

7TH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2015



ASGARD — PACKAGING OF COMMODITIES AND ITS ENFORCEMENT

AGATEA

(COMPLAINANT)

v

ASGARD

(RESPONDENT)

MEMORANDUM ON BEHALF OF THE COMPLAINANT

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LIST OF ABBREVIATIONS

§	Section
¶	Paragraph
AB	Appellate Body
ADOH	Asgard Department of Health
ADOL	Asgard Department of Law and Justice
APMA	Agatean Processed Food Members Association
Art.	Article
CSCPHN	Circle Sea Code on Public Health and Nutrition Agreement
DSU	Dispute Settlement Understanding
ed.	Edition
eds.	Editor
et al.	Among others
GATT	General Agreement on Trade and Tariffs
<i>Id.</i>	Ibidem
PaCE	Packaging of Commodities and its Enforcement
PIF	Processed Infant Food
pp.	Page Number
TBT	Technical Barriers to Trade
v.	Versus
vol.	Volume
WTO	World Trade Organization

INDEX OF AUTHORITIES

CASES

Short Title	Full Case Title and Citation
<i>Brazil — Retreaded Tyres</i>	Appellate Body Report, <i>Brazil — Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada — Periodicals</i>	Appellate Body Report, <i>Canada — Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Dominican Republic — Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>Dominican Republic — Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>EC — Asbestos</i>	Appellate Body Report, <i>European Communities — Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VIII, p. 3243
<i>EC — Asbestos</i>	Panel Report, <i>European Communities — Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by

	Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
<i>EC — Bananas III</i>	Appellate Body Report, <i>European Communities — Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>India — Autos</i>	Appellate Body Report, <i>India — Measures Affecting the Automotive Sector</i> , WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, DSR 2002:V, p. 1821
<i>India — Autos</i>	Panel Report, <i>India — Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
<i>Japan — Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan — Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan — Film</i>	Panel Report, <i>Japan — Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
<i>Korea — Alcoholic Beverages</i>	Appellate Body Report, <i>Korea — Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea — Various Measures on Beef</i>	Appellate Body Report, <i>Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001,

	DSR 2001:I, 5
<i>US — Clove Cigarettes</i>	Panel Report, <i>United States — Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865
<i>US — FSC (Article 21.5 — EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
<i>US — Gasoline</i>	Appellate Body Report, <i>United States — Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US — Gasoline</i>	Panel Report, <i>United States — Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
<i>US — Shrimp</i>	Appellate Body Report, <i>United States — Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
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<i>US — Tuna II (Mexico)</i>	Appellate Body Report, <i>United States —</i>

	<i>Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012
<i>US — Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013

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STATEMENT OF FACTS

1. Asgard is a developing country, with a population of 10 million, 5% of whom are under the age of five. It is a part of Circle Sea Nations Group which includes all the colonies of the Agatean Empire till 1950s.
2. In the annual conference of the Circle Sea Nations ‘Nine Realms Summit, 2014’, the Circle Sea Code on Public Health and Nutrition (hereinafter referred to as ‘CSCPHN’) was adopted which focused significantly on infant well-being.
3. In the early 2014, there was a sudden increase in the Type-1 Diabetes among the children below five years of age. The Asgard Department of Health (hereinafter referred as ‘ADOH’) conducted lab tests of samples of infant dietary intake. It was found that the Processed Infant Foods (hereinafter referred to as ‘PIFs’) formed a large portion of infant diet. These PIFs contained corn syrup and sugar. The ingredients of PIFs were only generically listed on the packaging — the packets did not display the contents by exact weight.
4. The ADOH suggested that the Government make rules which call for the display of exact ingredients on the packaging of PIF products. In July 2014, the Asgardian Government, drafted and published ‘Packaging of Commodities and its Enforcement’ (hereinafter referred to as ‘PaCE’). PaCE made it compulsory for all the products to mention all the ingredients on the packaging *in print*. Further, it invited comments from all stakeholders.
5. The major stakeholder is Agatea which is located in the Indian subcontinent. It controls 90 per cent of the world market for dairy products and health supplements. The Companies Castle, Viking, Flora and Theos (hereinafter referred to as the ‘**Agatean Companies**’) manufacture PIFs under the names Rincewind, Linacre, Diamanda and Cementac (hereinafter referred to as the ‘**Imported PIFs**’) respectively. Asgard imported its entire stock of PIFs from Agatean Companies. The Agatean Companies made a representation through the Agatean Processed Food Members Association (hereinafter referred to as the ‘APMA’). They expressed their difficulty in complying with PaCE standards within the tight deadline period. Therefore, they requested for a relaxation of the deadline so that they could comply with the requirements of PaCE without huge losses.
6. Relicare is a large industrial group located in Asgard. In July 2014, it announced the launch of its own PIF product in the Asgardian market. The PIF, named Likan (hereinafter

referred to as the ‘**Domestic PIF**’), received its approval by the ADOH in July and was set for launch in October 2014.

7. PaCE was tabled in the Parliament on August 28, 2014. It was approved and passed by the Parliament within two days on August 30, 2014 without any amendments. It came into effect immediately. A deadline of two months was provided for compliance with the requirements.

8. The Imported PIFs complied with the requirements of PaCE by pasting stickers on the packaging. These stickers mentioned all the constituent ingredients of the PIFs. However, on November 1, 2014 all the Imported PIFs in the market were seized. Stickers were not considered to be in compliance with PaCE. That very day, the Domestic PIF Likán was introduced in the Asgardian market and registered huge sales.

9. Agatea approached the Commissioner of the ADOH against the seizure of their products under PaCE. The Commissioner rejected their arguments and upheld the seizure of the Imported PIFs. Consequently, in November 2014, Agatea moved the High Court of Krull, Asgard against the seizure of their products. The High Court listed it for hearing on February 16, 2015. It dismissed the appeal and ordered the release of the seized PIF products to the respective Agatean Companies — either to be re-packaged or disposed off in the world market.

10. In December, 2014, consultations were held under WTO Dispute Settlement Understanding (DSU) between both the nations. When the consultations failed, Agatea requested for the formation of WTO Panel. Asgard had no objections to the formation of a Panel.

MEASURE AT ISSUE

The measure at issue is the Regulation 8/2014 '*Packaging of Commodities and its Enforcement*' (PaCE). Article 2 and Article 3 of PaCE regulate the appearance and form of the retail packaging of Powdered Infant Formula (PIF) products. Article 9 stipulates a deadline till 31st October 2014 for all Imported PIF products to comply with the packaging requirements thereof.

SUMMARY

1. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT.

- The imported and the domestic PIF products are *like* in nature.
- The measure puts higher burden on the imported products, thereby treating them unfavourably. The measure is protectionist in nature.
- Therefore, the measure is inconsistent with Article III:4 of GATT.

2. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION CANNOT BE JUSTIFIED UNDER ARTICLE XX OF THE GATT.

- The measure is not covered by any of the exceptions under Article XX (a) to (j). It does not have a policy to protect human health and hence cannot be justified under Article XX (b) of GATT.
- It does not fulfill the requirements of the Chapeau of Article XX. It is arbitrarily and unjustifiably discriminatory. It operates as a disguised restriction on International Trade.
- Thus, the measure cannot be justified under Article XX of the GATT.

3. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT.

- The measure is a *technical regulation* under Annex 1.1 of the TBT.
- The imported products and the domestic products at issue are *like* products.
- The imported products are accorded less favourable treatment than the like domestic products. Thus, the measure is inconsistent with Article 2.1 of the the TBT.

4. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT.

- The measure does not have a *legitimate objective*.
- It is *more trade restrictive than necessary* to fulfill the objective it claims to pursue.
- It does not adequately consider the extent of *trade restrictiveness* or alternative measures.
- It creates unnecessary obstacles to international trade.
- Therefore, the measure is inconsistent with Article 2.2 of TBT.

LEGAL PLEADINGS

1. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT.

1.1 The principle of *non-discrimination* is one of the essential building blocks in the WTO Legal Order. WTO Agreements have distinguished between two components of this principle: Most Favoured Nation Principle and National Treatment Obligation.¹ The National Treatment Obligations requires that Members’ goods should not be treated inferior to domestic goods.² This principle is incorporated in Art. III of the GATT.³ The national treatment requires that internal taxes, charges, laws and regulations must not be applied in a manner that treats imported products less favourably than domestic ones.⁴

1.2 The objective of Art. III of the GATT is to avoid protectionism and perpetuate an equal competitive relationship between countries. The Appellate Body in *Canada — Periodicals*,⁵ held that ‘*the fundamental purpose of Art. III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products*’. Art. III of the GATT protects the requirement and the expectation of equality of competitive relationship.⁶ Regulatory measures according an advantage to domestic products over imported products are therefore, inconsistent with the principle of equality of competition enshrined in Art. III.

1.3 Art. III:4 of the GATT must be read in unison with Art. III:1 which articulates the guiding principle for the interpretation of the obligations laid down in the other paragraphs of Art. III. Art. III:1 states that a country’s internal measures should not be applied in a manner so as to accord protection to domestic products.⁷ The Appellate Body in *Korea — Various Measures on Beef*,⁸ set forth a three-tier test of consistency of a measure with Art. III:4. A

¹ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 5 (Rudiger Wolfrum et al. eds., 2007).

² *Id.* at 6.

³ General Agreement on Tariffs and Trade 1994 art III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

⁴ *Id.*

⁵ Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, pp. 18, WT/DS31/AB/R (Jun. 30, 1997).

⁶ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, pp. 16, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

⁷ *Id.*

⁸ 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) [hereinafter AB Korea — Beef].

measure applied by a country will be in violation of Art. III:4 if it satisfies the following three essentials:

- i. that the imported products and domestic products in the matter at hand are like products;
- ii. that the measure under examination is a law, regulation or requirement that affects the internal sale, offering for sale, purchase, transportation, distribution or use; and
- iii. that the imported products are accorded less favourable treatment than the like domestic products.

I. The imported products and the domestic products are ‘like’ products.

1.4 *Like* is defined as *having the same characteristics or qualities as some other... thing; of approximately identical shape, size. etc., with something else; similar.*⁹ To determine whether the imported and the domestic products are *like*, a comparison between them is required. Likeness of products is determined on case to case basis.¹⁰ The Appellate Body in *EC — Asbestos*,¹¹ established that the essential test for *likeness* of products is a *competitive relationship*. It further established four general criteria to determine the likeness of products namely:

- (a) physical properties of the products;
- (b) the extent to which the products can serve the same end uses;
- (c) extent to which consumers treat the products as alternatives for the satisfaction of a particular demand; and
- (d) the international classification of products for tariff purposes.¹²

1.5 For products to be considered as *like* it must be shown that they share similar physical properties.¹³ Art. 2 of PaCE states that any food in powdered form, for use by infants, that is capable of completely or partially substituting human milk is known as Powdered Infant Formula (PIF).¹⁴ In the given case, the Imported PIFs as well as the Domestic PIF are both processed foods for infants.¹⁵ Any infant formula uses milk of cows or other animals or a mixture thereof as a base. Along with this base, other ingredients which have been proven to

⁹ 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1601 (Angus Stevenson, 6th ed. 2007).

¹⁰ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 15 (Rudiger Wolfrum et al. eds., 2007).

¹¹ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter AB EC — Asbestos].

¹² AB EC — Asbestos, *supra* note 11, ¶ 101.

¹³ *Id.*

¹⁴ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹⁵ Fact Sheet ¶ 7, 9.

be suitable for infants are added.¹⁶ Relicare further claims that it provides Likan in all the variants as supplied by the imported PIFs such as soya-based or lactose free.¹⁷ Thus, both the Imported PIFs and Domestic PIF, being milk based products with similar variants, have similar physical properties.

1.6 For products to be considered as like it must be shown that the products can serve the same end uses.¹⁸ The Appellate Body in *US — Clove Cigarettes*,¹⁹ stated that both the domestic menthol cigarettes and the like imported cigarettes satisfied an addiction to nicotine and created a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke and therefore had the same end use. The end use of any PIF product is its utilization as a milk-substitute for infants for their nutritional supplement.²⁰ Likan was launched by Relicare as a substitute to milk for *meeting the daily dietary requirements of an infant*.²¹ Both, the Imported PIFs and the Domestic PIF are used to supplement or substitute mother's milk,²² and hence the end use of both products is the same.

1.7 For products to be considered as *like* it must be shown that consumers would be willing to choose one product over the other.²³ This signifies that the products are substitutable. Two products may not be considered as substitutes by consumers at a particular point, but maybe capable of being substituted for one another..²⁴ Both products at issue are used for providing supplementary nutrition to infants.²⁵ The people of Asgard readily accepted the Domestic PIF as an alternative to the Imported PIFs when supply of the latter ceased in the domestic market.²⁶ Thus, consumers of both products perceive the products as alternatives or substitutes to each other.

1.8 Finally, *likeness* of products can be determined by their tariff classification.²⁷ When goods are imported or exported, they are classified into categories. Tariff classification of

¹⁶ *Standard for Infant Formula and Formulas for Special Medical Purposes Intended For Infant, Codex Stan 72-1981, 1* CODEX ALIMENTARIUS INTERNATIONAL FOOD STANDARDS (1981), http://www.codexalimentarius.org/input/download/standards/11026/CXP_066e.pdf.

¹⁷ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

¹⁸ AB EC — Asbestos, *supra* note 11, ¶ 101.

¹⁹ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 132, WT/DS406/R (Apr. 4, 2012).

²⁰ Fact Sheet ¶ 3.

²¹ Fact Sheet, Exhibit 2, ¶ 5, Letter from Kare Alexander, Chairman, Relicare Industries Ltd. to The Hon^{ble} Minister for Health, Asgard Department of Health (representation on record at the ADOH website).

²² Fact Sheet, Exhibit 1, art. 2, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

²³ AB EC — Asbestos, *supra* note 11, ¶ 101.

²⁴ AB Korea — Beef, *supra* note 8, ¶ 114 – 116.

²⁵ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

²⁶ Fact Sheet ¶ 11.

²⁷ AB EC — Asbestos, *supra* note 11, ¶ 101.

every product determines taxes and tariffs for each shipment of that particular product.²⁸ The latest European Commission data reveals that the tariff classification of any infant food is TAXUD/010254/2013.²⁹ The Imported and Domestic PIFs, are both infant food used as dietary supplements. For the purpose of retail sale, the tariff classification of infant food products is the same. Therefore, both the products at issue fall under the same tariff classification.

1.9 Since they are substitutes of each other, both products are in a competitive relationship with each other. The criteria along with the essential test for *likeness* are fulfilled. Therefore, it is submitted that the Imported and Domestic PIFs are *like* products.

II. PaCE is a regulation that is covered by Art. III:4.

1.10 To attract Art. III:4, it is essential that the measure under examination is a law, regulation or requirement that affects the internal sale, offering for sale, purchase, transportation, distribution or use of the products.³⁰ It will be seen that PaCE is a regulation affecting the internal sale and the offering of sale of the products at issue. Regulations are *mandatory rules applying across the board*.³¹ The Asgardian Legislature drafted the regulation PaCE on the recommendations of the ADOH Report to supposedly safeguard the health of the infants.³² The standards of PaCE are mandatory and applicable to all PIF products, both domestic and imported. Therefore PaCE is undoubtedly a regulation.

1.11 The scope of application of Art. III:4 includes only those measures which are affecting the specific activities mentioned in the provision.³³ Here *affecting* implies a broad scope of application.³⁴ It includes not only those measures which directly affect the sale and offering of sale but also the measures adversely modifying the conditions of competition between the domestic and the imported products.³⁵

²⁸ RAJ BHALLA, INTERNATIONAL TRADE LAW – INTERDISCIPLINARY THEORY AND PRACTICE 1415 (3rd ed. 2014).

²⁹ CUSTOMS CODE COMMITTEE TARIFF AND STATISTICAL NOMENCLATURE SECTION, SUMMARY REPORT OF THE 112TH MEETING OF THE CUSTOMS CODE COMMITTEE (2013).

³⁰ GATT 1994 art. III:4.

³¹ Panel Report, *India — Measures Affecting the Automotive Sector*, ¶ 7.181, WT/DS146/R, WT/DS175/R (Dec. 21, 2001).

³² Fact Sheet, Exhibit 1, Statement of Objects and Reasons, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

³³ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 33 (Rudiger Wolfrum et al. eds., 2007).

³⁴ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (Sept. 9, 1997).

³⁵ Panel Report, *India — Measures Affecting the Automotive Sector*, ¶ 7.196, WT/DS146/R, WT/DS175/R (Dec. 21, 2001).

1.12 PaCE is only formally equal all PIF products. However, it adversely affects the conditions of competition between the imported and domestic products. The last date for compliance with PaCE was 31st October. The Imported PIFs had two months to comply with the requirements of PaCE.³⁶ This time period was too short for the Imported PIFs to be shipped back to Agatea, repackaged and reshipped to Asgard.³⁷ It was impossible for the Agatean Companies to comply with provisions of PaCE within the stipulated deadline. The short deadline ensured that the presence of Imported PIFs in the Asgardian market would diminish. The domestic products would be sufficiently insulated because the packaging design had not been finalized yet.³⁸ The Chairman of Relicare admitted that his company could easily comply with requirements of PaCE within the deadline period without significant cost. The Asgardian Government was cognizant of this higher burden on the foreign companies. The Agatean Companies would incur further higher costs for re-packaging for 35 million PIFs already on-site.³⁹ In comparison, Relicare would incur no such cost.

1.13 To comply with PaCE, all the PIF products must specifically mention the weight of their contents. The weights have to be listed in terms of one serving as well as overall percentages.⁴⁰ Hence, the nutrients must be listed on the packet in a tabular format. A tabular representation of the nutritional contents of the products cost three times more than linear labelling. There are significant costs are involved in re-designing the packaging.⁴¹ PaCE might also lead to a demand for labelled packaging in the global market. Agatean Companies, which cater to 90% of the world market of PIFs,⁴² would have to necessarily create multilingual labels.⁴³ Change in packaging also involves vital decisions regarding finalization of new design and accordingly changing printers. Only after this can products be re-packaged and sent to Agatea. In these circumstances, a deadline of two months becomes impossible to comply with. The cost of mandatory nutrition labelling has a significant impact on the end costs of the product sold to the consumers.⁴⁴ Consumers may not respond well to an increase in the price of PIF products. In contrast, the Domestic PIF faces no such economic burden.

³⁶ Fact Sheet, Exhibit 1, art. 9, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

³⁷ Fact Sheet ¶ 7, 8.

³⁸ Fact Sheet, Exhibit 2, ¶ 6, Letter from Kare Alexander, Chairman, Relicare Industries Ltd. to The Hon'ble Minister for Health, Asgard Department of Health (representation on record at the ADOH website).

³⁹ Fact Sheet ¶ 8.

⁴⁰ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁴¹ *The introduction of Mandatory Nutrition Labelling in the European Union*, 36 (2004), http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/impact_assessment.pdf.

⁴² Fact Sheet ¶ 7.

⁴³ *The introduction of Mandatory Nutrition Labelling in the European Union*, 38 (2004), http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/impact_assessment.pdf.

⁴⁴ *Id.*

This creates an unfair advantage for the domestic products. It clearly contradicting the principles of fair and equal competition.

1.14 On November 1st, the market conditions were such that compliance with PaCE was near impossible for any of the Imported PIFs.⁴⁵ Likan, the Domestic PIF launched on the very same day, was the only available PIF for sale in the Asgard market.⁴⁶ Hence, Likan registered massive sales. The entry of Likan into the market was well-timed to ensure that no other PIF product could compete with it.⁴⁷ Enforcement of PaCE created the conditions that made the entry of Likan at that particular date tremendously successful. Apart from the economic losses, the Agatean Companies were constrained by time. They were not in a position to compete with Relicare and its Domestic PIF product. They were not on a level footing. PaCE ensured that the Domestic PIF would face no competition from the Imported PIFs, thereby modifying the conditions of competition between Likan and the Imported PIFs.⁴⁸ Therefore, it is submitted that PaCE is a regulation that affects internal sale and offering of sale of the Imported PIFs.

III. The imported product is accorded 'less favourable' treatment.

1.15 The most important essential which has to be proved to attract Art. III:4 is that the measure at issue accords less favourable treatment to the imported products than to the domestic products.⁴⁹ We recall that PaCE is a regulation that affects the conditions of market competition between the domestic and imported products.⁵⁰ No less favourable treatment calls for '*effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products*'.⁵¹

1.16 A regulation that distinguishes between imported and domestic products should not be discriminatory, be *de jure* or *de facto*.⁵² De jure discrimination refers to discrimination as regards the origin of the product. De facto discrimination refers to disturbing the equality of

⁴⁵ Fact Sheet, Exhibit 4, ORDER OF THE COMMISSIONER, ASGARD DEPARTMENT OF HEALTH KRULL, ASGARD, Nov. 10, 2014.

⁴⁶ Fact Sheet ¶ 11.

⁴⁷ *Id.*

⁴⁸ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

⁴⁹ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 34 (Rudiger Wolfrum et al. eds., 2007).

⁵⁰ See ¶ 1.14.

⁵¹ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.10, WT/DS2/R (Jan. 29, 1996).

⁵² Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.380, WT/DS44/R (Mar. 31, 1998).

opportunities between the imported and domestic products without being prima facie discriminatory.⁵³ In order to determine whether PaCE accords less favourable treatment it is necessary to enquire whether it changes the conditions of market to the detriment of the Imported PIFs.⁵⁴

1.17 PaCE was enacted on 30th August, 2014 by the Asgardian Legislature. All companies producing PIF products had two months to comply with the stipulated standards.⁵⁵ It is not sufficient to enquire whether a regulation accords formally equal and identical treatment to the imported and domestic products.⁵⁶ A regulation, though formally equal in nature, must not be de facto discriminatory. PaCE accords formally identical treatment to all PIF products. It applies uniformly to all PIF products both imported and domestic.⁵⁷ In *Dominican Republic — Cigarettes*,⁵⁸ the Panel held that formally equal treatment may result in less favourable treatment to the imported products. It will be seen that PaCE is de facto discriminatory and thus, is inconsistent with Art. III:4.⁵⁹

1.18 The provisions of PaCE entailed repackaging of the Imported PIFs so as to mention all the ingredients of their products *in print*.⁶⁰ The representation by the APMA stated that two months was too short a period to comply with requirements of PaCE. Further, it was stated that it takes at least one month for shipments to reach by sea to Asgard, from Agatea.⁶¹ 20 million units of PIF products were already present in Asgard. The shipping and repackaging of these products could not be practically completed in two months.⁶² The Asgardian Legislature dismissed this plea.⁶³ Further, they noted that the PIF products could be airlifted to comply with the deadline.⁶⁴ Airlifting 20 million units of PIF products is neither economically nor physically possible for the Agatean Companies. Hence, provisions of PaCE are de-facto discriminatory against the imported products.

⁵³ *Id.*

⁵⁴ AB Korea — Beef, *supra* note 8, ¶ 137.

⁵⁵ Fact Sheet, Exhibit 1, art. 9, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁵⁶ AB Korea — Beef, *supra* note 8, ¶ 136.

⁵⁷ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁵⁸ Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.181, WT/DS302/R (Nov. 26, 2004).

⁵⁹ Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7, WT/DS302/R (Apr. 25, 2005).

⁶⁰ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁶¹ Fact Sheet ¶ 8(iii).

⁶² *Id.*

⁶³ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

⁶⁴ *Id.*

1.19 To prove less favourable treatment, it is sufficient to prove that the regulation at hand places an unequal burden on the imported products.⁶⁵ The cost of repackaging one unit of PIF is 1.5 US Dollars. Apart from 20 million units already present in Asgard, 15 million units have already been shipped to Asgard by the Agatean Companies. A recall of Imported PIFs would thus entail huge monetary losses. Despite the projected loss, the Agatean Companies are willing to comply with PaCE. The Agatean Companies have only requested an extension of the deadline to March 2015.⁶⁶

1.20 A total recall of the Imported PIFs would bring the Agatean Companies to disrepute. An absence of the products from the Asgardian market would lead to consumers losing faith in the Agatean Companies. Consequently, consumers would switch to other alternative products.⁶⁷ The Asgardian Legislature was aware that Relicare was launching a Domestic PIF i.e. Likan on November 1. It was conveniently the date by which Imported PIFs were supposed to meet the standards laid down by PaCE.⁶⁸ The firm stronghold of Likan was possible only due to the enforcement of PaCE. PaCE made it impossible for the Agatean Companies to compete in the market. Likan was introduced in the market at the point when Imported products were seized from the market.⁶⁹ The sales of Likan skyrocketed because people of Asgard were heavily dependant on PIF products for their infants.⁷⁰ Consumers switched from the Imported PIFs to the domestically produced Likan. Upon the re-introduction of Imported PIFs in the Asgardian market, they had lost 60% of the market share to Relicare.⁷¹ This contradicts the prediction of experts who stated that Relicare could have atmost captured 5-10% of the market in the ideal conditions.⁷² This large deviation in the statistics has occurred because the market conditions were intentionally and artificially altered in favor of Likan. The total burden on the imported products includes not only the losses caused by the cost of repackaging but also the loss of goodwill of the consumers.

1.21 Despite the patent impossibility of the standards laid down by PaCE, the Agatean Companies tried to comply with the provisions of PaCE. They pasted stickers on all the PIF products in the Asgardian market. These stickers revealed all the constituent ingredients of the

⁶⁵ Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7,180 *et. seq.*, WT/DS302/R (Nov. 26, 2004).

⁶⁶ Fact Sheet ¶ 8 (iv), (ix), (x).

⁶⁷ Fact Sheet ¶ 8 (vi).

⁶⁸ Fact Sheet ¶ 9.

⁶⁹ Fact Sheet ¶ 11.

⁷⁰ Fact Sheet ¶ 3(ii), 11.

⁷¹ Clarification ¶ 1.

⁷² Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

PIFs.⁷³ This served the purpose and objective of PaCE until the Agatean Companies could undertake a more permanent solution. However, the imported products were seized and removed from the market.⁷⁴ Hence, it is submitted that PaCE undoubtedly treats the imported products less favourably than the domestic products. In the light of above arguments, it is submitted that the regulation PaCE is inconsistent with Art. III:4 of the GATT.

2. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION CANNOT BE JUSTIFIED UNDER ARTICLE XX OF THE GATT.

2.1 PaCE cannot be justified under Art. XX of the GATT. The Appellate Body Report in *US — Gasoline*,⁷⁵ established a two-tiered approach for the application of Art. XX. A measure which is otherwise inconsistent with the obligations laid down by the provisions of the GATT can be justified under its Art. XX if it fulfills these two conditions. First, that the GATT inconsistent measure must meet the requirements of the exceptions listed in paragraphs (a) to (j) of Art. XX. Second, that the said measure must fulfill the requirements of the Chapeau of Art. XX. A measure can thus be defended under Art. XX of the GATT only if it satisfies the requirements of both these conditions and not just one of them.

2.2 The only provision that Asgard can resort to protect PaCE is Article XX (b) of the GATT. The exception states that the Members won't be prevented from implementing such measures which are *necessary to protect human, animal or plant life*.⁷⁶ A measure will fall within the scope of the exception under Art. XX (b), only if it satisfies a three-fold test.⁷⁷ First, that the policy in respect of the measures for which the provision was invoked is within the range of policies designed to protect human, animal or plant life or health; Second, that the measure, for which the exception was being invoked, was necessary to fulfil the policy objective; Third, that the measure was applied in conformity with the requirements of the introductory clause of Art. XX. It will be seen that PaCE does not fall under this exception as it doesn't not fulfill the tests as stated above.

⁷³ Fact Sheet ¶ 12.

⁷⁴ *Id.*

⁷⁵ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, pp. 22, WT/DS2/AB/R (Apr. 29, 1996).

⁷⁶ GATT 1994 art.XX (b).

⁷⁷ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WT/DS2/R (Jan. 29, 1996).

I. PaCE does not have a policy to protect human health

2.3 In order to fall under Art. XX (b) of the GATT, the measure adopted must have subjective intention of protecting life or health of humans, animals or plants.⁷⁸ If a measure has been adopted without the objective of protection of human health, it does not fall within the scope of this Article.⁷⁹ For there to be a need of protection, there is an implication of the need for existence of a health risk.⁸⁰ The risk as identified by Asgard relates to the sudden increase in the occurrence of Type-1 diabetes in children below five years of age.⁸¹ A report released by the ADOH found that the imported PIF products contained high levels of corn syrup and sugar content.⁸² The ADOH suggested that the Government introduce rules regarding packaging so that parents would be fully informed of the exact ingredients and content in the PIF.⁸³ However, the ADOH could not explicitly draw a link between the two.

2.4 The actual cause of Type-1 diabetes is unknown. It has been found to be a genetic disease. It has been scientifically proven that Type-1 Diabetes develops when body is unable to produce insulin. Insulin is responsible for regulating the sugar level in the body. When the insulin production lessens or stops in the body, sugar level in the blood increases. Type-1 diabetes is an autoimmune condition where the immune system mistakes the insulin producing cells in pancreas (known as beta cells) as harmful and attacks them, which hampers the insulin production. There is no evidence that the ingredients of PIF have a causal link with Type-1 diabetes.⁸⁴ There was no actual risk posed by the Imported PIF products against infant and human health. Hence, there was no requirement of protection. Further, it is stated that this regulation was considered the sole and necessary method to *safeguard the health and future of the young populace*.⁸⁵ It is not clear as to how indicating the contents of the product would lessen the risk of Type-1 diabetes. The objective of PaCE seems to be to provide consumers with requisite information about the contents of PIFs. This does not fall under the purview of the policy objectives of protection of human life and health.

⁷⁸ Stoll & Strack, *GENERAL AGREEMENT ON TARIFFS AND TRADE 1984*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 502 (Rudiger Wolfrum et al. eds., 2007).

⁷⁹ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 102 (Rudiger Wolfrum et al. eds., 2007).

⁸⁰ Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.170, WT/DS135/R and Add.1. (Sep. 18, 2000).

⁸¹ Fact Sheet, Exhibit 1, Statement of Objects and Reasons, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁸² Fact Sheet ¶ 3.

⁸³ *Id.*

⁸⁴ Type 1 Diabetes, <http://www.bupa.co.uk/health-information/directory/t/type-1-diabetes> (last visited Jan. 8, 2015).

⁸⁵ Fact Sheet, Exhibit 1, Statement of Objects and Reasons, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

II. PaCE was not necessary to fulfil the objective of protecting human health.

2.5 A measure can be called necessary only if no alternative measure exists which is less inconsistent with the GATT, that could reasonably be expected to be adopted.⁸⁶ Asgard sought to safeguard the health of infants by increasing the information being provided to consumers. However, there were other alternate means by which the health objective could have been achieved. When PaCE was drafted, the APMA informed the Asgardian Legislature that it would be impossible for the Agatean Companies to meet the deadline. The shipping of PIF products from Asgard to Agatea and vice versa alone took at least two months.⁸⁷ Despite knowing these facts, Asgard did not extend the date to March 2015.

2.6 Further, there was another less trade restrictive measure available which was rejected by Asgard. Stickers containing the requisite information could have been allowed for the existing stock. The Agatean Companies did comply with PaCE guidelines for the new stock of PIFs.⁸⁸ If Asgard's objective was to safeguard health by allowing consumers to make informed choices, stickers would fulfil this objective. Stickers would have been less trade restrictive than mandatory re-packaging of products which were already present in the Asgardian market. Hence, PaCE is not necessary to safeguard the infant health in Asgard.

III. PaCE does not conform with the Chapeau of Article XX.

2.7 The task of the Chapeau of Art. XX of the GATT is '*the delicate one of locating and marking out a line of equilibrium between the Right of Member to invoke an exception under Art. XX and rights of other Members under varying substantive provisions of the GATT 1994*'.⁸⁹ Thus, the Chapeau should protect against abuses of rights of Member under paragraphs (a) to (j) of Art. XX.⁹⁰

2.8 The Chapeau of Art. XX formulates restrictions on application of the GATT inconsistent measures or regulations. It ensures that such measures neither constitute a means of arbitrary or unjustifiable discrimination between countries where same conditions prevail nor does it constitute a disguised restriction on international trade.⁹¹ A Member of WTO cannot avail the defence under any clause of Art. XX if the measure at hand is unjustifiably

⁸⁶ AB Korea — Beef, *supra* note 8, ¶ 165.

⁸⁷ Fact Sheet ¶ 3(iii).

⁸⁸ Clarification ¶ 1.

⁸⁹ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 159, WT/DS58/AB/R (Oct. 12, 1998).

⁹⁰ *Id.* at ¶ 158.

⁹¹ Wolfrum, *Article XI GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 46, 64 (Rudiger Wolfrum et al. eds., 2007).

discriminatory or is a disguised restriction on International trade.⁹² On examining PaCE, in the light of the Chapeau of Art. XX, it will be seen that the provisions of the regulation are arbitrary and unjustifiably discriminatory and a disguised restriction on international trade.

2.9 Every country has the authority to take measures to protect its own interests. However, such measures of protection must not lead to arbitrary and unjustifiable discrimination.⁹³ PaCE claims to be a regulation to protect the health of infants. To determine whether the enacted regulation is justifiable or not, it is important to consider whether the difference in treatment of imported and domestic products is intentional or arbitrary.⁹⁴ Often, measures that seek to *protect plant or animal or human life* are misused for indirect protection.⁹⁵ In *US — Gasoline*,⁹⁶ the Appellate Body examined the conduct of the Member applying the measure with respect to the Member against whom the measure was applied. It held that a failure to consider the costs imposed by its measures upon the other Members as well as an omission in considering cooperation with the governments of the other Members constituted *unjustifiable discrimination* and a *disguised trade restriction*. This was sufficient to establish a violation of Art. III:4. Further, it held that *discrimination that is foreseeable and not merely inadvertent or unavoidable is unjustifiable*.⁹⁷

2.10 The Appellate Body in *US — Shrimp*,⁹⁸ dealt with the coercive nature of unilateral measures and failure to negotiate. It found that no effort was made by USA to negotiate with the Asian countries, which was plainly discriminatory. Further, it stated that a lack of cooperation with other states, lead to unjustified discrimination and that there should have been a multilateral solution. Therefore a rigid and inflexible certification process was found to constitute not only unjustifiable, but also arbitrary discrimination.⁹⁹

2.11 The representations made by APMA were disregarded by the Asgardian Legislature and consequently there were no negotiations with the Agatean Companies.¹⁰⁰ The Asgardian Legislature unilaterally fixed the unfair two-month period to comply with PaCE. It did not

⁹² Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 23, WT/DS2/AB/R (Apr. 29, 1996).

⁹³ *Id.* at 66.

⁹⁴ *Id.* at 76.

⁹⁵ *Article XX General Exceptions*, 563, http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf.

⁹⁶ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 28, WT/DS2/AB/R (Apr. 29, 1996).

⁹⁷ *Id.*

⁹⁸ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 35, WT/DS58/AB/R (Oct. 12, 1998).

⁹⁹ *Id.* at ¶ 177.

¹⁰⁰ Fact Sheet ¶ 10.

consider the plea of the Agatean Companies for an extension of the deadline for compliance. Despite the said representations by APMA, the Asgardian Legislature failed to even contemplate temporary alternatives for infant protection.¹⁰¹ Further, it failed to consider the heavy monetary costs and loss of goodwill, which PaCE brought upon the Agatean Companies.¹⁰² Thus, Asgard's failure to negotiate with Agatea on this issue is without a doubt unjustifiably discriminatory and is a disguised restriction on international trade.

2.12 The Asgardian Legislature was privy to the fact that the demand for PIFs was completely met by the Imported PIF products before PaCE.¹⁰³ They knew that Relicare was set to launch its Domestic PIF contemporaneously with the expiration of the two month deadline.¹⁰⁴ The removal of the Imported PIFs from the Asgardian market would have brought disrepute leading to a shift in consumer preferences to alternative products.¹⁰⁵ Despite this, the Asgardian Legislature proceeded to enact PaCE without any amendments.¹⁰⁶ Clearly, enactment of the PaCE was intentional and a disguised restriction on international trade. Further, Asgard also rejected Agatea's interim measure to reveal ingredients of their PIF by sticking posters. This rigidity and inflexibility in law makes the regulation arbitrarily and unjustifiably discriminatory. Thus, PaCE is inconsistent with the Chapeau of Art. XX of the GATT.

2.13 In the light of the above arguments, it is submitted that PaCE cannot be justified under Art. XX of the GATT.

3. THE 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' REGULATION IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT.

3.1 The general objective of the the TBT Agreement, particularly that of Art. 2, is to achieve a balance between the right of Members to enact regulatory measures for the protection of their legitimate interests and the need to prevent unnecessary trade restrictions.¹⁰⁷ Art. 2 is applicable only to *central governmental bodies*. Annex 1.6 defines it as '*a central government, its ministries and departments or anybody subject to the control of*

¹⁰¹ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

¹⁰² Fact Sheet ¶ 8(vii).

¹⁰³ Fact Sheet ¶ 8(ii).

¹⁰⁴ Fact Sheet ¶ 9.

¹⁰⁵ Fact Sheet ¶ 8(vii).

¹⁰⁶ Fact Sheet ¶10.

¹⁰⁷ Tamioiti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 212 (Rudiger Wolfrum et al. eds., 2007).

*the central government in respect of the activity in question.*¹⁰⁸ PaCE has been enacted by Asgard, a Member of the WTO and thus, it clearly falls within the scope of Art. 2.

3.2 Agatea contends that PaCE accords less favourable treatment to the retail sale of Imported PIFs than to the Domestic PIF. Art. 2.1 provides that ‘*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country*’.¹⁰⁹ This is the principle of non-discrimination.¹¹⁰

3.3 To establish a violation of the National Treatment Obligation in Art. 2.1, three elements must be satisfied.¹¹¹ First, the measure at issue must be a technical regulation. Second, the products at issue must be like products. Third, the treatment accorded to imported products must be less favourable when compared to domestic products.

I. PaCE is a technical regulation under ‘Annex 1.1’ of the TBT Agreement.

3.4 For any measure to fall under the scope of the TBT Agreement, it must be a technical regulation. Annex 1.1 of the TBT Agreement defines a *technical regulation* as a document which lays down product characteristics, compliance with which is mandatory.¹¹² The Appellate Body formulated three criteria that a document must fulfill to fit into the definition of a *technical regulation*.¹¹³ First, the measure at issue should apply to an *identifiable product or group of products*. Second, the measure at issue must lay down one or more *characteristics of the product* which may be either *intrinsic or related to it*. Third, *compliance* with these characteristics laid down by the measure must be *mandatory*.

3.5 A technical regulation can be applied only to those products which are identifiable. The first criterion has been recognized as a core obligation of a Member under Article 2.9.2 of the TBT.¹¹⁴ Other members must be notified *of the products to be covered* by a proposed technical regulation. The given products need not be named or explicitly specified in the regulation. It is absolutely correct and administratively sound if a technical regulation makes a

¹⁰⁸ *Id.* at 213.

¹⁰⁹ Agreement on Technical Barriers to Trade art. 2.1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 120 [hereinafter TBT].

¹¹⁰ Tamiotti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 214 (Rudiger Wolfrum et al. eds., 2007)

¹¹¹ MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY* 484 (2nd ed. 2005).

¹¹² *Id.*

¹¹³ AB EC — Asbestos, *supra* note 11, ¶ 67 et seq.

¹¹⁴ *Id.* at ¶ 70.

product identifiable not by its name but by a certain characteristic or feature of the product.¹¹⁵ PaCE is a regulation applicable to business entities dealing with manufacture and sale of PIF products.¹¹⁶ It does not specify any particular brand name but it identifies the products to which it is applicable. Art. 2 of PaCE explicitly defines PIF products which are any kind of food in powdered form for use of infants which can substitute milk completely or partially.¹¹⁷ Thus, PaCE is clearly applicable to an identifiable group of products.

3.6 The heart of the definition of a technical regulation is that the document must stipulate certain *product characteristics*.¹¹⁸ The characteristics of a product include any objectively definable quality, feature or an attribute. Such characteristics can relate to product's size, shape, colour, texture, composition, hardness, tensile strength, conductivity, density or viscosity.¹¹⁹ Annexure 1 of the TBT also provides examples of certain product characteristics including *terminology, symbols, packaging, marking or labelling requirements*.¹²⁰ This indicates that the product characteristics need not only be intrinsic but can also be related characteristics such as means of identification or appearance of product. Further, a technical regulation might set product characteristics exclusively dealing with labelling requirements.¹²¹ PaCE regulates the retail sale of PIF products by formulating certain labelling requirements. All commercial products are properly packaged before being sold in any market. The packaging of any product is thus an important characteristic related to the product. PaCE lays down the standards of packaging that must be followed for the retail sale of PIF products in the Asgardian market.¹²² It states that each product must reveal all the ingredients on the its packaging in terms of weight and in percentage. Thus, PaCE clearly lays down a characteristic related to the products at issue.

3.7 A technical regulation must regulate the characteristics in a binding or an imposing manner.¹²³ Art. 3 of PaCE states the standards regarding the retail packaging of all PIF products, thereby making it a mandatory characteristic applicable to every PIF product.¹²⁴ It specifies the font and format in which the ingredients are to be printed on the PIF packets.

¹¹⁵ *Id.*

¹¹⁶ Fact Sheet, Exhibit 1, art. 2, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹¹⁷ *Id.*

¹¹⁸ AB EC — Asbestos, *supra* note 11, ¶ 67.

¹¹⁹ *Id.*

¹²⁰ TBT Annexure 1.

¹²¹ AB EC — Asbestos, *supra* note 11, ¶ 67.

¹²² Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹²³ AB EC — Asbestos, *supra* note 11, ¶ 68.

¹²⁴ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

Further, Art. 9 of PaCE sets the deadline for compliance with its standards.¹²⁵ These conditions are not mere optional guidelines, but binding requirements for entry of any PIF in the Asgardian market. PaCE empowers the Government to take strict action in case of non-compliance.¹²⁶ PIF products which did not comply with PaCE on the stipulated date were removed from the Asgardian market.¹²⁷ Therefore, compliance with PaCE was mandatory. In light of these arguments, it is submitted that PaCE is a *technical regulation* within the meaning of Annex 1.1 of the TBT Agreement.

II. The imported products and the domestic products are ‘like’ products.

3.8 To determine if a technical regulation is inconsistent with Art. 2.1, it has to be proved that the Imported and Domestic products are *like*. The concept of *likeness* of products has been interpreted under Art. III of the GATT.¹²⁸ It has been established that *like product* may have different meanings in the different provisions depending on the context and the circumstances of the case.¹²⁹ The term *like product* as used in Art. 2.1 appears parallel to the non-discrimination obligations as dealt under Art. III:4 of the GATT.¹³⁰ Hence, the interpretation of *like products* in Art. III:4 provides guidance and direction for the interpretation of Art. 2.1 of the TBT Agreement.

3.9 We recall that *likeness* of a product can be determined by comparing the following four categories of *characteristics*.¹³¹ First, physical properties of the products. Second, the extent to which the products are capable of serving the same or similar-end uses. Third, the extent to which the consumers perceive the products as alternative means of performing particular functions. Fourth, the international tariff classification.¹³²

3.10 Again, we recall that PaCE regulates the retail sale of PIF products. A PIF product is essentially a milk based product capable of substitution, either completely or partially, mother’s milk.¹³³ The imported as well as domestic products are PIFs. Both are available in similar varieties and share similar properties. Both the products at issue cater to this same end use. The consumers in the Asgardian market readily replaced the consumption of the Imported

¹²⁵ Fact Sheet, Exhibit 1, art. 9, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹²⁶ *Id.*

¹²⁷ Fact Sheet ¶ 11.

¹²⁸ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.223-7.225, WT/DS381/R (Sep. 15, 2011) [hereinafter Panel US — Tuna].

¹²⁹ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, ¶ 20, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

¹³⁰ Panel US — Tuna, *supra* note 128, ¶ 7.223-7.225.

¹³¹ Report of the Working Party, *Border Tax Adjustments*, ¶ 18, B.I.S.D 18S/97 (adopted Dec. 2, 1970).

¹³² AB EC — Asbestos, *supra* note 11.

¹³³ Fact Sheet, Exhibit 1, art. 2, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

PIFs with the Domestic PIF as a supplement to mother's milk. Since both products at issue cater to infant dietary needs, they are alternatives. For the purpose of retail sale, both infant food products are categorized under the same tariff classification.¹³⁴ Hence, the products at issue are *like* products for the purpose of Art. 2.1.

3.11 The Imported PIFs and the Domestic PIF all function in the same domestic market and hence share a competitive relationship for garnering maximum retail sales. Therefore, it is submitted that the Imported PIFs and the Domestic PIF are *like* products.

III. The measure accords 'less favourable treatment' to the imported product than to the like domestic product.

3.12 For a technical regulation to be consistent with Art. 2.1, the regulation should not accord *less favourable treatment* to the imported products than to the like domestic products. The concept of *no less favourable treatment* has been at the center of scrutiny for many disputes pertaining to the application of Art. III:4 of the GATT. These disputes provide a direction to the interpretation of this phrase.¹³⁵ We recall that PaCE is a regulation that is inconsistent with the *no less favourable treatment* obligation under Art. III:4 of the GATT.¹³⁶

3.13 The principle of non-discrimination in the context of the TBT is much stricter than in the context of the GATT and thus provides for no exemptions. A measure which provides most favourable treatment to like products may fall within the scope of some exemption under Art. XX of the GATT. Such a measure would still be inconsistent with Art. 2.1 of the TBT Agreement.¹³⁷ Thus, it is irrelevant whether protectionism was not the intended objective of a measure. Only the application of the measure is relevant for determining unfavourable treatment.¹³⁸

3.14 To establish unfavorable treatment, it has to be examined if the measure at issue changes the conditions of market competition to the detriment of imported products.¹³⁹ Under Art. III:4 of the GATT the "*fundamental thrust and effect of the measure itself*" has to be considered to

¹³⁴ See ¶ 1.8.

¹³⁵ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 35 (Rudiger Wolfrum et al. eds., 2007).

¹³⁶ See ¶ 1.21.

¹³⁷ Tamiotti, *Article 2 TBT*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 217 (Rudiger Wolfrum et al. eds., 2007).

¹³⁸ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, ¶ 27, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

¹³⁹ AB Korea — Beef, *supra* note 8, ¶ 137.

determine unfavourable treatment.¹⁴⁰ We recall that enactment and enforcement of PaCE facilitated the exit of the Imported PIFs from the Asgardian market. Consequently, there was a high sale of the Domestic PIF.¹⁴¹ The short deadline as well as the seizure of the imported products from the market brought both monetary losses and disrepute to the Agatean Companies and the Imported PIFs. Likan was introduced in the Asgardian market without any competitor. The dependency of the Asgardian consumers on PIFs ensured high sales of Likan. PaCE created market conditions which were severely detrimental to the Imported PIFs. Likan now controls 60% of the market in Asgard which is much higher than what was generally predicted. Therefore, PaCE accords less favourable treatment to Imported PIFs than the Domestic PIF. In the light of above arguments, it is submitted that PaCE is inconsistent with Art. 2.1 of the TBT Agreement.

4. THE ‘PACKAGING OF COMMODITIES AND ITS ENFORCEMENT’ REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT.

4.1 Art. 2.2 of the TBT Agreement states that Members are obligated to ensure that no technical regulation is prepared, adopted or applied with a view to or with the effect of *creating unnecessary obstacles to international trade*. Thus, a technical regulation cannot be *more trade-restrictive than necessary to fulfill a legitimate objective*.¹⁴² For examining the necessity of a measure, *the risks of non-fulfilment of objective* also have to be taken into account.¹⁴³ Asgard, a Member of WTO, is therefore, permitted to enact regulations that are restrictive to fulfill a legitimate objective. However, PaCE cannot be more trade restrictive than necessary to fulfill the objective it pursues.

4.2 We recall that PaCE is a technical regulation that falls within the scope of Art. 2 of the TBT Agreement.¹⁴⁴ A technical regulation to be consistent with Art. 2.2 must: (a) pursue a *legitimate objective*; and (b) not be *more trade restrictive than necessary* to fulfill that legitimate objective.¹⁴⁵ To determine if PaCE was in fact more trade restrictive than necessary, it is indispensable to know its objective. Art. 2.2 enumerates a non-exhaustive list of legitimate objectives which its Members should have while enacting a technical regulation which is trade-restrictive. It includes national security requirement, the prevention of

¹⁴⁰ 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).

¹⁴¹ See ¶ 1.20.

¹⁴² TBT art. 2.2.

¹⁴³ *Id.*

¹⁴⁴ See ¶ 3.7.

¹⁴⁵ Tamiootti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 218 (Rudiger Wolfrum et al. eds., 2007).

deceptive practices; and the *protection of human health or safety*, animal or plant life or health, or the environment.¹⁴⁶

I. Asgard did not have a legitimate objective in enacting PaCE.

4.3 One of the legitimate objectives which can be pursued by a Member while enacting a regulation is *protection of human health*.¹⁴⁷ Asgard claims that PaCE was enacted to protect infant health in Asgard. The ADOH report merely stated that the Imported PIFs contained a large amount of sugar and corn syrup.¹⁴⁸ The cause of Type-1 diabetes is unknown. It has been regarded as a genetic disease.¹⁴⁹ Eatables like corn syrup and sugar therefore cannot be a cause of the disease. The ADOH report does not connect the outbreak of diabetes in Asgard to consumption of sugar and corn syrup in PIF products. Without any further enquiry, regulation PaCE was drafted which incorporates very strict measures and an impossible deadline. Not only were the Agatean Companies willing to comply with PaCE, but they were also willing to provide help for further scientific research on the issue.¹⁵⁰ However, the Asgardian Legislature dismissed this help without consideration. Further, the Asgardian Legislature failed to answer how PaCE could have achieved health objectives of protecting infant health. Asgardians were heavily dependant on PIF products for the diet of infants. PaCE does not have any provisions for directly reducing the consumption of the *supposedly* harmful PIFs. This is corroborated by Likan's huge success in the Asgardian market.¹⁵¹ Therefore, it is submitted that PaCE was not enacted with the legitimate objective of protecting human health.

4.4 Asgard asserts that PaCE was enacted in consonance with Asgard's obligation under Art. 12 of CSCPHN¹⁵² which focused on measures for infant wellbeing.¹⁵³ However, according to Article 12(g) of CSCPHN, nutritious food and food supplements have to be made available to infants at all times. ADOH report verified that PIF products are very nutritious for growth of infants. PIFs have been doctor recommend for the normal dietary intake of children.¹⁵⁴ Before the introduction of Likan, Asgard was totally dependant on Agatea for its

¹⁴⁶ TBT art. 2.2.

¹⁴⁷ *Id.*

¹⁴⁸ Fact Sheet ¶ 3(iv).

¹⁴⁹ Type 1 Diabetes, <http://www.bupa.co.uk/health-information/directory/t/type-1-diabetes> (last visited Jan. 8, 2015).

¹⁵⁰ Fact Sheet ¶ 8(viii).

¹⁵¹ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

¹⁵² Fact Sheet, Exhibit 1, Statement of Objects and Reasons, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹⁵³ Fact Sheet ¶ 2.

¹⁵⁴ Fact Sheet ¶ 3(ii).

PIF product requirement.¹⁵⁵ Enactment of PaCE led to seizure of all the nutritious PIF products from the market on November 1, 2014.¹⁵⁶ This created a supply deficit in the Asgardian market with respect to a huge demand of PIF products. The newly introduced Likan took advantage of the heavy dependence of the Asgardian population on PIF products. Even so, it could not sustain the heavy demand of PIF products. The stocks of Likan ran out in a week.¹⁵⁷ Asgardians were left with no PIF products until the next batch was released by Relicare. Therefore, it is submitted that PaCE was not in consonance with CSEPHN, rather it was in contravention of the same.

II. PaCE was more trade restrictive than necessary to fulfill its objective.

4.5 The Asgardian government drew a link between the PIFs and the increase in the number of Type-1 diabetes cases among infants under five years of age.¹⁵⁸ This was based on ADOH report about parents' preference for PIFs for the diet of infants,¹⁵⁹ along with high levels of sugar and corn syrup in PIF products.¹⁶⁰ Thus, Asgard enacted PaCE mandating all PIF manufacturers to reveal ingredients of their products *in print*. A measure which is more trade restrictive than necessary is automatically an unnecessary hindrance to trade and therefore inconsistent with Art. 2.2.¹⁶¹ It will be seen that PaCE is more trade restrictive than necessary to fulfill its supposed objective.

4.6 To determine the necessity of the restrictiveness of a measure, one has to determine the meaning of the term *necessary*. As observed by the Panel, '*the criteria on the preparation, adoption or application of technical regulations in Art. 2.2 of the TBT Agreement are very similar to those in Art. XX of the GATT 1994*'.¹⁶² The Panel further stated that the preparatory work in the Tokyo Round shows that the TBT Agreement should have emerged as a development of the existing rules of the GATT, particularly Art. XX.¹⁶³ The exception under Art. XX (b) of the GATT deals with measures taken for the protection of human, animal and plant life. The context of Art. 2.2, in particular, the objective of protection of human health,

¹⁵⁵ Fact Sheet ¶ 8(ii).

¹⁵⁶ Fact Sheet ¶ 11.

¹⁵⁷ *Id.*

¹⁵⁸ Fact Sheet, Exhibit 1, Statement of Objects and Reasons, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹⁵⁹ *Id.*

¹⁶⁰ Fact Sheet ¶ 3(iv).

¹⁶¹ Taminioti, *Article 2 TBT*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 218 (Rudiger Wolfrum et al. eds., 2007).

¹⁶² Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.55, WT/DS135/R and Add.1. (Sep. 18, 2000).

¹⁶³ *Id.* at pp. 409, footnote 41.

establishes a link to Art. XX (b) of the GATT.¹⁶⁴ Thus, the interpretation developed under Art. XX (b) of the GATT is relevant and provides guidance to the interpretation of the term *necessary* under Art. 2.2 of the TBT.

4.7 PaCE was adopted by Asgard supposedly to *protect the health and life of children* below years 5 years, particularly from Type-1 diabetes. For this purpose, PaCE seeks to inform the public about the ingredients of PIFs. Asgard believes that this can help the parents making better decision for their infant children's health. The implementation of PaCE is more trade-restrictive than necessary and it does not correspond to the objective sought to be achieved.

4.8 A measure is *trade-restrictive* if it imposes any kind of limitation on imports, discriminates against imports or denies competitive opportunities to imports.¹⁶⁵ It was observed by the Appellate Body in *Korea — Various Measures on Beef*,¹⁶⁶ that a measure is said to be necessary within Art. 2.2 in (a) situations where the measure is *indispensable*; and (b) situations where a Member is able to justify the measure as a *necessity* by proportionality test of *weighing and balancing a series of factors*. A measure could be termed as *necessary* to achieve a legitimate objective only if no other alternative measure existed which were less inconsistent with the provisions of the GATT, and which could have been reasonably adopted by the respondent country.¹⁶⁷

4.9 The lab tests conducted by the ADOH reported that the Imported PIFs contained high levels of corn syrup and sugar content.¹⁶⁸ ADOH merely stated that the PIFs contain these ingredients - it did not unequivocally establish any causal link between them and emergence of diabetes.¹⁶⁹ There is no scientific data to prove a reasonable nexus between high levels sugar and corn syrup and incidence of diabetes. Without proving the link between the detrimental effects of the ingredients of the Imported PIFs and the increase in diabetes among children, there is no scientific basis for regulating their packaging. Therefore, the prevailing circumstances didn't create a situation where enacting PaCE was indispensable.

4.10 Asgard had the option of less trade restrictive measures available which could have been more effective in addressing the situation. The specification of various ingredients may

¹⁶⁴ Panel US — Clove Cigarettes, *supra* note 133, ¶ 7.369.

¹⁶⁵ Panel US — Tuna, *supra* note 128, ¶ 7.455.

¹⁶⁶ AB Korea — Beef, *supra* note 8, ¶ 164.

¹⁶⁷ *Id.* at ¶ 170.

¹⁶⁸ Fact Sheet ¶ 3(iv).

¹⁶⁹ *Id.*

have helped the parents in making an informed choice for the dietary needs of infants. However, the term ‘*in print*’ should not be so narrowly construed so as to exclude the temporary solution of putting up stickers on the Imported PIFs. Stickers do fulfil the objective of PaCE, that is, safeguarding the health of infants by informing the public of the ingredients of the products. A relaxation of the term ‘*in print*’ in favor of the Imported PIFs already present in Asgard does not negate the fulfillment of the legitimate objective of the regulation. Even if this relaxation for the Imported PIFs lead to some administrative difficulties; this can’t be an excuse to not do so.¹⁷⁰ Considering the commercial hardships, the short time period given for compliance and the strict interpretation of the term ‘*in print*’, PaCE as it has been applied, is more restrictive than is necessary for achieving the legitimate objective it pursues.

4.11 The scope of the word *necessary* is not limited to something which is indispensable or inevitable. There are other aspects of enforcement which have to be considered while assessing a measure as being *necessary*.¹⁷¹ The proportionality test includes first, the extent to which the measure has contributed towards the end that is pursued; second, the importance of common interests or values protected by the measure and regulation; and third the accompanying impact of the measure on the imports or exports.¹⁷²

4.12 The trade restrictiveness of a measure can be scrutinized in two-steps.¹⁷³ The first step is to examine whether the measure at issue made a material contribution to the achievement of the legitimate objective. The second step is to analyze whether a less trade restrictive measure could have made the same contribution.¹⁷⁴ If the measure has not materially contributed to the objective sought by the Legislature, then it cannot be termed necessary for fulfilling the purpose.¹⁷⁵ The supposed objective of implementing PaCE was to safeguard infant health. ADOH claimed that there was a link between Type-1 diabetes and high levels of corn syrup and sugar in imported PIFs.¹⁷⁶ It was reported that Likan contained similar ingredients and could be as poisonous as the imported products.¹⁷⁷ But as soon as Likan was introduced,¹⁷⁸ it captured a strong position in the market and its products sold out within a week.

¹⁷⁰ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.26 – 6.28, WT/DS2/R (Jan. 29, 1996).

¹⁷¹ AB Korea — Beef, *supra* note 8, ¶ 163.

¹⁷² *Id.* at ¶ 164.

¹⁷³ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (Dec. 3, 2007).

¹⁷⁴ *Id.*

¹⁷⁵ Panel US — Clove Cigarettes, *supra* note 133, ¶ 7.432.

¹⁷⁶ Fact Sheet ¶ 3.

¹⁷⁷ Fact Sheet ¶ 14.

¹⁷⁸ Fact Sheet ¶ 11.

Enforcement of PaCE did not reduce consumption of PIFs and infants were still at peril of falling prey to diabetes. Merely passing a regulation mandating labelling standards does not resolve the problem of rising incidents of diabetes among infants.¹⁷⁹ Therefore, PaCE did not materially contribute to its objective.

4.13 Further, Agatea was willing to comply with the standards of PaCE through stickers. This was a temporary solution adopted by the Agatean Companies since it was otherwise impossible to comply with the labelling standards of PaCE. These stickers also revealed the ingredients of PIF products and thereby provided the consumer information required for pursuing the objective of PaCE. Thus, there were less trade restrictive measures which could have achieved the same contribution.

4.14 Another aspect that has to be considered while evaluating necessity of the measure are the values it seeks to protect. It has been held that preservation of human life and health is the most vital and important value in the highest degree.¹⁸⁰ If the measure pursues this value, the next thing which has to be examined is if an alternative measure was present to achieve the same end and which was less trade restrictive than the measure.¹⁸¹ We recall that Asgard enacted PaCE solely on the basis of the ADOH report which drew no proximate connection between causation of Type-1 diabetes. It carried out no further research, dismissed the help Agatea was willing to give and could not clearly answer how labelling of PIF products can protect infant health.¹⁸² Therefore, Asgard didn't have a legitimate object to protect human health and consequently, values protected by the measure are neither vital nor important.

4.15 Alternatively, even if it is assumed that the measure sought to protect human life and health, it has to be analyzed if an alternative less trade restrictive measure existed.¹⁸³ We recall that even stickers would have provided information about all the ingredients of PIF products.¹⁸⁴ This would also achieve the objective pursued by PaCE in the same manner as labelling on the packets. Further, it would have been less trade restrictive as Agatea could have easily complied with the same without substantial costs.¹⁸⁵ Therefore, PaCE cannot be held to be *necessary* for the protection of human life and health.

¹⁷⁹ *The introduction of Mandatory Nutrition Labelling in the European Union*, 18 (2004), http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/impact_assessment.pdf.

¹⁸⁰ AB EC — Asbestos, *supra* note 11, ¶ 172.

¹⁸¹ *Id.*

¹⁸² See ¶ 4.3, 4.4.

¹⁸³ EC — Asbestos, WT/DS135/AB/R ¶ 172.

¹⁸⁴ See ¶ 1. 21.

¹⁸⁵ See ¶ 4.13.

4.16 To determine *necessity*, the impact of the measure on the exports and imports has to be weighed and balanced.¹⁸⁶ It is evident that the enforcement of PaCE has a detrimental impact on the commercial interests of the Agatean Companies. The Imported PIF products have to be repackaged and reshipped back to Asgard. Asgard does not have the required technology for the repackaging of the Imported PIFs on-site.¹⁸⁷ These products have to be necessarily shipped back to Agatea for repackaging. This would cost 1.5 U.S. Dollars for each unit of the product.¹⁸⁸ A large stock is already available in the Asgardian market and subsequently a large amount of stock has already been shipped.¹⁸⁹ Despite the monetary loss and no scientific proof linking the health problems of infants to the Imported PIFs, Agatea was willing to comply with the standards of PaCE if given more time. This shows that the means adopted to fulfil the objective are too restrictive when compared to the risks of non-fulfillment of the objective. The restrictiveness of the regulation is not necessary or justified for the achievement of its aim of protection of infant health.

4.17 PaCE was neither indispensable nor the only alternative available to Asgard for the legitimate objective sought by it. The trade restrictiveness of PaCE was not proportional to its objective. Thus, it is submitted that PaCE is inconsistent with Art. 2.2 of the TBT Agreement.

III. The risks of non-fulfillment of the objective with respect to the trade-restrictiveness of the measure were not assessed.

4.18 When assessing the trade-restrictiveness of the regulation under Art. 2.2, the enactment of the technical regulation must take into account the risks of non-fulfillment of the objective would create. This requirement is one of the crucial factors to establish whether the trade measure was *necessary* to fulfill the legitimate objective.¹⁹⁰ Art. 2.2 of the TBT provides the relevant elements which have to be considered while calculating the risks involved namely, (a) available scientific and technical information; (b) related processing technology; or (c) intended end uses of the products.¹⁹¹ The likelihood and gravity of the potential risks that might arise if the legitimate objective is not fulfilled have to be considered.¹⁹² This means that

¹⁸⁶ AB Korea — Beef, *supra* note 8, ¶ 164.

¹⁸⁷ Fact Sheet ¶ 8(v).

¹⁸⁸ Fact Sheet ¶ 8(iv).

¹⁸⁹ Fact Sheet ¶ 8(vi).

¹⁹⁰ Tamiotti, *Article 2 TBT, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES* 210, 220 (Rudiger Wolfrum et al. eds., 2007).

¹⁹¹ TBT art. 2.2.

¹⁹² Panel US — Tuna, *supra* note 128, ¶ 7.467.

a less trade restrictive alternative measure would not be a valid alternative if it would entail greater *risks of non-fulfillment*, even if it sought the same objective.¹⁹³

4.19 The restrictions imposed on packaging are not proportional to the necessity to fulfil the objective pursued by the measure. Asgard claimed that PaCE was enacted for protecting infant health and safety. The exact detrimental effect of these products and the effect of the consumption of these products in relation to infant diabetes is still unclear.¹⁹⁴ It is known that the causes of Type-1 diabetes are in fact genetic.¹⁹⁵ It is unreasonable to arbitrarily attribute high levels of sugar and corn syrup constituents to be the sole reason for causing diabetes.

4.20 It was not possible to comply with PaCE within the deadline as the Imported PIFs would necessarily have to be reshipped to Agatea. There was no technology in Asgard for re-packaging of the 35 million Imported PIFs present in the country.¹⁹⁶ An alternative to PaCE would have been to extend the deadline for compliance and allow the use of stickers for an interim period. Even if Asgard had given them extension of deadline till March 2015, the *risks of non-fulfillment* of the legitimate objective would have remained the same. The demand for PIFs was very heavy and consumers did not suddenly changed their feeding style. If the objective of the regulation was to make the parents aware of the ingredients of the PIFs, use of stickers fulfilled this objective. Recalling the 20 million units in Asgard market plus 15 million units already shipped from Agatea would have entailed huge costs and harmed the reputation of the imported products.¹⁹⁷ The Asgardian Legislature was aware of the fact that Relicare was about to launch its PIF when the deadline to comply with PaCE expired.¹⁹⁸ The limited time period for compliance with the regulation operated to eliminate, or at the least minimize the sale of Imported PIFs. Consequently, it increased the retail sales of the Domestic PIF. We recall that Likan could not fulfill the entire demand for PIFs after a week and this deprived infants of the required nutritional supplements.¹⁹⁹ Therefore, it is submitted that PaCE did not balance the risks of non-fulfilment of its legitimate objective with respect to trade restrictiveness of the regulation. In the light of above arguments, it is submitted that the regulation PaCE is inconsistent with Art. 2.2 of the TBT Agreement.

¹⁹³ *Id.*

¹⁹⁴ Fact Sheet, Exhibit 3, FALL SESSION OF PARLIAMENT, 2014, Extracts from debates: 28 – 29 August 2014.

¹⁹⁵ Type 1 Diabetes, <http://www.bupa.co.uk/health-information/directory/t/type-1-diabetes> (last visited Jan. 8, 2015).

¹⁹⁶ Fact Sheet ¶ 8(vii).

¹⁹⁷ Fact Sheet ¶ 8.

¹⁹⁸ Fact Sheet, Exhibit 3, FALL SESSION OF PARLIAMENT, 2014, *Extracts from debates: 28 – 29 August 2014*.

¹⁹⁹ Fact Sheet ¶ 3(ii), 11.

REQUEST FOR FINDINGS

Agatea requests the panel to:

1. Find that PaCE is inconsistent under Article III:4 of the GATT and that it is not capable of being justified under Article XX of the GATT.
2. Find that PaCE is inconsistent under Article 2.1 of the TBT Agreement.
3. Find that PaCE is inconsistent under Article 2.2 of the TBT Agreement.