

BEFORE THE PANEL ESTABLISHED BY THE WTO DSB



ASGARD: MEASURES CONCERNING POWDERED INFANT FORMULA

COMPLAINANT: AGATEA

WT/DS/XXX

MEMORIAL FOR THE RESPONDENT

7TH GNLU INTERNATIONAL MOOT COURT COMPETITION

2015

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List of Abbreviations

| | |
|--------|---|
| ¶ | Paragraph |
| \$ | U.S. Dollars |
| A. | Article |
| ABR | Appellate Body Report |
| ADOH | The Asgard Department of Health |
| ADOL | The Asgard Department of Law and Justice |
| APMA | Agatean Processed Food Members Association |
| COOL | Country of Origin Labelling |
| CSCPHN | Circle Sea Code on Public Health and Nutrition |
| DMD | Doha Ministerial Declaration |
| DS | Dispute Settlement |
| DSB | Dispute Settlement Board |
| DSU | Understanding On Rules And Procedures Governing The Settlement Of Disputes |
| EC | European Communities |
| Ed. | Edition |
| EEC | European Economic Community |
| GATS | General Agreement on Trade in Services |
| GATT | The General Agreement On Tariffs And Trade |
| Ibid | Ibidem |

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|-------|--|
| ICJ | International Court of Justice |
| IEC | International Electrotechnical Commission |
| ISO | International Organization for Standardization |
| JWT | Journal on World Trade |
| NGO | Non-Governmental Organisations |
| PaCE | Packaging of Commodities and its Enforcement |
| Pg. | Page |
| PIF | Powdered Infant Formula |
| TBT | Agreement On Technical Barriers To Trade |
| Thai | Thailand |
| UN | United Nations |
| US | United States of America |
| VCLT | Vienna Convention on Law of Treaties |
| Vol. | Volume |
| WT/DS | World Trade/Dispute Settlement |
| WTO | World Trade Law |

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| EC- Asbestos | Appellate Body Report, <i>European Communities – Measures Affecting Asbestos And Asbestos-Containing Products</i> , WT/DS135/AB/R (March 12 2001). |
| EC- Asbestos | Panel Report, <i>European Communities –</i> |

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| | <i>Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R (April 5, 2001). |
| EC- Hormones | Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R (February 13, 1998). |
| EC- Sardines | Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R (September 26, 2002). |
| EC- Seals | Appellate Body Report, <i>European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R (May 22 2014). |
| Italian- Agricultural Machinery | Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833 - 7S/60 (Oct. 23 1958). |
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| Korea- Beef | Appellate Body Report, <i>Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000). |
| Thailand- Cigarettes | Appellate Body Report, <i>Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines</i> , WT/DS371/AB/R (June 17 2011). |
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| US- COOL | Appellate Body Report, <i>United States – Certain Country Of Origin Labelling (Cool) Requirements</i> , WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012) |
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Statement of Facts

The Parties

Asgard is a developing country with a population of 10 million, with 5% of the population under the age of 5. It is one of the 9 Circle Sea islands that share historical, cultural and ethnic roots due to colonization by Agatea till the 1950s. Agatea is located in the Indian sub-continent and is the world leader in dairy and health supplements. Both countries are members of the World Trade Organization.

Circle Sea Code on Public Health and Nutrition

The Nine Realm Summit themed “Health” was held in Krull, the capital city of Asgard, in January 2014. One of the breakthroughs of the summit was the finalization of the Circle Sea Code on Public Health and Nutrition(CSCPHN). Article 12 of the CSCPHN dealt with infant wellbeing and health. Sub clause (g) of article 12 recognized that for the well being of infants, nutritious food and food supplements should be made available at all times. The proviso to the same called upon the parties to the code to ensure that relevant information regarding nutritious content of food is made available to the public and empowered them to take appropriate measures in this regard.

Powdered Infant Formula(PIF) market in Asgard

The Asgardian PIF market consists of roughly 0.5 million consumers and till October 2014 was completely controlled by four Agatean companies named Castle, Viking, Flora and Theos via their products named Rincewind, Linacre, Diamanda and Cemantac respectively. However, as of March 2015, 60% of the market is controlled by Relicare, a domestic company that entered the market in November 2014 with its product Likan, while the remaining share is split among the Agatean companies. Apart from offering all the variants that its competition offers, Relicare additionally offers carrot-flavored variants as well.

Regulation No.8/2014 Packaging of Commodities and it’s Enforcement(PaCE)

A sudden spike in Asgard of Type-1 diabetes among children resulted in the Asgard Department of Health(ADOH) releasing a report which called for the exact ingredients and content in terms of percentage and weight to be made known to parents in order to make an informed decision about using PIFs for their children. Deeming the situation to be urgent and

an emergency, the Asgard Department of Law(ADOL) introduced the draft of Regulation No.8/2014 Packaging of Commodities and it's Enforcment(PaCE) in July 2014. Article 9 of the same called for compliance with certain packaging requirements by 31st October 2014. All the four Agatean corporations, through their association Agatean Processed Food Members Association (APMA) made a representation to the ADOL on 25th July 2014. They emphasized that they will incur huge costs in changing the entire packaging of PIF products as about 20 million units shall have to be recalled and repackaged, along with another 15 million units that have already been shipped. The cost per unit to change the packaging was about 1.5\$ excluding the shipping period. Due to these reasons, APMA requested an extension in the compliance deadline to March 2015. The Asgardian Parliament passed PaCE in its original form without any amendments.

Post-Compliance Date Events

On 1st November 2014, all non-complying PIF products manufactured by APMA companies were seized by ADOH. On the same day, Relicare launched its own PIF “Likan” and registered brisk sales. The product ran out within a week. In December, it came to light that APMA had tried pasting stickers containing the requisite details of ingredients on existing products but regardless, the products were seized by the ADOH as the products still violated article 3 of PaCE. A latter appeal to the High Court of Krull by the companies was dismissed and the seized products were returned to the companies.

Planned Retaliatory Measures

In December 2014, the Agatean media reported that the government was planning on imposing strict packaging guidelines with regard to energy drinks. This would adversely impact Asgardian companies as Asgard is the biggest exporter of energy drinks in the world. In particular, BigBull and Tadpole would be impacted, both being Relicare products manufactured in Asgard and holding 55% of the energy drink market share in Agatea.

Panel Establishment

In December 2014, Agatea requested consultations with Asgard under the WTO Dispute Settlement Understanding (DSU). However these consultations were unsuccessful. Agatea then requested for the establishment of a WTO panel. Asgard did not object to this request. The Dispute Settlement Body(DSB) established a panel in April 2015. The WTO Director General composed the Panel in May 2015.

Measure of Issues

1. PaCE does not violate the national treatment obligation under article III:4 of GATT 1947
 - 1.1 PaCE satisfies the three tier test:
 - 1.1.1 The measure at issue is a law, regulation or requirement covered by article III:4
 - 1.1.2 The imported and domestic products are like products. Likeness is judged by four criteria:
 - 1.1.2.1 The properties, nature and quality of the products
 - 1.1.2.2 The end-uses of the products
 - 1.1.2.3 Consumers' tastes and habits-more comprehensively termed consumers' perceptions and behaviour- in respect of the products
 - 1.1.3 The imported products are not accorded less favourable treatment
 - 1.1.3.1 PaCE accords effective equality to imported products
2. PaCE does not violate the national treatment obligation under article 2.1 of TBT
 - 2.1 PaCE does not satisfy the three tier test for violation of article 2.1
 - 2.1.1 The measure at issue is a technical regulation
 - 2.1.1.1 PaCE affects one or more products
 - 2.1.1.2 PaCE specifies the technical characteristics of products which allows them to be marketed in Asgard
 - 2.1.1.3 Compliance with PaCE is mandatory.
 - 2.1.2 The imported and domestic products are like products.
 - 2.1.3 The imported products are not accorded less favourable treatment.
 - 2.2 The impact of the measure stems from a legitimate even-handed regulatory distinction
3. The imported and domestic products at issue must be like products; and
4. The treatment accorded to imported products must be less favourable than that accorded to like domestic products.
 - a. *Arguendo*, if the measure has had a detrimental impact, it does not amount to less favourable treatment of imports as prohibited by article 2.1 of TBT, as the impact stems exclusively from a legitimate even-handed regulatory distinction.

5. Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is NOT inconsistent with article 2.2 of the TBT Agreement and does NOT violate the WTO obligations.
 - 5.1 The measure formulated by Asgard, by way of the regulation, pursues a legitimate objective.
 - 5.2 The PaCE Regulation is not more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create.
 - 5.2.1 The PaCE Regulation makes a notable degree of contribution towards the achievement of the legitimate objective.
 - 5.2.2 The technical regulation, i.e., PaCE Regulation 8/2014 is not trade restrictive.
 - 5.2.3 The risk and the gravity of consequences of non-fulfilment of the objective would have been grave and fatal.
 - 5.2.4 No alternative measure, to the PaCE regulation, is available.
 - 5.3 The PaCE Regulation does not create an unnecessary obstacle to trade.
6. The PaCE Regulation 8/2014 is consistent with article 2.12 of the TBT Agreement and therefore, NOT violative of the WTO obligation.
7. *Arguendo*: if the panel holds that the PaCE regulation 8/2014, is violative of the obligations under the general agreement of GATT, then the regulation is justified under the general exception under article XX, GATT.
 - 7.1 The PaCE regulation is protected under article XX(b) of the GATT agreement.
 - 7.1.1 The policy in respect of the measure for which the provision of article XX(b) was invoked falls within the range of policies designed to protect human life or health.
 - 7.1.2 The measure, for which the exception was being invoked, is necessary to fulfil the policy objective.
 - 7.1.3 The PaCE regulation is in confirmation with the introductory clause, i.e., the chapeau of article XX GATT.
 - 7.2 The PaCE Regulation 8/2014 is not in confirmation with the introductory clause/ chapeau of article XX.

Summary

Argument I

Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is consistent with article III: 4 of the GATT and thus not violative of WTO obligations.

- The measure formulated by Asgard, by way of the regulation, does not accord less favourable treatment to imported products as compared to domestic products.
- The imported products and the domestic products are like products and are afforded effective equality as mandated by WTO obligations as there is the application of formally equal legal provisions .

Argument II

The PaCE Regulation 8/2014 is consistent with article 2.1 of the TBT Agreement and therefore, is not violative of the WTO obligation.

- The measure formulated by Asgard, by way of the regulation, does not accord less favourable treatment to imported products as compared to domestic products.
- The imported products and the domestic products are like products and are afforded effective equality as mandated by WTO obligations as there is the application of formally equal legal provisions.
- *Arguendo*, even if we agree with the contention that PaCE negatively detriments imported products and hence leads to a violation of article 2.1, Asgard is protected by reason of the regulation being an even-handed regulatory measure.

Argument III

Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is NOT inconsistent with article 2.2 of the TBT Agreement and does NOT violate the WTO obligations.

- The measure formulated by Asgard, by way of the regulation, pursues a legitimate objective of protection of health and ensuring the safety of children in Asgard and also the prevention of deceptive practices.
- The PaCE Regulation is not more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create as the PaCE Regulation makes a notable degree of contribution towards the achievement of the legitimate objective and is therefore, not trade restrictive. Also, the risk and the

gravity of consequences of non-fulfilment of the objective would have been grave and fatal and no alternative measure, to the PaCE regulation, is available.

- The PaCE Regulation does not create an unnecessary obstacle to trade because the PaCE regulation is necessary to be complied with for the protection of health and safety of the children in Asgard by creating consumer awareness among the parents and also, there is no reasonable and equitable alternative available.

Argument IV

The PaCE Regulation 8/2014 is consistent with article 2.12 of the TBT Agreement and therefore, NOT violative of the WTO obligation.

- The Asgard government was faced with an emergency situation with respect to the safety and health of the children in Asgard and therefore, the government could not have taken chances by delaying compliance with regulation as it might have been detrimental to the safety and health of the children.
- Also, the interpretation accorder to the term *reasonable interval* under article 2.12 by the Doha Ministerial Decision, is not binding as a rule and can be used only as a means of supplemental interpretation.

Argument V

Arguendo: if the panel holds that the PaCE regulation 8/2014, is violative of the obligations under the general agreement of GATT, then the regulation is justified under the general exception under article XX, GATT.

- The PaCE regulation is protected under article XX(b) of the GATT agreement because the policy in respect of the measure for which the provision of article XX(b) was invoked falls within the range of policies designed to protect human life or health. In addition, the measure, for which the exception was being invoked, is necessary to fulfil the policy objective.
- The PaCE Regulation 8/2014 is in confirmation with the introductory clause/ chapeau of article XX because it fulfils all the requirements under the chapeau. The regulation does not result in any sort of discrimination and also, cannot be said to be a disguised restriction on trade.

Legal Pleadings

1. PaCE does not violate the national treatment obligation under article III:4 of GATT 1947

Asgard humbly submits that Regulation No. 8/2014 Packaging of Commodities and its Enforcement (herein after referred to as PaCE) does not violate the national treatment commitment undertaken by Asgard under article III:4 of the GATT. The broad and fundamental purpose of Article III is to avoid protectionism in the application of regulatory measures.¹ Specifically, article III:4 creates an obligation on a Member to accord “treatment no less favourable than that accorded to like products of national origin”.² The regulation at hand does not meet the three tier test for violation of article III:4 as laid down in *Korea-Beef*.³

1.1 PaCE does not satisfy the three tier test for violation of article III:4

As per *Korea-Beef*, for a violation of Article III:4 to be established, three elements must be satisfied: *firstly*, that the measure at issue must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; *secondly*, the imported and domestic products at issue must be "like products"; and *thirdly* that the imported products must be accorded "less favourable" treatment than that accorded to like domestic products.⁴ PaCE satisfies the first two elements of this test but fails to satisfy the third element and hence does not violate the obligation under article III:4.

1.1.1 The measure at issue is a law, regulation or requirement covered by Article III:4

Asgard submits that as laid down by the panel in *Italy–Agricultural Machinery*, the use of the “word “affecting” would imply, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.”⁵ The Panel thus interpreted the scope of application of Article III: 4 broadly as including all measures

¹ Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.10, L/6439 - 36S/345 (Nov. 7 1989).

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

³ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

⁴ *Id.*

⁵ Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, L/833 - 7S/60 (Oct. 23 1958). See also Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, footnote 44 and 45, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996) and Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 129, WT/DS371/AB/R (June 17 2011).

that may modify the conditions of competition.⁶ PaCE clearly satisfies this element of the test as it is a regulation that aims to ensure that packaged food and food supplements exhibit their nutritional contents in a manner that lets the public take an informed decision⁷ and therefore, directly affects the “internal sale” and “distribution” of the products.

1.2 The imported and domestic products are like products

“Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. Article III protects expectations not of any particular trade volume but rather of an equal competitive relationship.⁸ The determination of whether products are ‘like products’ under Article III:4 is, fundamentally, a determination about the nature and extent of the competitive relationship between these products.⁹ This approach has, in the main, consisted of employing four general criteria in analysing “likeness”¹⁰ These general criteria, or groupings of potentially shared characteristics, provide a framework for analysing the “likeness” of particular products on a case-by-case basis. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.¹¹ These criteria are:

1.2.1 The properties, nature and quality of the products

The domestic product (Likan) and the imported products (Rincewind, Linacre, Diamanda and Cementac) in question share similar properties, nature and quality. All of these products meet the definition of a Powdered Infant Formula under article 3 of PaCE.¹²

1.2.2 The end- uses of the products

The end-uses of the domestic products and the imported products are the same i.e. providing a complete or partial substitute to human milk.

⁶ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 390 (1ST ED. 2005).

⁷ Exhibit 1, Compromis.

⁸ Appellate Body Report, *European Communities – Measures Affecting Asbestos And Asbestos-Containing Products*, ¶ 97, WT/DS135/AB/R (March 12 2001).

⁹ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 356 (1ST ED. 2005).

¹⁰ Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, ¶ 18. *See also* Peter Van den Bossche, The Law and Policy of the World Trade Organization: Texts, Cases and Materials 356 (1ST ed. 2005) and Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, footnote 44 and 45, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996).

¹¹ Appellate Body Report, *European Communities – Measures Affecting Asbestos And Asbestos-Containing Products*, ¶ 102, WT/DS135/AB/R (March 12 2001).

¹² Exhibit 1, Compromis.

1.2.3 Consumers’ perceptions and behaviour – in respect of the products

The brisk sale of Likan in absence of other PIFs in the market¹³ and the subsequent regaining of market share by the four Agatean companies¹⁴ clearly demonstrate that consumers share a common perception in respect of the products under question.

1.3 The imported products are not accorded less favourable treatment

The “no less favourable” treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the MFN standard, or to domestic products, under the national treatment standard of Article III.¹⁵ The words “treatment no less favourable” in article III: 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis.¹⁶ Panels have repeatedly found that "treatment no less favourable" under Article III: 4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements.¹⁷ At the same time, As per WTO obligations under article III:4 of the GATT, Members are barred from maintaining in their laws provisions that discriminate between national and imported products.¹⁸

Asgard humbly submits that it does not accord “less favourable” treatment to imported products. PaCE accords effective equality to imported products with respect to domestic products.

¹³ Pg. 6, Compromis.

¹⁴ Answer 1, Clarifications.

¹⁵ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 356 (1ST ED. 2005).

¹⁶ GATT Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.11, L/6439 - 36S/345 (Nov. 7 1989).

¹⁷ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 134, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000) and Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 176, WT/DS406/AB/R (April 4 2012).

¹⁸ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 45 (1ST ED, 2007).

1.3.1 PaCE accords effective equality to imported products

Article III: 4 does not require the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products.¹⁹ Whether or not imported products are treated "less favourably" than like domestic products has to be assessed by examining whether a measure modifies the "conditions of competition" in the relevant market to the detriment of imported products.²⁰ The analysis of whether imported products are accorded less favourable treatment requires a careful examination "grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'"²¹, including of the implications of the measure for the conditions of competition between imported and like domestic products.²² For a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.²³ The Panel needs to take an all rounded perspective of the measure at hand by evaluating whether it changes the market conditions to such an extent to unreasonably favour a domestic player. The implications of the contested measure for the equality of competitive conditions are, first and foremost, those that are discernible from the design, structure, and expected operation of the measure.²⁴

In light of this, it is important to note that the Asgardian government introduced the draft regulation in July 2014 and invited comments from all stakeholders.²⁵ In addition to this, Asgard provided a time period of two months to all companies in the market to comply with

¹⁹ Appellate Body Report, *European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products*, ¶ 5.108, WT/DS400/AB/R, WT/DS401/AB/R (May 22 2014).

²⁰ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

²¹ Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations" Recourse To Article 21.5 Of The DSU By The European Communities*, ¶ 215, WT/DS108/AB/RW (Jan. 14 2002). See also Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 142, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

²² Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 129, WT/DS371/AB/R (June 17 2011).

²³ Appellate Body Report, *United States – Certain Country Of Origin Labelling (Cool) Requirements*, ¶ 270, WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012) See also Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 134, WT/DS371/AB/R (June 17 2011) and Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

²⁴ Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 130, WT/DS371/AB/R (June 17 2011).

²⁵ ¶ 6, Pg. 4, Compromis.

the regulation at hand.²⁶ Also, the definition of PIFs, as under article 2 of the regulation, was broad enough to cover the upcoming domestic product as well,²⁷ and accordingly, actions would have been taken if Relicare and its product Likan had not complied with the regulation.

The existence of the above mentioned facts clearly demonstrate that there was effective equality between the domestic product (Likán) and imported products (APMA companies produced PIFs) as there was application of equal legal provisions for both the domestic and the imported products.

Arguendo, if the competitive conditions are changed, the changes in the competitive conditions in the PIF marketplace are "not imposed directly or indirectly by law or governmental regulation, but [are] rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits", and hence cannot be the basis for a finding that a measure treats imported products less favourably than domestic like products.²⁸ The decision to launch a product on a particular date is completely at the discretion of the company, and is based on a variety of factors, including but not restricted to market analysis, cost-benefit analysis etc. In the scenario at hand, the supposed change in competitive conditions arises from a decision taken by a private entrepreneur rather than the measure taken by the government.

Hence, PaCE does satisfy the three-tier test for violating the national treatment obligation under article III: 4 of the GATT.

2. PaCE does not violate the national treatment obligation under article 2.1 of TBT

Article 2.1 of the TBT Agreement contains a national treatment and a most-favoured nation treatment obligation.²⁹ The preamble of the TBT Agreement is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement.³⁰ In furtherance of this, as per the 2nd, 5th and 6th recital of the preamble of the TBT agreement, the agreement overlaps with and furthers the objectives of the GATT. Hence, it is of utmost importance to

²⁶ ¶ 10 & 11, Pg. 4, Compromis.

²⁷ Article 9, Pg. 9, Compromis.

²⁸ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 149, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000). See also Appellate Body Report, *United States – Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products*, ¶236, WT/DS381/AB/R(May 16 2012) and Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 270, WT/DS406/AB/R (April 4 2012).

²⁹ Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 87, WT/DS406/AB/R (April 4 2012).

³⁰ *Id.* at ¶ 89.

read any provision of this agreement in light of the preamble of the agreement and other instruments such as GATT. The text of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.³¹ The regulation at hand does not meet the three-tier test for violation of article 2.1 as laid down in *US-Cloves*.³²

2.1 PaCE does not satisfy the three tier test for violation of national treatment obligation under article 2.1 of the TBT Agreement

As per *US-Cloves*, for a violation of Article 2.1 to be established, three elements must be satisfied: firstly, that the measure at issue must be a technical regulation; *secondly*, that the imported and domestic products at issue must be "like products"; and *thirdly* that the imported products must be accorded "less favourable" treatment than that accorded to like domestic products.³³ PaCE satisfies the first two elements of this test but fails to satisfy the third element and hence does not violate the obligation under article 2.1 of the TBT agreement.

2.1.1 The measure is a technical regulation

As per *EC-Asbestos*,³⁴ a measure constitutes a technical regulation if it meets a *threefold* argument. *Firstly*, the measure must affect one or more given products; *secondly*, the measure must specify the technical characteristics of the product(s) that allows them to be marketed in the Member that took the measure³⁵ and *thirdly*, compliance with the measure must be mandatory.

2.1.1.1 The measure affects one or more products

PaCE clearly affects PIF products, regardless of whether they are domestically produced or imported,³⁶ as they statement of objects and reasons of the regulation reads that the regulation

³¹ *Id.* at ¶ 190.

³² Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 87, WT/DS406/AB/R (April 4 2012).

³³ *Id.*

³⁴ Appellate Body Report, *European Communities – Measures Affecting Asbestos And Asbestos-Containing Products*, ¶ 61, WT/DS135/AB/R (March 12 2001).

³⁵ Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 U.N.T.S 120.

³⁶ Article 2, Exhibit 1, *Compromis*.

is applicable to all entities in the business of packaged food and food supplements that are conducting business in Asgard.³⁷

2.1.1.2 The measure specifies the technical characteristics of products which allows them to be marketed in Asgard

Article 3 of PaCE when read in consonance with article 9, mandates the technical characteristics i.e. the retail packaging requirements for PIFs that have to be complied with by 31st October 2014 in order to be allowed to be marketed in Asgard.³⁸

2.1.1.3 Compliance with the measure is mandatory

Article 9 of PaCE empowers the government of Asgard to take appropriate action in the event of non-compliance by 31st October 2014.³⁹ On 1st November 2014, ADOH officials raided all across Asgard and seized PIFs of all imported brands. None of the seized brands had been able to meet the two-month compliance deadline.⁴⁰ Also after the High Court of Krull dismissed the appeal and ordered release of seized PIFs to the respective Agatean companies, the APMA companies were given the discretion to repackage PIFs as per PaCE or dispose their products in other world markets.⁴¹ This clearly shows the mandatory nature of compliance with the regulation.

As all three elements of the *EC-Asbestos* test are satisfied, we can safely say that PaCE is a technical regulation.

2.1.2 The imported and domestic products are like products

As shown earlier in argument 1.1.2, the domestic and the imported products are like products.

2.1.3 The imported products are accorded less favourable treatment

As shown earlier in argument 1.1.3, the imported products are not accorded less favourable treatment with regard to domestic products.

2.2 The impact of the measure stems from a legitimate even-handed regulatory distinction

Arguendo, even if we agree with the contention that PaCE negatively detriments imported products and hence leads to a violation of article 2.1, Asgard is protected by reason of the

³⁷ Exhibit 1, Compromis.

³⁸ Article 3 and Article 9, Exhibit 1, Compromis.

³⁹ Article 9, Exhibit 1, Compromis.

⁴⁰ ¶ 11, Pg. 5, Compromis.

⁴¹ Answer 1, Clarifications.

regulation being an even-handed regulatory measure. Not every instance of a detrimental impact amounts to the less favourable treatment of imports that is prohibited under article 2.1. Rather, some technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction.⁴² In assessing even-handedness, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".⁴³

As evident from article 2, 3, 9 and 11 of PaCE, it is a regulation designed to cover all PIFs including both partial and complete substitutes,⁴⁴ architected and structured to display certain details about the ingredients of the PIFs,⁴⁵ and applied uniformly if not complied with by 31st October 2014.⁴⁶ This clearly demonstrates that PaCE is in fact an even handed measure whose design, architecture, structure or operation are not aimed at discriminating between imported and domestic products but rather aims to be a regulatory measure.

3. Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is NOT inconsistent with article 2.2 of the TBT Agreement and does NOT violate the WTO obligations

It is humbly submitted before the Hon’ble panellists, that, the PaCE Regulation drafted and published by ADOL, is very much consistent with article 2.2 of TBT Agreement and thus not violative of WTO obligation. Article 2.2 establishes certain obligations with which WTO members must comply when preparing, adopting and applying technical regulations.⁴⁷ The members must ensure that the technical regulation does not create an unnecessary obstacle to international trade and that it is not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.⁴⁸

⁴² Appellate Body Report, *United States – Certain Country Of Origin Labelling (Cool) Requirements*, ¶ 271, WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012). See also Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 182, WT/DS406/AB/R (April 4 2012) and Appellate Body Report, *United States – Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products*, ¶ 215, WT/DS381/AB/R(May 16 2012).

⁴³ Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 182, WT/DS406/AB/R (April 4 2012).

⁴⁴ Article 2, Exhibit 1, Compromis.

⁴⁵ Article 3, Exhibit 1, Compromis

⁴⁶ Article 9, Exhibit 1, Compromis.

⁴⁷ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁴⁸ *Id.*

3.1 The measure formulated by Asgard, by way of the regulation, pursues a legitimate objective

Pursuant to article 2.2, members must have a legitimate objective while preparing, adopting or applying a trade restrictive technical regulation. Article 2.2 includes a non- exhaustive list of legitimate objectives, which include: national security requirements, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or environment. Other objectives (in addition to those explicitly mentioned in article 2.2) can be the adoption of new domestic law, consumer information and labelling, quality requirements, harmonisation, the lowering or removal of trade barriers and trade facilitation,⁴⁹ consumer protection, market transparency and fair competition.⁵⁰ A ‘legitimate objective’ refers to an aim or target that is lawful, justifiable or proper.⁵¹ The legitimate objective of Asgard government, behind formulation and adoption of the PaCE regulation, is protection of human health and safety of the children of Asgard from Type 1 diabetes. For this, the government has taken an initial step, which is first of many,⁵² towards creating awareness among the parents with respect to the ingredients of the PIF⁵³, so that they can make an informed choice about administering the quantity of PIF that their children consume, until the government comes up with a solution or an alternative. If an objective falls under those listed in article 2.2, then it will end the inquiry into the legitimacy of the objective.⁵⁴ Therefore, the present objective pursued through the regulation, is very much legitimate under article 2.2 of the TBT Agreement.

It is further argued that, the PaCE regulation pursues another objective, that of prevention of deceptive practices by protecting the consumers through information, mainly in the form of labelling requirements.⁵⁵ It has been the case that prior to the enactment of PaCE the PIF manufacturers only disclosed the details of the products that they wanted to and thought to be beneficial for their business. It is the concern of the Asgardian authorities that the consumers

⁴⁹ Committee on Technical Barriers to Trade, *Note by the Secretariat: Eleventh Annual Review of the Implementation and Operation of the TBT Agreement*, G/TBT/18, ¶ 12, (Feb. 17 2006).

⁵⁰ Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 7.113, WT/DS231/AB/R (September 26, 2002).

⁵¹ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 313, WT/DS381/AB/R (May 16, 2012); *See also* Shorter Oxford English Dictionary 1577,1970 (6th ed. 2007).

⁵² Exhibit 3, Pg. 13-15, Compromis.

⁵³ *Id.*

⁵⁴ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 372, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁵⁵ Technical Barriers To Trade, Technical Information On Technical Barriers To Trade, http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm#agree1 (last visited Jan 7 2015).

and doctors being uninformed about the ingredients of the PIF's are often mistaken about the nutritional value of these products.⁵⁶ It has been observed that the lack of any laws regarding the same have allowed the companies to disclose by will the ingredients of their products, hence deceiving the consumer due to lack of transparency. In the pursuit of the same it is humbly submitted that the enactment of the PaCE has *inter alia* the objective of preventing deceptive trade practices, which is a legitimate objective under article 2.2 of the TBT agreement.

Arguendo: If Agatea states that the objective of the PaCE regulation is invalid and claims that the measure impugned is not in pursuance of their obligations under the CSCPHN, it is humbly submitted that, in the light of the multilateral treaty, which is in direct conflict with WTO treaty, as long as the agreement does not breach the WTO rights of third parties, the WTO treaty generally gives way to the other treaty at hand. The reason for the same being that a WTO obligation is a reciprocal obligation and a member can deviate from the regulation as long as it does not breach the WTO rights of a third party. It is further stated that affecting economic rights of members does not amount to breaching of WTO rights.⁵⁷

In this case, it is seen that only the economic interests of Agatea are getting affected by the measure that too incidentally owing to the place of packaging and many other factors.

It is hence submitted that, Asgard by complying with all its obligations under the international trade law, is pursuing a legitimate objective. In addition, the measure is in the pursuance of the legitimate objective to provide information and enacted in the light of the unfolding of events, leading to a spurt in Type-1 diabetes, and hence the Complainants challenging the objective of the PaCE regulation is without any backing and baseless.

3.2 The PaCE Regulation is not more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create

It is submitted before this Hon'ble panel, that the measure was *not* more trade restrictive than necessary. Article 2.2 of the TBT Agreement requires that, the technical regulation is not prepared, adopted or applied with a view to creating unnecessary obstacles to international trade and that it is not more trade restrictive than necessary to fulfil a legitimate objective,

⁵⁶ Pg. 3 Compromis.

⁵⁷ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 64 (1ST ED, 2005) See Also J. PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER NORMS OF INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS, 2003).

taking account of the risks non-fulfilment would create.⁵⁸ By its terms, article 2.2 requires an assessment of the necessity of the trade restrictiveness of the measure at issue. The assessment of ‘necessity’, in the context of article 2.2, involves a relational analysis⁵⁹ of the following factors: the *trade restrictiveness* of the technical regulation; the *degree of contribution* that it makes to the achievement of a legitimate objective; and the *risks non-fulfilment* would create. In a particular case, a panel’s determination of what is considered necessary will be based on a consideration of all these factors.⁶⁰ There needs to be a weighing and balancing of these factors.⁶¹

3.2.1 The PaCE Regulation makes a notable degree of contribution towards the achievement of the legitimate objective

For an inquiry under article 2.2, it is necessary and prerequisite to determine the degree of contribution to the objective that a measure actually achieves. The degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something, that is revealed through the measure itself.⁶² In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective.⁶³ That is, to what degree, if at all, the challenged technical regulation actually contributes to the achievement of the legitimate objective pursued by the member.⁶⁴ The measure formulated by Asgard notifies the manufacturers of the PIFs to mention the percentage of the contents of the PIF product in

⁵⁸ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁵⁹ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 318, WT/DS381/AB/R (May 16, 2012).

⁶⁰ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 318; See also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WT/DS332/AB/R (December 17, 2007); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306-308, WT/DS285/AB/R (April 20, 2005).

⁶¹ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (April 5, 2001); Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 162, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

⁶² Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 373, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012); See also Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 316, WT/DS381/AB/R (May 16, 2012).

⁶³ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 390, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁶⁴ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 317, WT/DS381/AB/R (May 16, 2012); See also Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, ¶ 252, , WT/DS363/AB/R (January 19, 2010).

print.⁶⁵ This is so that the consumers are made aware of the products they use and consume and can make an informed choice as to whether to use the product or not. This will be helpful to protect the health and safety of the children in Asgard, until the government of Asgard can formulate a more concrete measure or guideline with respect to the performance of the PIF products. The PaCE, therefore, makes a notable contribution towards the achievement of the legitimate objective.

3.2.2 The technical regulation, i.e., PaCE Regulation 8/2014 is not trade restrictive

It is submitted before this Hon'ble panel, that the PaCE regulation is not trade restrictive. 'Trade restrictiveness' means having a limiting effect on trade.⁶⁶ The PaCE regulation does not have any limiting effect on trade. All the manufacturers, including Relicare, have been given equal and reasonable amount of time to comply with the regulation/measure. However, even if it is assumed that the regulation is trade restrictive, then, the reference in article 2.2 of the TBT Agreement, to *unnecessary obstacles*, implies that some trade restrictiveness is allowed. Further, that what is actually prohibited are those restriction on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.⁶⁷ As has been stated earlier as well, this step was taken by the Asgard government to inform the consumers of the contents of the PIF that they use for their children. For this, it was necessary that the manufacturers mention the percentage of the contents used in the PIFs on the package of the PIF. This was necessary for the objective of consumer awareness and furthering the protection of health and safety of the children in Asgard. Therefore, it cannot be said that the measure was more trade restrictive than necessary.

It is also argued that, in order to comply with the technical regulations, the exporters may have to incur various kinds of costs/ compliance costs, and an exporter or manufacturer must adjust its production facilities to comply with diverse technical requirements in individual markets, production costs per unit are likely to increase.⁶⁸ Therefore, the costs highlighted by APMA in their representations made to the Asgard Department of Law⁶⁹, which they would have had to incur to comply with the requirements under the PaCE regulation, is something

⁶⁵ Exhibit 1, Pg. 9, Compromis.

⁶⁶ *Appellate Body Report, United States – Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 319, WT/DS381/AB/R (May 16, 2012).

⁶⁷ *Id.*

⁶⁸ Technical Barriers To Trade, Technical Information On Technical Barriers To Trade, http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm#agree1 (last visited Jan 7 2015).

⁶⁹ ¶ 8, Pg. 4, Compromis.

which cannot be avoided. Also, the perceived loss in the market share, suffered by the Agatean companies, was an effect of the loss of economies of scale. The PaCE measure being valid and having a legitimate objective of protection of health and safety and prevention of deceptive practices, whatever losses the Agatean companies go through are an unfortunate effect of the same, which cannot be avoided. This does not make the PaCE regulation trade restrictive or more trade restrictive than necessary.

3.2.3 The risk and the gravity of consequences of non-fulfilment of the objective would have been grave and fatal

A final requirement under article 2.2 is that the members must take into account the risks non-fulfilment of the legitimate objective would create when assessing the trade restrictiveness of the regulation.⁷⁰ The PaCE regulation is extremely necessary to be adopted and adhered to. The term necessary here means making a contribution to⁷¹, and the technical regulation makes a notable contribution towards the achievement of the legitimate objective. This legitimate objective being protection of human health and safety through creation of consumer awareness, is very essential and has to be fulfilled at any cost. The non-fulfilment of this objective would lead to fatal consequences, which are already being experienced by Asgard currently (that the outbreak of type 1 diabetes among the children). Non-fulfilment will negate the very cause for the enactment of the measure. The effect of non-fulfilment of the measure will lead to the continuance of status quo, which the Asgardian government is seeking to dispense with. This measure is the first of many steps to abate the increasing occurrence of Type 1 diabetes⁷², making exceptions in the implementation of the measure at this stage will lead to the failure on the part of the Asgardian government to implement the proceeding measures.

While considering the risks non-fulfilment would create, a comparison of the challenged measure with a possible alternative measure should be made, in the light of the nature of the risks at issue and the gravity of the consequences that would arise from the non-fulfilment of the legitimate objective.⁷³ However, such a comparison might not be required when the

⁷⁰ WTO Technical Barriers and SPS Measures, 220 (Max Planck Commentaries on World Trade Law, Max Planck Institute for Comparative Public Law and International Law ed. 2007).

⁷¹ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 318, WT/DS381/AB/R (May 16, 2012); *See also* Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 161, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

⁷² Exhibit 3, Pg. 13 Compromis.

⁷³ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 321, WT/DS381/AB/R (May 16, 2012).

measure is not trade restrictive at all.⁷⁴ And as has been stated previously, the measure in question is not trade restrictive.

3.2.4 No alternative measure, to the PaCE regulation, is available

The comparison with reasonably available alternative measures is a "conceptual tool" to be used for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary.⁷⁵ An alternative measure, however, as to be less trade restrictive than the challenged measure, makes an equivalent contribution to the relevant objective and is reasonably available.⁷⁶ In the present situation, there is no alternative measure that is reasonable available. The use stickers which was proposed by the government of Asgard, is not a very viable option. It is humbly submitted that one needs to understand the gravity of the situation. This measure/regulation was formulated by the government of Asgard, for protecting the health and ensuring safety of the children of Asgard, consuming PIFs. The government of the Asgard could not have compromised with this objective. The stickers are not very reliable as they lack the element of permanency and can be easily removed or replaced or tampered with, not fulfilling the objective sought to be achieved by this regulation. Therefore, the stickers may not hold a conviction among the consumers and cannot have the same degree of effect and contribution as the percentage of ingredients being printed permanently on the packaging of the PIF products.

3.3 The PaCE Regulation does not create an unnecessary obstacle to trade

In order to ascertain whether a regulation creates an unnecessary obstacle to trade or not, one needs to look at the degree of contribution it makes towards the legitimate objective and comparing it with any other alternative measure available. In the present situation, it has already been shown above that, the measure makes a notable contribution towards the achievement of the legitimate objective and nonfulfillment of the objective will be risky. It has also been argued previously that there is not reasonable alternative available with the Asgard government and the alternative proposed by Agatea is not a feasible one. This measure /regulation is necessary to be complied with for the protection of health and ensuring the safety of the children in Asgard by creating consumer awareness and labelling, until the Asgardian Government comes up with a more concrete and effective measure/ regulation in

⁷⁴ *Id.* at ¶ 322.

⁷⁵ *Id.* at ¶ 320.

⁷⁶ *Id.* at ¶¶ 320-322, WT/DS381/AB/R (May 16, 2012); *See also* Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 166, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000); *See also* Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 194, WT/DS18/AB/R (November 6, 1998).

this regard. This is important for reducing the number of diabetes cases among the children. Therefore, the regulation cannot be said to an unnecessary obstacle to trade.

4. The PaCE Regulation 8/2014 is consistent with article 2.12 of the TBT Agreement and therefore, NOT violative of the WTO obligation

It is humbly submitted before this Hon'ble panel, that, the PaCE Regulation does not violate the provisions under article 2.12. Article 2.12 provides that the members must leave a reasonable interval between the publication of the technical regulation and their entry into force, except in case of urgent circumstances. The object of this requirement is to allow time for the producers in the exporting member countries to adapt their products or methods of production to the requirements of the importing member country.⁷⁷ In the Ministerial Decision on implementation related issues and Concerns adopted on 14th November 2001 in Doha, Ministers decided that, subject to the conditions specified in article 2.12 on technical regulations, the phrase "reasonable interval" had to be understood to mean normally a period of not less than six months, except when this would be ineffective in fulfilling the legitimate objective.⁷⁸ Here, Asgard is faced with an emergency situation with respect to the health and safety of the children in Asgard, consuming PIF. The Asgardian government could not have immediately come up with a regulation with respect to the performance of the PIF products or improving the quality of PIF products as that would require a sufficient amount of research being done. But, for the emergent situation faced by Asgard, the PaCE regulation is the most effective measure for the time being. Under such urgent circumstances, it would not be feasible for the government of Asgard to provide with a period of at least six months for compliance with the regulation, as this would render the ineffective, the fulfilment of the legitimate objective. Therefore, Asgard government could not have provided for a greater time period and thus, the measure cannot be said to be inconsistent with article 2.12 of the TBT Agreement.

It is further argued that, the Doha Ministerial Decision cannot be accorded an authoritative interpretative value. The legal value of paragraph 5.2 of the Doha Ministerial Decision is, at most, a means of supplemental interpretation under article 32 of the Vienna Convention on

⁷⁷ Committee On Technical Barriers To Trade, *Third Triennial Review Of The Operation And Implementation Of The Agreement On Technical Barriers To Trade (adopted report)*, ¶ 24, G/TBT/13 (Nov. 11, 2003); See also Committee On Technical Barriers To Trade, *Decisions And Recommendations Adopted By The Committee Since 1 January 1995*, Chapter X, G/TBT/1/Rev.8 (May 23, 2002).

⁷⁸ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 5.2, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

Law of Treaties.⁷⁹ Therefore, while paragraph 5.2 of the Doha Ministerial Decision may be used to confirm the meaning of the term *reasonable interval* in article 2.12 of the TBT agreement, it may not be applied as a rule that can be relied upon as the exclusive basis for concluding that the term reasonable interval means not less than six months.⁸⁰ Also, paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to article IX:2 of the WTO agreement.⁸¹

5. Arguendo: if the panel holds that the PaCE regulation 8/2014, is violative of the obligations under the general agreement of GATT, then the regulation is justified under the general exception under article XX, GATT

It is humbly submitted before the Hon'ble panel, that there has been no violation of any of the obligations under the GATT agreement and therefore, no article XX defence is necessary. However, if the Hon'ble panel holds that the measure in question is violating Asgard's obligation under the general agreement of the GATT, then it is argued that, the measure will still be justified under the general exceptions (Article XX) of GATT.

Article XX enumerates the various categories of govt. acts, laws and regulations, which WTO members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalisation.⁸² The Asgard government too, adopted the PaCE regulation in pursuit of a legitimate objective of protection of health and ensuring safety of children in Asgard in order to control the spike in type 1 diabetes among children in Asgard. In such a situation, the contracting parties can give priority to human health over trade liberalisation.⁸³

The analysis under article XX is two tiered: first, provisional justification by reason of characterisation of the measure under article XX lit a to j; and second, further appraisal of the same measure under the introductory clauses of article XX, that is the chapeau.⁸⁴

⁷⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁸⁰ Appellate Body Report, *United States – Measures Affecting The Production And Sale of Clove Cigarettes*, ¶ 242, WT/DS406/AB/R (April 4, 2012).

⁸¹ *Id.*

⁸² WTO, WTO Analytical Index- Guide to WTO Law and Practice (2007).

⁸³ Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 73, WT/DS371/R (July 15, 2011).

⁸⁴ Appellate Body Report, *United States- Standards For Reformulated And Conventional Gasoline*, ¶ 118, WT/DS2/AB/R (May 20, 1996); *See also* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998).

5.1 The PaCE regulation is protected under article XX(b) of the GATT agreement

It is humbly submitted before the Hon'ble panel, that, the regulation in question, is protected by the provisions of lit b under article XX of GATT, according to which nothing shall be construed to prevent the adoption or enforcement by any contracting party of measures which are necessary to protect human life and health. Article XX lit b envisages a three-fold test, which requires to ascertain, (i) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human animal or plant life or health; (ii) The inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and (iii) that the measures were applied in conformity with the requirements of the introductory clause of article XX, i.e. the chapeau.⁸⁵ In order to justify the application of article XX(b), all the above elements have to be satisfied.⁸⁶

5.1.1 The policy in respect of the measure for which the provision of article XX(b) was invoked falls within the range of policies designed to protect human life or health.

Article XX(b) requires that the measures in question, be aimed at protecting humans. Inasmuch as they include the notion of protection, the words *policies designed to protect human life or health* imply the existence of a health risk.⁸⁷ In *Thailand cigarettes* case, the panel acknowledged, in agreement with the parties to the dispute, that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of article XX lit b.⁸⁸ Similarly, in the present case, the measure adopted by Asgard government was in consequence of the spike in type 1 diabetes among children in Asgard. The government of Asgard formulated this measure so that, until they can come up with a more concrete regulation with respect to the same, the parents are aware of what they are feeding their children and can therefore, make an informed decision. This would have helped in reducing the consumption, if not completely stop the use of, the PIF.

⁸⁵ Panel Report, *United States- Standards For Reformulated And Conventional Gasoline*, ¶ 6.20, WT/DS2/R (May 20, 1996); See also Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 8.167-8.169, WT/DS135/R (April 5, 2001).

⁸⁶ Panel Report, *United States- Standards For Reformulated And Conventional Gasoline*, ¶ 6.20, WT/DS2/R (May 20, 1996); See also Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 8.167-8.169, WT/DS135/R (April 5, 2001).

⁸⁷ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 8.170, 8.184, WT/DS135/R (April 5, 2001).

⁸⁸ Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 73, WT/DS371/R (July 15, 2011).

There are two things, which need to be looked into: the element of risk and the determination of the level of protection.⁸⁹ A preventive measure may be taken only if the risk, despite the fact that its reality and extent have not been fully demonstrated by conclusive scientific evidence, appears nevertheless to be adequately based on scientific data available at the time when the measure was taken. A risk may be evaluated in either qualitative or quantitative terms.⁹⁰ As per the report of the ADOH, there a study had been conducted and ADOH finally concluded that, there was a possible risk to the health of the children in Asgard due to the increased consumption of PIFs, causing Type 1 diabetes among the children.⁹¹ Therefore, there was an element of risk to the health of the children.

Once the existence of an identifiable and ascertainable risk has been established, the member needs to determine the level of protection, which it considers appropriate in a given situation.⁹² The level of protection is actually an objective and the measure is the instrument chosen to attain or implement the objective.⁹³ In the present case, the legitimate objective pursued is to protect the health of the children and prevent the instances of Type 1 diabetes in Asgard. The level of protection, which the Asgard government has formulated, is creating awareness among the consumers/ parents with respect to the ingredients of the PIF, so that they make an informed choice and thus possibly reduce the consumption of PIF. It is not always necessary that a measure has to show immediate effects towards the achievement of the objective or it may be that the measure is one of the measures towards the achievement of the objective and may have only a contributory effect. Thus, it cannot be said that creating awareness among the consumers will have no effect at all. This measure provides for additional information that was not available prior to the PaCE regulation⁹⁴ and the labelling requirements under the measure may have reduced consumer confusion⁹⁵ and provided the

⁸⁹ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.170, WT/DS135/R (April 5, 2001); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 158, WT/DS135/AB/R (April 5, 2001).

⁹⁰ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 167, WT/DS135/AB/R (April 5, 2001); *See also* Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 186, WT/DS26/AB/R, WT/DS48/AB/R (February 13, 1998).

⁹¹ ¶ 3, Pg. 3, *Compromis*.

⁹² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WT/DS135/AB/R (April 5, 2001); Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 200, WT/DS18/AB/R (November 6, 1998).

⁹³ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 200, WT/DS18/AB/R (November 6, 1998).

⁹⁴ Panel Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.717, WT/DS384/R, WT/DS386/R (June 29, 2012).

⁹⁵ *Id.*

consumers with meaningful information.⁹⁶ Thus, there was an element of health risk involved and the level of protection employed in coherence with it. Therefore, the policy with respect to the measure falls within the range of policies designed to protect human life or health.

5.1.2 The measure, for which the exception was being invoked, is necessary to fulfil the policy objective

Article XX(b) explicitly requires the performance of the necessity test: measures must be necessary to protect human life or health.⁹⁷ This involves the requirement of *least-trade restrictiveness*, *i.e.*, a measure could be considered to be necessary only if no alternative measure existed which was less inconsistent or consistent with the provisions of the GATT, and could reasonably be expected to be adopted by the member in question.⁹⁸ The extent to which the alternative measure contributes to the realisation of the end pursued is to be taken into consideration.⁹⁹ The regulation adopted by Asgard was the only measure available to pursue the objective. the alternative proposed by Agatea, that is the use of stickers, could not be said to be reasonably available and did not contribute equally to the realisation of the end pursued as compared to the PaCE regulation. The end pursued, that is, protection of health and safety of children in Asgard through consumer awareness, was very crucial and could not have been compromised with. The use of stickers may not have had the same level of conviction with the consumers as the print on the packaging of the PIF. The stickers are temporary and could have been easily removed or tampered with. This chance could not have been taken by the Government of Asgard in wake of the health risk which was looming large in Asgard. The more vital or important the common interests or values pursued, the easier it would be to accept, as necessary, measures designed to achieve those ends.¹⁰⁰ Therefore, there are different levels of scrutiny applicable to the analysis of the necessity test, depending on the importance of the interest or the values it serves. If the objective pursued by the measure is preservation of human life and health, a value both important and vital to the

⁹⁶ *Id.* at ¶ 7.718.

⁹⁷ GATT Panel Report, *United States- Section 337 of The Tariff Act of 1930*, ¶ 5.26, (November 7, 1989).

⁹⁸ Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 75, WT/DS371/AB/R (July 15, 2011).

⁹⁹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (April 5, 2001); *Also see* Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 163, 166, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

¹⁰⁰ *Id.*; *Also see Id.* at ¶ 162.

highest degree¹⁰¹ then, the measure adopted to promote the same, will be considered to be a necessary measure.

5.1.3 The PaCE regulation is in confirmation with the introductory clause, i.e., the chapeau of article XX GATT

Further, in order to comply with the requirements of lit b, a measure has to meet the conditions set out in the introductory clause of article XX in order to be exempted from the obligations under the GATT Agreement. The PaCE regulation, does comply with the chapeau, as has been argued below, and thus, is protected under article XX as it fulfils the three tier test.

5.2 The PaCE Regulation 8/2014 is in confirmation with the introductory clause/ chapeau of article XX

The chapeau is concerned, not with the measure or its specific contents, but with the manner in which that measure is applied.¹⁰² The exceptions under article XX are conditional or limited exceptions. That is to say, the ultimate availability of these exceptions is subject to the compliance by the invoking member with the requirements of the chapeau.¹⁰³ Under the terms of the chapeau, it is required that the measure in question is not applied in a manner, which causes an arbitrary and unjustifiable discrimination between countries wherein the same conditions prevail or causes a disguised restriction on international trade. Foremost, there is no discrimination at all, in the present case. The regulation adopted and published by Asgard is equally applicable to all the countries manufacturing PIFs and selling their products in the Asgard market. Therefore, there is no arbitrary or unjustifiable discrimination taking place. All the companies, including the four Agatean companies and Relicare, were given the same amount of time to comply with the PaCE regulation. Disguised restriction includes disguised discrimination and has to be read in conjunction with arbitrary and unjustifiable discrimination.¹⁰⁴ There cannot be said to be any disguised restriction or discrimination on trade as all the terms of the regulation are quite clear and unambiguous and the regulation was duly published and also, comments were invited from the different member companies, on the draft regulation. Therefore, the entire process was non-arbitrary. Thus, the measure cannot be said to be inconsistent with the requirements under the chapeau.

¹⁰¹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (April 5, 2001).

¹⁰² GATT Panel Report, *United States – Imports of Certain Automotive Spring Assemblies*, ¶ 56, (May 26, 1983).

¹⁰³ GATT Panel Report, *United States- Section 337 of The Tariff Act of 1930*, ¶ 5.9, (November 7, 1989).

¹⁰⁴ WTO, *WTO Analytical Index- Guide to WTO Law and Practice* (2007).

Request for Findings

Wherefore for the foregoing reasons, Asgard respectfully requests the panel to adjudge and declare:

1. The government of Asgard, by adopting the PaCE regulation 8/2014, has not violated the national treatment obligation under Article III:4 of the GATT and under Article 2.1 of the TBT Agreement. Even if the panel holds otherwise, the regulation is capable of being justified under Article XX(b) of the GATT.
2. The government of Asgard, by adopting the PaCE regulation 8/2014, has not violated Article 2.2 of the TBT Agreement and the objective of the regulation is legitimate.
3. The PaCE regulation 8/2014 is consistent with Article 2.12 of the TBT Agreement.
4. The government of Asgard is not liable to pay damages for loss suffered by the Agatea due the PaCE regulation.

Respectfully submitted,

X _____

Agent(s) on behalf of the Respondent.