⁴ The equality of conditions of competition has been held to be the yardstick for establishing that there has been less favourable treatment.¹⁰⁵

53. The Panel in *Dominican Republic - Import and Sale of Cigarettes*¹⁰⁶ observed that equal treatment cannot be inferred merely from formal identical requirements. A formal identical requirement may also result in the imported products being accorded less favourable treatment. In such cases, the test to be used is whether imported products are subject to treatment which is not less favourable to that accorded to domestic products such as additional process to be undertaken, which entail additional cost.

54. Moreover, the ‘*fundamental thrust and effect of the measure*’ test, as put forth by Appellate Body in *US-FSC*,¹⁰⁷ envisages a close scrutiny of the measure at hand and its implications on the market. A simple assertion cannot act as a conclusive ground for satisfaction of the above-mentioned test.¹⁰⁸

55. In the instant case, PaCE envisages only formal equality by using terms such as “*all powdered infant formula*”.¹⁰⁹ In effect, it still accords less favourable treatment to imported PIFs. In the letter sent by Relicare to ADOH expressing its support and assuring compliance with PaCE, Relicare clearly stated that it will be able to incorporate the additional requirements envisaged by PaCE at no significant cost. It was able to achieve this because Likan had not yet been released in the market and the processing was still underway.¹¹⁰ On the other hand, four months’ stock of the imported PIFs was available for sale in Asgard. Additionally, three months stock had been shipped to Asgard. In order to comply with PaCE, the importers would have had to recall the products, change the labels and ship them back. It is estimated that an additional cost of US \$1.5 per unit would have been incurred by the

¹⁰⁴ Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most Favoured nation Treatment or Equal Treatment?*, 36(5) J. WORLD TRADE 921, 925 (2002).

¹⁰⁵ Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.379, WT/DS44/R (Mar. 31, 1998).

¹⁰⁶ Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.182, WT/DS302/R (Nov. 26, 2004).

¹⁰⁷ Appellate Body Report, *United States – Tax Treatment of “Foreign Sales Corporations”*, ¶ 215, WT/DS108/R (May 20, 2001) [hereinafter *US – FSC Appellate Body Report*]; *Thailand – Cigarettes Appellate Body Report*, *supra* note 42, ¶ 129; *Korea- Beef Appellate Body Report*, *supra* note 42, ¶ 142; Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, ¶ 110, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Feb. 14, 1997) [hereinafter *Japan-Alcoholic Beverages II Appellate Body Report*].

¹⁰⁸ *US – FSC Appellate Body Report*, *supra* note 106, ¶ 215; *Thailand – Cigarettes Appellate Body Report*, *supra* note 42, ¶ 129; *Korea- Beef Appellate Body Report*, *supra* note 42, ¶ 142; *Japan-Alcoholic Beverages II Appellate Body Report*, *supra* note 106, ¶ 110.

¹⁰⁹ Art. 3(1), Packaging of Commodities and its Enforcement (Regulation No. 8/2014).

¹¹⁰ ¶ 6, Fact on Record.

members of APMA.¹¹¹ This cost is in addition to the time spent in shipping and repackaging. In a nutshell, it would have resulted in loss of time, money and reputation.¹¹² The additional cost to would be passed on to the consumers which would consequently reduce the competitiveness of the imported products. It is trite that compliance with PaCE would have resulted in additional burden on the importers. It is well-established that the Government regulations which seek to confer competitive advantage on the domestic products results in increased cost of production for the foreign firms than the domestic firms.¹¹³ Although, PaCE might seem origin-neutral, yet it had adverse impact on the competitive relationship of imported products vis-à-vis the like domestic products. Hence, PaCE is a disguised form of protectionist measure.

56. Additionally, it has been elucidated in reports of *The New Asgard Times* that in an ideal market scenario, Likan would have been able to capture only five to ten percent of the market.¹¹⁴ However, in the very first week of its launch, it registered brisk sales. In March 2015, when the seized imported products re-entered the market, Likan retained sixty percent of the market in which it had been the sole supplier for the past four months.¹¹⁵ Thus, PaCE resulted in reduction of market share of the imported products from hundred percent to a mere forty percent.

57. An asymmetrical factual matrix is essentially a tabular representation of altered market shares owing to the change in conditions of competition which are detrimental to imported goods.¹¹⁶ The above data fits into this matrix. Since, PaCE altered the conditions of competition to the detriment of imported PIFs the *asymmetric impact test* is satisfied in the present case. Therefore, it is submitted that PaCE accords less favourable treatment to the like products.

58. Therefore, PaCE is a “*law, regulation or requirement which is affecting the internal sale, offering for sale, purchase, transportation, distribution or use* (of the imported products)” which has led to less favourable treatment being accorded to like products. It is submitted that PaCE is inconsistent with the obligations of Asgard under Art. III:4 of the GATT.

¹¹¹ ¶ 8, Fact on Record.

¹¹² ¶ 8, Fact on Record.

¹¹³ 4 Kym Anderson & Bernard Hoekman, *THE GLOBAL TRADING SYSTEM* 315 (2002).

¹¹⁴ Exhibit 6, Fact on Record.

¹¹⁵ Clarification no. 1, Fact on Record.

¹¹⁶ Ehring, *supra* note 103, at 926.

3.4. PACE IS NOT JUSTIFIED UNDER ART. XX(B) OF THE GATT

59. For a measure to be protected under Art XX, a two-tier test needs to be proved. The measure at issue must come under one or another of the particular exceptions listed under Article XX [3.4.1] and it must satisfy the requirements imposed by the opening clauses of Article XX [3.4.2].¹¹⁷ Art. XX(b) of the GATT provides an exception when the measure at issue is necessary to protect human, animal or plant life or health. It is submitted that PaCE does not satisfy this exception.

3.4.1 PACE DOES NOT FALL WITHIN THE SCOPE OF ART. XX(B) OF THE GATT

60. A measure is said to fall under Art. XX(b) of the GATT when it falls within the policies designed to protect human health and life [3.4.1.1] and when the measure is ‘necessary’ to achieve this policy objective [3.4.1.2].¹¹⁸

3.4.1.1 PACE DOES NOT FALL WITHIN THE POLICIES DESIGNED TO PROTECT HUMAN HEALTH AND LIFE

60. It has been shown above in Section 2.1 that PaCE does not seek to achieve the objective of protection of health of the infants. The real objective is to protect the domestic producers of PIFs.

3.4.1.2. IN ANY CASE, PACE IS NOT ‘NECESSARY’ TO ACHIEVE THE LEGITIMATE OBJECTIVE

61. Assuming but not conceding that the measure falls within the policy of protection of human health under Art. XX(b), it is submitted that the measure is not necessary, to achieve this objective. Necessity of a measure is examined by adopting a ‘weighing and balancing test’. The factors to be analysed are contribution of the measure to the objective, relative importance of the interests and values pursued by the measure and trade restrictiveness of the measure.¹¹⁹ It has been demonstrated in Section 2.2 by analysing these factors that the measure is not necessary for achieving the objective of protection of health of the infants.

¹¹⁷ *US-Gasoline* Appellate Body Report, *supra* note 54, ¶ 22; *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 156; *Brazil-Tyres* Appellate Body Report, *supra* note 59, ¶ 139.

¹¹⁸ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.198, 7.199, WT/DS/246/R (Dec. 1, 2003); *US – Gasoline* Panel Report, *supra* note 54, ¶ 6.20.

¹¹⁹ *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 139-143.

3.4.2 PACE DOES NOT SATISFY THE REQUIREMENTS OF THE CHAPEAU OF ART. XX OF THE
GATT

62. A measure may fall within the exceptions listed under Art. XX. However, it can be held to be consistent with provisions of the GATT only if it does not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail or it is not a disguised restriction on international trade.¹²⁰ It is submitted that PaCE does not satisfy the chapeau as it is a disguised restriction on international trade.

63. The restriction need not be concealed or unannounced for it to be a disguised restriction.¹²¹ Thus, the fact that the measure was publicly announced does not indicate that it is not a disguised restriction. Disguised restriction on international trade includes restrictions that amount to arbitrary or unjustifiable discrimination taken under the guise of a measure which is formally within the terms of an exception listed in Art. XX of the GATT.¹²² A measure is said to cause arbitrary or unjustifiable discrimination when the reasons given for discrimination bear no rational connection to the objectives laid down under Art. XX.¹²³

64. It has been demonstrated in Section 1.3.2 that PaCE discriminates against imported PIFs by according them less favourable treatment. Section 1.3.2 illustrates that this discrimination does not stem from a legitimate regulatory distinction. The objective of PaCE has been stated to be protection of the health of children from harmful PIFs. It is a legitimate objective under Art. XX (b) of the GATT. However, the measure leads to an arbitrary and unjustifiable discrimination. Thus, PaCE under the guise of protecting the health of children, PaCE seeks to discriminate against imported PIFs to the advantage of domestic product, Likas. The fact that PaCE was publicly announced is of no consequence. It is a disguised restriction on international trade.

Therefore, since PaCE does not fall within the scope of Art. XX(b) and it does not satisfy the chapeau of Art. XX, it is not justified under Art. XX.

¹²⁰ General Agreement on Trade and Tariffs, art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

¹²¹ *US – Gasoline* Appellate Body Report, *supra* note 54, ¶ 25.

¹²² *US – Gasoline* Appellate Body Report, *supra* note 54, ¶ 25.

¹²³ *Brazil – Tyres* Appellate Body Report, *supra* note 59, ¶ 227

REQUEST FOR FINDINGS

Wherefore in light of the Issues Raised, Arguments Advanced, the complainant requests this Panel to:

- a) Find that the technical measure at issue accorded less favourable treatment to imported products than that accorded to like domestic products and hence, is inconsistent with Article 2.1 of the TBT Agreement.
- b) Find that the technical regulation at issue created unnecessary obstacles to trade and hence, is inconsistent with Article 2.2 of the TBT Agreement.
- c) Find that the regulation at issue accorded less favourable treatment to imported products than that accorded to like domestic products and hence, is inconsistent with Article III:4 of the GATT, 1994.

All of which is respectfully affirmed and submitted,

Counsel for the Complainant,

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