

7TH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2015



ASGARD — PACKAGING OF COMMODITIES AND ITS ENFORCEMENT

AGATEA

(COMPLAINANT)

v

ASGARD

(RESPONDENT)

MEMORANDUM ON BEHALF OF THE RESPONDENT

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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	Agreement on Technical Barriers to Trade
v.	Versus
vol.	Volume
WTO	World Trade Organization

INDEX OF AUTHORITIES

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Short Title	Full Case Title and Citation
<i>Argentina — Footwear (EC)</i>	Appellate Body Report, <i>Argentina — Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<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>Chile — Alcoholic Beverages</i>	Appellate Body Report, <i>Chile — Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, p. 281
<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>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 —</i>

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<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>EC — Hormones</i>	Appellate Body Report, <i>European Communities — Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
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<i>EC — Tariff Preferences</i>	Appellate Body Report, <i>European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
<i>EC — Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603

<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>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>Thailand — Cigarettes</i>	Report of the Panel, <i>Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R, adopted 7 November 1990, GATT B.I.S.D. 37S/200
<i>US — Clove Cigarettes</i>	Appellate Body Report, <i>United States — Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
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<i>US — Spring Assemblies</i>	Report of the Panel, <i>United States — Imports of Certain Automotive Spring Assemblies</i> , L/5333, adopted on 26 May, 1983, GATT B.I.S.D. 30S/107
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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 Circle Sea Nations ‘Nine Realms Summit, 2014’, the Circle Sea Code on Public Health and Nutrition (hereinafter referred to as ‘CSCPHN’) was adopted. It 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 very high levels of corn syrup and sugar content which was not specified on the packaging of these products.
4. This caused widespread anxiety amongst the population of Asgard. The Asgardian Government thus, drafted and published ‘Packaging of Commodities and its Enforcement’ (hereinafter referred to as ‘PaCE’) in July, 2014. It also invited comments and suggestions from all the stakeholders.
5. Agatea is a world leader in dairy and health supplements and controls 90% of the world market of these products. Asgard depends completely on imports of PIFs namely Rincewind, Linacre, Diamanda and Cementac (hereinafter referred to as the ‘**Imported PIFs**’). These PIFs are manufactured by Castle, Viking, Flora and Theos (hereinafter referred to as the ‘**Agatean Companies**’) respectively. The Agatean Companies made a representation through the Agatean Processed Food Members Association (hereinafter referred to as the ‘**APMA**’), listing out their difficulties and requesting for an extension of the time period for compliance with PaCE.
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**’), has been approved by ADOH in June 2014 and is set for launch in October 2014.
7. PaCE was tabled in the Parliament on August 28, 2014. After much debate and discussion on the issue, it was approved and passed by the Parliament on August 30, 2014 to be effective immediately.

8. PaCE required all PIF products to list out all the constituent ingredients on the packaging ‘*in print*’. Its primary objective was to help parents to be fully aware of the exact contents of the food products consumed by their infants. This would enable them to make an informed decision about the diets of their children. It was unrealistic and unreasonable to expect Agatean Companies, to be able to switch their packaging immediately. Hence, a two month time period was provided for compliance with the requirements laid down by PaCE.

9. The Agatean Companies responded to these required standards by pasting stickers on the packaging of PIF products. This was not in compliance with PaCE as it required all the ingredients to be mentioned on PIF products explicitly ‘*in print*’. Subsequently, on November 1, 2014, none of the Imported PIFs which had not complied with the requirements of PaCE were seized from the market. Products which fulfilled the requirements of PaCE, such as the Domestic PIF product Likan, were allowed to be sold in the Asgardian market.

10. On November 10, Agatea approached the Commissioner of the Asgard Department of Health against the seizure of their products under PaCE. The Commissioner upheld the seizure as the Imported PIFs had not complied with the guidelines under PaCE upon the expiry of the deadline. Further, in November 2014, Agatea moved the High Court of Krull, Asgard. The High Court listed it for hearing on February 16, 2015. The High Court dismissed their appeal and ordered the release of the seized Imported PIFs to the respective Agatean Companies. These PIFs could be either re-packaged and sold in the Asgardian market or disposed off in the world market.

11. In December 2014, both countries held consultations under WTO Dispute Settlement Understanding (DSU). However, these consultations failed, leading to Agatea’s demand for the formation of a WTO Panel for dispute resolution.

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' IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT.

- The imported and the domestic products are not *like* products within the meaning of Article 2.1 of the TBT.
- The measure applies uniformly to all the PIFs. It does not treat the imported products unfavourably as compared to the domestic products.
- Thus, the measure is consistent with the Article 2.1 of the TBT.

2. THE 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' IS CONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT.

- The measure was enacted to pursue a *legitimate objective*.
- It is not *more trade restrictive than necessary* to fulfil the legitimate objective it pursues.
- It took into consideration the risks of non-fulfilment of the legitimate objective.
- Thus, the measure is consistent with Article 2.2 of the TBT.

3. THE PROVISIONS OF THE GATT DO NOT APPLY IN THIS CASE.

- The measure is a *technical regulation*.
- The TBT Agreement deals more specifically with the matter than the GATT. The measure must be examined under provisions of the TBT to the exclusion of the GATT.
- Thus, the provisions of the GATT do not apply.

4. THE 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' IS CONSISTENT WITH ARTICLE III:4 OF THE GATT.

- The imported and the domestic products are not *like* products.
- The imported products are not treated unfavourably as compared to the domestic products.
- Alternatively, the measure falls within the exceptions provided under Article XX (b) of the GATT.
- Thus, the measure is consistent with Article III: 4 of the GATT.

LEGAL PLEADINGS

1. 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT.

1.1 Only a measure which qualifies as a technical regulation falls within the scope of the TBT Agreement. Annex 1.1 of the TBT Agreement defines a *technical regulation* as essentially a document which lays down certain standards, compliance with which is compulsory.¹ Article 3 of PaCE deals with the product characteristic, namely, the packaging of the PIFs. It lays down mandatory labelling requirements and PIFs cannot be sold in the Asgardian market without following these standards.

1.2 The Appellate Body in *EC — Asbestos*,² laid down a three-tier test to examine whether a document is a technical regulation. First, the measure in question must apply to an *identifiable group of products*. PaCE defines PIFs as powdered food for infants capable of partially or completely substituting human milk.³ Article 3 states that the stipulated labelling requirements apply uniformly to all PIF products.⁴ Second, the measure must lay down one or more *characteristics* of the products which may be *related or intrinsic* to it.⁵ Article 3 of PaCE requires all PIF packets to list their constituent ingredients *in print*.⁶ Packaging is one of the characteristics related to a commercial product.⁷ Third, compliance with the measure at issue must be *mandatory*.⁸ No PIF product can be sold in the Asgardian market without proper packaging conforming to the standards of PaCE. The Government has the power to take corrective steps if the standards of PaCE are violated.⁹ Thus, the measure PaCE fulfils all the aforementioned conditions and is undoubtedly a technical regulation.

1.3 Art. 2 of the TBT Agreement governs the preparation, adoption and application of technical regulations. It ensures that these regulations do not become obstacles or hindrances to international trade.¹⁰ Art. 2.1 of TBT states that:

¹ MITSUAO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY* 484 (2nd ed. 2005).

² Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 70, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *AB EC — Asbestos*].

³ Fact Sheet, Exhibit 1, art. 2, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁴ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁵ *AB EC — Asbestos*, *supra* note 2, ¶ 67.

⁶ Fact Sheet, Exhibit 1, art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁷ *AB EC — Asbestos*, *supra* note 2, ¶ 67.

⁸ *AB EC — Asbestos*, *supra* note 2, ¶ 69.

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

¹⁰ Tamiotti, *Article 2 TBT*, in 3 *WTO — TECHNICAL BARRIERS AND SPS MEASURES* 210, 212 (Rudiger Wolfrum et al. eds., 2007).

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.'

1.4 Agatea claims that PaCE is inconsistent with Art. 2.1 of the TBT Agreement. To prove that a technical regulation is inconsistent with Art. 2.1, it has to be established that, (a) the imported and domestic products in question are *like products* and; (b) the technical regulation accorded less favourable treatment to the imported products than to the domestic product.¹¹ It will be seen that the imported and domestic products are not *like*. Further, it is a regulation that calls for packaging standards for retail sale for all PIF products. Therefore, it does not accord less favourable treatment to the imported products.

I. Likan and other PIFs produced by Agatea are not like products.

1.5 The products at issue must be compared to determine the *likeness* of the products. The concept of *no less favourable treatment* is embodied in Art. III:4 of the GATT and in Art. 2.1 of the TBT Agreement.¹² Hence, the interpretation of *likeness* in Art. 2.1 of TBT is guided by the interpretation developed under Art. III:4 of GATT.¹³ The *likeness* of products is determined, narrowly or broadly depending on the facts of the case. No one approach is exhaustive and appropriate in itself for all cases.¹⁴

1.6 To determine *likeness*, the products at issue must first be compared, based on certain criteria. The general criteria for analyzing *likeness* include the properties of the products, the end-uses of the products, competitiveness or substitutability of the products and tariff classification of the products.¹⁵ A *competitive relationship* between the products at issue is a necessary condition for determining the likeness of the products.¹⁶

1.7 End uses are *the extent to which products are capable of performing the same, or similar, functions*.¹⁷ However the Appellate Body in *US — Clove Cigarettes*,¹⁸ held that an

¹¹ MITSUAO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY 484 (2nd ed. 2005).

¹² AB EC — Asbestos, *supra* note 2, ¶ 101.

¹³ 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).

¹⁴ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, pp. 20, WT/DS/8/AB/R, WT/DS/10/AB/R, WT/DS/11/AB/R (Oct. 4, 1996).

¹⁵ AB EC — Asbestos, *supra* note 2, ¶ 101.

¹⁶ AB EC — Asbestos, *supra* note 2, ¶ 99.

¹⁷ AB EC — Asbestos, *supra* note 2, ¶ 117.

¹⁸ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 127 – 130, WT/DS406/R (Apr. 4, 2012).

analysis of end use should be comprehensive and specific to ascertain if the goods are *like* products. In that dispute, clove and menthol cigarettes, were both found to have the common function of ‘*to be smoked*’. However, the specific functions of smoking such as ‘*satisfying an addiction to nicotine*’ and ‘*creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke*’ were also considered as different end uses.¹⁹ Both the Imported and the Domestic PIFs are substitutes to breast milk. However, the Imported PIFs function only as a supplement to mother’s milk whereas the specific function of the Domestic PIF is to fulfil the complete dietary needs of infants.²⁰ The Domestic PIF consist of more nutrients and is more filling.²¹ Thus, their end uses are different.

1.8 Two products are in competition when consumers regard them as substitutes. Only when two products are in a competitive relationship can a measure, that affects them unequally, operate as a protectionist measure.²² The benefits offered by Likan are essentially different from the other PIFs. Likan is more nutritious and has been prepared after a comprehensive study of the local demands. Likan is capable of being a complete substitute to mother’s milk as it is more filling and infants have less hunger pangs than before.²³ Whereas, the Imported PIFs are seen as only partial substitutes to human milk. Likan is not seen as an alternative to the Imported PIFs but as a wholly different product. Products cannot be *like* if they are not regarded as substitutes by consumers, which ultimately signifies a competitive relationship. Therefore, the products at issue are not in a competitive relationship. As a corollary, the Domestic and the Imported PIF products cannot be treated as *like* products.

1.9 A *competitive relationship* between the imported and the domestic products is necessary but not sufficient to determine the *likeness* of the products.²⁴ A competitive relationship between two products does not by itself render them *like*.

1.10 The guiding principle in Art. III:1 states that measures should not be applied *so as to afford protection to the domestic production*.²⁵ The term *like products* in Art. III:4 of the GATT has to be interpreted keeping in mind the basic purpose of Art. III:1, which is avoiding protectionism.²⁶ To decide if a measure is protectionist the aim or the regulatory purpose for

¹⁹ *Id.*

²⁰ Fact Sheet ¶ 5.

²¹ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

²² Donald H. Regan, *Regulatory Purpose and ‘Like Products’ in Article III:4 of the GATT*, 447 (2002), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1752&context=articles>.

²³ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

²⁴ Donald H. Regan, *Regulatory Purpose and ‘Like Products’ in Article III:4 of the GATT*, 447 (2002), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1752&context=articles>.

²⁵ AB EC — Asbestos, *supra* note 2, ¶ 93, 98.

²⁶ *Id.*

implementation of the measure has to be considered.²⁷ The regulatory purpose of a measure also guides the criteria for comparison of the products at issue.²⁸

1.11 An increase in Type-1 diabetes led to great concern for the health of infants in Asgard. PaCE was drafted to safeguard the health of infants by bringing about reforms in their dietary patterns.²⁹ The Imported PIFs contain high levels of sugar and corn syrup.³⁰ These ingredients pose a potential risk to the health and safety of infants. This was evidenced by the overlap of the time in which consumption of PIFs had increased with the rise in Type-1 diabetes among children.³¹ To comply with PaCE, all PIF products would have to list their constituent ingredients. Subsequently, parents would be able to take an informed decision about their infant's diet. Due to the regulatory purpose of PaCE, the health risk posed by the products becomes a point of comparison to determine *likeness*. It is clear that PaCE was implemented to counter the risk posed to infant health. Without proper labelling, parents would remain in the dark about the ingredients consumed by their infants. Consequently, they would have been unable to clearly judge the health risk of any PIF. Hence, the health risk posed by PIFs with unlabelled packaging cannot be ignored, especially where infant health is at stake. Precisely this unequal risk, renders the Imported PIFs (without labelled packaging) unlike from the Domestic PIF (with labelled packaging).³²

1.12 The regulatory purpose of PaCE (protection of infant health) determines the risk or the harm posed by the products at issue. It casts a heavier burden on the Imported PIFs due to the larger risk associated with them. When the products pose an unequal risk, one cannot treat them as *like* products, despite being in a competitive relationship.³³ Therefore, it can be concluded that the Domestic PIF and the Imported PIFs are not *like* products.

II. PaCE did not accord less favourable treatment to Imported PIFs when compared to the Domestic PIFs.

1.13 A technical regulation would violate Art. 2.1 of the TBT Agreement, if it accords *less favourable treatment* to imported products than to the like domestic products. The interpretation of the term *less favourable treatment* is guided by the interpretation under Art.

²⁷ Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 62, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999).

²⁸ ROBERT E. HUDEC, *GATT/WTO constraints on national regulation: Requiem for an "aim and effects" test*, 13 – 14, <http://www.worldtradelaw.net/articles/hudecrequiem.pdf>.

²⁹ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

³⁰ Fact Sheet ¶ 4.

³¹ Fact Sheet ¶ 3.

³² Donald H. Regan, *Regulatory Purpose and 'Like Products' in Article III:4 of the GATT*, 447-449, (2002) <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1752&context=articles>.

³³ *Id.*

III:4 of GATT.³⁴ The term *less favourable treatment* is embodied in the general principle that regulations ‘*should not be applied in a manner so as to accord protection to domestic products more favourable than to imported products*’.³⁵ If a group of like imported products is treated less favorably, it conversely implies that the group of like domestic products is protected.³⁶

1.14 To prove a claim under Art. 2.1 it has to be demonstrated by the complainant that the labeling requirement at issue accorded *less favourable treatment*.³⁷ Agatea has failed to demonstrate how the labeling requirement on packaging of PIF products has accorded less favourable treatment to the Imported PIFs and therefore the complainant cannot bring a claim under Art. 2.1 of the TBT.

1.15 PaCE lays down the standards for the packaging of PIF products. These standards are applicable to both imported and domestic products.³⁸ Hence, the question of less favourable treatment with respect to the Imported PIFs does not arise. Likan and the Imported PIFs have the same obligation to reveal their ingredients on their packaging. A detrimental effect on a given imported product does not necessarily imply that the measure accords less favourable treatment if it can be explained by factors or circumstances unrelated to its foreign origin.³⁹

1.16 The Agatean Companies control 90% of the world’s market in dairy and health products. They are the only exporters of PIFs to Asgard.⁴⁰ These companies earn annual turnovers in billions of dollars and can expend some revenue for meeting the safety requirements prescribed by an importing country.⁴¹ If the burden on the imported products is slightly higher, it is not because of their foreign origin. The domestic producers also have to conform to same requirements as the foreign manufacturers.

1.17 The interpretation of *less favourable treatment* under Art. 2.1 is guided by the interpretation of the same term under Art. III:4 of GATT.⁴² It has to be examined whether the

³⁴ Tamiotti, *Article 2 TBT*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 216 (Rudiger Wolfrum et al. eds., 2007).

³⁵ GATT 1994 art. III:1.

³⁶ AB EC — Asbestos, *supra* note 2, ¶ 100.

³⁷ Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, ¶ 7.446-7.475, WT/DS290/R (Mar. 15, 2005) [hereinafter Panel EC — Asbestos].

³⁸ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

³⁹ Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WT/DS302/AB/R (Apr. 25, 2005) [hereinafter AB Dominican Republic — Cigarettes].

⁴⁰ Fact Sheet ¶ 7.

⁴¹ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

⁴² Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 35 (Rudiger Wolfrum et al. eds., 2007).

measure at issue modifies the conditions of competition to the detriment of the imported products.⁴³ PaCE was uniformly applicable to all PIF products. By regulating the packaging specifications, PaCE endeavours to create awareness about the constituent ingredients of PIFs. This will allow parents to make a well-informed decision about the dietary intake of their children. Thus, PaCE does change the conditions of the market. However, this change in market conditions is uniform for all PIFs. PaCE does not change the conditions of *competition* to the *detriment* of the Imported PIFs. The provisions of PaCE apply even to the Domestic PIF. Hence, Likan was introduced in the market only after complying with the labelling requirements of PaCE.⁴⁴

1.18 In order to determine whether a measure accords *less favourable treatment*, enquiry has to be made about the '*fundamental thrust and effect of the measure itself*' in the market.⁴⁵ The principal purpose for the enactment of PaCE was to safeguard the life and health of infants in Asgard. The object of preserving human life and health is a value both *vital* and *important in the highest degree*.⁴⁶ PaCE was strictly implemented not to create a detrimental effect on Imported PIFs, but to ensure the protection of infant life and health.

1.19 While examining a measure under Article III:4 of GATT, it has to be considered whether the circumstances created by PaCE lead to de-facto unfavourable treatment to the imported products.⁴⁷ The costs of repackaging the Imported PIFs are so low as to be unlikely to alter the market conditions unfavourably for the same. The annual turnover of the Agatean Companies is around 600 billion dollars.⁴⁸ The cost of repackaging 35 million products (20 million in the Asgardian market and 15 million in transit) would be around \$52, 500, 000 which is merely 0.00875 % of their annual turnover. The Appellate Body has observed that '*conditions of the market are not affected by a marginal, negligible difference in costs.... A measure with formally equal treatment and minimal or negligible practical consequences is unlikely to be applied so as to afford protection*'.⁴⁹ This clearly demonstrates that PaCE does not create any significant financial hardships for the Agatean producers.

1.20 Therefore, it can be concluded that the measure at issue, that is, PaCE does not accord any less favourable treatment to the imported products than to the domestic products. In the

⁴³ AB Dominican Republic — Cigarettes, *supra* note 39, ¶ 96.

⁴⁴ Fact Sheet ¶ 11.

⁴⁵ Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, ¶ 215, WT/DS108/AB/RW (Feb. 24, 2000).

⁴⁶ AB EC — Asbestos, *supra* note 2, ¶ 172.

⁴⁷ AB Dominican Republic — Cigarettes, *supra* note 39, ¶ 52.

⁴⁸ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

⁴⁹ AB Dominican Republic — Cigarettes, *supra* note 39, ¶ 52.

light of above arguments, it is submitted that the regulation PaCE is consistent with Art. 2.1 of the TBT Agreement.

2. 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' IS CONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT.

2.1 Agatea claims that disclosing the contents of their products would not facilitate the achievement of the health objective of PaCE. It further suggests that Asgard should undertake further scientific research upon the matter.⁵⁰ Agatea has failed to understand the proper enquiry for the application of the obligations under the TBT Agreement. Under the Art. 2.2 of the TBT, a Member is enabled to pursue a legitimate objective through a technical regulation.⁵¹ The burden of proof remains on the complaining party that measure adopted by the respondent is inconsistent with the particular provision.⁵² However, PaCE is not inconsistent with Art. 2.2 of the TBT Agreement.

2.2 To prove that a measure is consistent with Art. 2.2 of TBT, the following requirements have to be fulfilled:

- i. there should be a legitimate objective when preparing, adopting or applying a technical regulation which is trade-restrictive;
- ii. the measure should not create unnecessary obstacles to international trade and cannot be more trade restrictive than necessary; for that
- iii. Members must take into account the risks of non-fulfilment of the legitimate objective would create when assessing trade-restrictiveness of the regulation.⁵³

I. PaCE was enacted for the protection of infant health and safety through labelling requirements.

2.3 The Panel in *US — Clove Cigarettes*,⁵⁴ observed that the identification of the legitimate objective pursued '*is the logical starting point in the analysis under Art. 2.2 of the TBT Agreement, because it serves as the reference point for the purpose of analysing whether a measure is more trade-restrictive than necessary to achieve its objective*'. Every country

⁵⁰ Factsheet ¶ 4(viii).

⁵¹ 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].

⁵² Tamiami, *Article 2 TBT*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 220 (Rudiger Wolfrum et al. eds., 2007).

⁵³ Tamiami, *Article 2 TBT*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 218 (Rudiger Wolfrum et al. eds., 2007).

⁵⁴ Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.335, WT/DS406/R (Sep. 2, 2011) [hereinafter Panel US — Clove Cigarettes].

while preparing, adopting or applying a technical regulation which is trade restrictive in nature, must have a legitimate objective to do so.⁵⁵ A technical regulation is said to be consistent with Art. 2.2 of the TBT, only if it is enforced with the objective of national security requirement; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment.⁵⁶ However, this list is not exhaustive. This also includes adoption of a domestic law; consumer information and labelling etc.⁵⁷ It has been established that it is possible for a single technical regulation to pursue more than one objective.⁵⁸

2.4 PIFs form a large portion of the daily dietary intake of the infants in Asgard. Following an increase in Type-1 diabetes among infants, laboratory tests were conducted by the Government and independent NGOs to understand its causes. The Imported PIFs contained high levels of corn syrup and sugar. These contents were not specified on their packaging.⁵⁹ Parents need to make an informed choice about the infants' dietary intake. For this, knowledge of constituent ingredients of PIF products is essential.

2.5 Art. 12 of CSCPHN recognizes the importance of infant health and wellbeing. It states that parties must ensure that '*relevant information regarding nutritious content of food is made available to the public*'. It also entitles parties to take appropriate measures for the achievement of this target.⁶⁰ Asgard, being one of the nations which finalized this code, had an obligation to conform to its provisions in spirit. The relevant information regarding the contents of the PIFs was not available to the public. Hence, the Asgardian Legislature enacted PaCE in consonance with the health objectives of the CSCPHN.

2.6 PaCE was enforced to ensure that parents are aware of the contents of PIF products. They would then be able to make informed choices about the diet of their infants.⁶¹ Labelling food products is an important element in the strategy for improving consumer health. Nutrition-labelling along with other nutrition-related initiatives lead to better consumer understanding of different foods and diet. This leads to better and balanced food choices and

⁵⁵ Tamiami, *Article 2 TBT, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES* 210, 219 (Rudiger Wolfrum et al. eds., 2007).

⁵⁶ TBT art. 2.2.

⁵⁷ *Id.*

⁵⁸ Panel US — Clove Cigarettes, *supra* note 54, ¶ 7.342.

⁵⁹ Fact Sheet ¶ 3.

⁶⁰ Fact Sheet ¶ 2.

⁶¹ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

ultimately improves consumer health.⁶² Consumers of food products benefit from nutrition-labelling only if they read the labels. Studies have shown that about 70 to 80% of the consumers do read such labels.⁶³ These statistics and patterns vary in specific population groups. With Asgardian infants suffering from widespread Type-1 diabetes, parents would be more cautious and particularly interested in the food choices they make for their infants.⁶⁴ The impact of labelling food products on consumer health also depends on the clarity and quality of the information provided. The generic ingredients listed on the Imported PIFs do not provide any clear information or assessment about their nutritional content. Failure to provide nutrition information can seriously undermine other initiatives which aim to improve consumer health and diet.⁶⁵ Hence, it became necessary for Asgard to enact PaCE. As the purpose of enactment of PaCE was protection of infant well-being through provisions pertaining to consumer information, it fulfils the criteria of *legitimate objective*.

II. PaCE is not more trade-restrictive than necessary to fulfill its legitimate objective.

2.7 For PaCE to be consistent under Art. 2.2 of the TBT, it must be shown that: (a) it was not prepared or applied with view to or with the effect of creating unnecessary obstacles to international trade; and (b) it was not more trade restrictive than necessary to fulfil the legitimate objective. It will be seen that PaCE was not more trade restrictive than necessary to fulfil its legitimate objective. Consequently, it did not have the effect of creating unnecessary obstacles in the international trade.⁶⁶

2.8 A technical regulation prepared, adopted or applied for any legitimate objectives explicitly mentioned in Art. 2.2, in accordance with relevant international standards, shall be presumed not to create an unnecessary obstacle to international trade.⁶⁷ Whether a measure is necessary or not has been a very crucial part of panel discussion under Art. XX (b) and (d) of the GATT.⁶⁸ In *US — Clove Cigarettes*,⁶⁹ it was established that some aspects of Art. XX (b) interpretation can be taken into account in the context of interpreting Art. 2.2 of the TBT. The

⁶² *The introduction of Mandatory Nutrition Labelling in the European Union*, 18 (2004), http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/impact_assessment.pdf.

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 20, 22, 25.

⁶⁵ *Id.* at 21, 25.

⁶⁶ Tamiotti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 218 (Rudiger Wolfrum et al. eds., 2007).

⁶⁷ TBT art. 2.5.

⁶⁸ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 108 (Rudiger Wolfrum et al. eds., 2007).

⁶⁹ Panel US — Clove Cigarettes, *supra* note 54, ¶ 7.369.

interpretation of the *necessity* requirement has evolved from a least-trade restrictive approach to a less trade-restrictive approach, supplemented by a proportionality test.⁷⁰

2.9 A Member may be able to justify a measure as *necessary*, even if other alternatives were available.⁷¹ The justification, where a measure might not be indispensable but is still necessary, involves *a process of weighing and balancing a series of factors*.⁷² The factors include contribution made by the compliance of the measure to the enforcement of the law or regulation at issue; importance of the common interests or values protected by that regulation; and the impact of the regulation on imports and exports.⁷³

2.10 In *Thailand — Cigarettes*,⁷⁴ the Panel noted that Art. XX (b) ‘clearly allowed contracting parties to give priority to human health over trade liberalization’. The objective of protection of public health, is such that it take precedence over all other considerations and warrants adverse economic repercussions, even if they are of grave nature.⁷⁵ The Appellate Body in *EC — Asbestos*,⁷⁶ observed that a ‘Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a major scientific opinion’. A Member is allowed to rely on scientific sources which may represent divergent, but a respected opinion.⁷⁷

2.11 In early 2014, there was an alarming increase in the occurrence of Type-1 diabetes among children below five years of age. In the preceding five years, parents had shifted from natural breast milk to regular use of PIFs. After lab testing, the ADOH found that the Imported PIFs contained high level of corn syrup and sugar.⁷⁸ This was further corroborated by other independent studies.⁷⁹ Sugar and corn syrup are basically large complexes of sucrose and fructose respectively.⁸⁰ Unless essential, the addition of sucrose and fructose as an

⁷⁰ Tamiotti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 218 (Rudiger Wolfrum et al. eds., 2007).

⁷¹ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter AB Korea — Beef].

⁷² *Id.* at 164.

⁷³ *Id.*

⁷⁴ Report of the Panel, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 73, DS10/R (Oct. 5, 1990), GATT B.I.S.D. 37S/200 [hereinafter Panel Thailand — Cigarettes].

⁷⁵ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 112 (Rudiger Wolfrum et al. eds., 2007).

⁷⁶ AB EC — Asbestos, *supra* note 2, ¶ 178.

⁷⁷ Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 194, WT/DS26/AB/R (Jan. 16, 1998).

⁷⁸ Fact Sheet ¶ 3.

⁷⁹ Fact Sheet ¶ 5.

⁸⁰ D. Worku Batu and T. Wunesh Solomon, *Quantitative Determination of Sugar Levels in Natural Plants of Cactus Pear (Opuntia ficus indica) and Votre-Coach Alimantaire Cultivated in Adigrat, North of Ethiopia*, 126 (2014) <http://www.issr-journals.org/links/papers.php?journal=ijisr&application=pdf&article=IJISR-14-212-05>.

ingredient should be avoided in infant formula.⁸¹ The reason behind this is the potential life-threatening symptoms in young infants with unrecognized hereditary fructose intolerance.⁸² Scientific studies have shown that environmental factors such as foods or dietary practices may play a role in the development of Type-1 diabetes.⁸³ This leads to a reasonable inference that there might be a connection between the consumption of PIF products and the rising incidence of diabetes among children. The constituents of the Imported PIFs may be a trigger for the disease of diabetes. Therefore, this possible link between PIF products and the outbreak of Type-1 diabetes could not have been overlooked by the Government.

2.12 Further, there have been scientific studies, which clearly establish a link between Type-1 diabetes and infant feeding practices.⁸⁴ 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 be suitable for infants are added.⁸⁵ Studies show that early exposure to cow milk and cereal proteins may trigger a risk of falling prey to Type-1 diabetes.⁸⁶ Several studies have found that short-term breastfeeding can also trigger Type-1 diabetes in children.⁸⁷ The shift from breastfeeding towards PIFs in the last five years necessarily implies short-term breastfeeding and hence, the risk of Type-1 diabetes increases.⁸⁸ Hence, there was a reasonable apprehension of risk to infant health in Asgard due to the PIF products.

2.13 The labelling requirements under PaCE are also necessary to protect the children who are already suffering from Type-1 diabetes. In Type-1 diabetes, the hormone responsible for regulating the sugar levels, that is insulin, isn't produced naturally. Consequently, the blood sugar increase to dangerous levels.⁸⁹ Therefore, it is necessary that the exact ingredients of the PIFs are known to the parents of the diabetic children too. Only then can they make a careful choice about the dietary needs of their children, taking into consideration the sugar levels permissible for diabetic patients. Hence, the Asgardian Legislature set forth labelling

⁸¹ *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.

⁸² *Id.*

⁸³ CAUSES OF DIABETES, diabetes.niddk.nih.gov/dm/pubs/causes/ (last visited Jan. 9, 2015).

⁸⁴ *Id.*

⁸⁵ *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.

⁸⁶ *Id.*

⁸⁷ Mikael Nip et al., *Infant feeding and the risk of type 1 diabetes*, 2, <http://m.ajcn.nutrition.org/content/91/5/1506S.full.pdf>.

⁸⁸ Fact Sheet ¶ 3(i).

⁸⁹ Type 1 Diabetes, <http://www.bupa.co.uk/health-information/directory/t/type-1-diabetes> (last visited Jan. 8, 2015).

requirements under PaCE for the purpose of safeguarding the health of infants from this potential risk.

2.14 Even if the Agatean Companies contend that diabetes was not directly caused by their products, it cannot be denied that there was a potential risk to the health and safety of infants. Once a risk has been established, it is upon the Member to determine the level of protection which it considers appropriate in the given situation.⁹⁰ There was a huge demand for an outright ban of the Imported PIFs. However, Asgard enacted a less trade restrictive regulation PaCE, whereby all the PIF manufacturers could voluntarily adopt best practices and reveal the ingredients of their products.⁹¹ This measure was necessary to make sure that parents make an informed choice regarding their infants' diet. Further, two months was given to all existing manufacturers of PIFs to comply with the regulations of PaCE. These two months were provided for the Agatean Companies to minimize the economic losses that would incur upon compliance with PaCE. The Agatean Companies have a combined net worth of \$600 billion and hence, airlifting the PIF products from Asgard to Agatea was economically viable.⁹² The protection of human health holds the highest degree of priority and cannot be disregarded in view of monetary burden incurred for the protection of infant health.⁹³ Hence, PaCE can't be said to be more trade restrictive than necessary.

2.15 Further, it has to be considered if the measure makes a material contribution towards the objective sought to be fulfilled by the measure.⁹⁴ The enforcement of PaCE ensured that the Asgardian population became aware of the constituent ingredients of PIFs. It was enacted to ensure that parents are provided with the relevant information to make an informed decision about their infant's health care and dietary habits.⁹⁵ On the date that PaCE was implemented, every PIF in the market had the constituent ingredients specified on its packaging.⁹⁶ Hence, the enforcement of PaCE has made a material contribution to the legitimate objective pursued by Asgard.

2.16 To examine *necessity* of a measure, another factor which has to be taken into consideration is its impact on imports and exports.⁹⁷ We recall the impact of shipping and repackaging of the Imported PIFs constituted a marginal percentage of the annual turnover of

⁹⁰ AB EC — Asbestos, *supra* note 2, ¶ 168.

⁹¹ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

⁹² *Id.*

⁹³ Panel Thailand — Cigarettes, *supra* note 74, ¶ 73.

⁹⁴ Panel US — Clove Cigarettes, *supra* note 54, ¶ 7.352.

⁹⁵ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

⁹⁶ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

⁹⁷ AB Korea — Beef, *supra* note 71, ¶ 164.

these companies.⁹⁸ The impact of imports and exports is negligible to the Agatean Companies. Therefore, it is submitted that PaCE was not more trade restrictive than necessary and consequently, doesn't create unnecessary obstacles to international trade.

III. Asgard took into account the risks non-fulfilment of the legitimate objective in relation to the trade restrictiveness of PaCE.

2.17 The sixth recital of the Preamble of the TBT Agreement explicitly recognizes a Members' right to enact regulations to pursue legitimate objectives which includes the protection of human, animal or plant life or health. This is counterbalanced by the fifth recital which embodies the principle of non-discrimination, that is, to avoid creating unnecessary obstacles to international trade.⁹⁹

2.18 Under Art. 2.2 of the TBT, Members must consider the risks involved in non-fulfilment of the legitimate objective that a measure pursues in light of the trade restrictiveness of the. This test of risk assessment is linked with the process of weighing and balancing a series of factors for the enquiry of the *necessity* of a measure.¹⁰⁰ For determining the risks associated with the non-fulfilment of the a measure's objective, the available scientific and technical information, the available processing technology and the intended end uses of the products must be considered.¹⁰¹

2.19 The rise in cases of Type-1 diabetes coincided with the rise in dependence on PIFs for infant dietary needs. These circumstances, along with the ADOH report, point towards a potential risk to infant health.¹⁰² PaCE seeks to provide parents with information which will help them make informed choices about the diet of their children.¹⁰³ Agatea has failed to understand the level of protection sought by Asgard. Asgard has not implemented a total ban on PIF products or their importation. PaCE does not place any other restriction on trade apart from a requirement of labelling. This requirement also takes into account the presence of the Imported PIFs in the Asgardian market. It allocates sufficient amount of time for the Agatean Companies to comply with the standards of PaCE.¹⁰⁴

⁹⁸ See ¶ 1.19.

⁹⁹ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 94 – 95, WT/DS406/R (Apr. 4, 2012).

¹⁰⁰ Tamioiti, *Article 2 TBT GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 210, 220 (Rudiger Wolfrum et al. eds., 2007).

¹⁰¹ *Id.*

¹⁰² Fact Sheet ¶ 3.

¹⁰³ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹⁰⁴ *Id.*

2.20 The trade restriction imposed by a measure at issue must not exceed the level of protection sought by its objective.¹⁰⁵ This implies that the trade restrictiveness of a measure must be in proportion to the risks associated with its non-fulfilment. Based on the available scientific data, the level of protection sought by Asgard is limited to revealing the constituent ingredients of infant food products. It does not restrict complete access to PIF products. Without the requirements under PaCE, parents would not be able to judge the nutritional value of any PIF as they would not be privy to its constituent ingredients. We recall that high level of sugar and corn syrup, which are ingredients of PIFs, have been indicated to be linked with incidence of Type-1 diabetes in infants.¹⁰⁶ Knowledge about the contents of PIFs will help parents to decide whether to purchase these products for their infant children. Selection of any PIF without being aware of its specific constituents poses a health risk to infants. This is the risk that Asgard wants to eliminate through the enactment of PaCE.

2.21 PaCE ensured that the PIFs in the Asgardian market complied with the labelling requirements. It succeeded in achieving the level of protection sought by Asgard. PaCE is trade restrictive only to the extent of its labelling requirement. This is an appropriate and reasonable requirement for the protection of human life and health in this particular dispute. Hence, the trade restrictiveness of the measure at issue is in balance and proportion with the risks of non-fulfilment of the objective sought to be achieved. In light of the abovementioned arguments, it is submitted that PaCE is consistent with Art. 2.2 of the TBT Agreement.

3. THE PROVISIONS OF GATT DO NOT APPLY IN THIS CASE.

3.1 The complainant has sought relief under the provisions of the GATT as well as the TBT. The interpretative note to Annex 1A mentions that in case of any conflict between the GATT and any Agreement under Annex 1A, then to the extent of the conflict, the provisions of the Agreement shall apply and not the GATT.¹⁰⁷

3.2 The doctrine of *lex-specialis* says that in a situation where two laws are applicable, the law which specifically deals with the issue in question overrides the general law.¹⁰⁸ If the provisions of the GATT and one other Agreement are applicable, then, the provision of the other Agreement shall be applicable which deals with the issue more *specifically and in*

¹⁰⁵ Panel US — Clove Cigarettes, *supra* note 54, ¶ 7.134.

¹⁰⁶ See ¶ 2.11, 2.12.

¹⁰⁷ MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY 483 (2nd ed. 2005).

¹⁰⁸ *Id.S*

detail.¹⁰⁹ Therefore the TBT takes precedence over GATT. If both provisions of the GATT and the TBT are claimed — only when it is proved that the measure at issue is not inconsistent with the TBT can it be tried under provisions of the GATT.¹¹⁰

3.3 If a measure taken by the respondent country falls under the provisions of GATT and TBT simultaneously and if it reveals the characteristics of a technical regulation, then, it should be reviewed under the TBT and not GATT.¹¹¹ We recall that PaCE clearly falls within the definition of a *technical regulation*.¹¹² Hence, for the purpose of examination of its validity, the TBT is applicable to the exclusion of the GATT.

4. 'PACKAGING OF COMMODITIES AND ITS ENFORCEMENT' IS CONSISTENT WITH PROVISIONS OF GATT III:4.

4.1 The principle of *non-discrimination* is one of the essential building blocks of the WTO Legal Order. WTO agreements distinguish two components of this principle: Most Favoured Nation Principle and National Treatment Obligation.¹¹³ The National Treatment Obligation requires treatment of Members' goods not inferior to the treatment given to the domestic goods. This principle is incorporated in Art. III of GATT which requires that internal taxes, charges, laws and regulations must not be applied in a manner that treats imported products less favourably than domestic ones.¹¹⁴

4.2 The objective of Art. III of GATT is to avoid protectionism.¹¹⁵ This has been reiterated by various rulings of the Appellate Body. '*The fundamental purpose of Art. III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products*'.¹¹⁶ The intent of Art. III of the GATT is to protect the requirement and the expectation of equality of competitive relationship.¹¹⁷ The Appellate Body in *Korea — Various Measures on Beef*,¹¹⁸ laid down a three-tier test of consistency of a measure with

¹⁰⁹ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 204, WT/DS27/AB/R (Sept. 9, 1997).

¹¹⁰ Panel EC — Asbestos, *supra* note 37, ¶ 7.14 – 7.16.

¹¹¹ AB EC — Asbestos, *supra* note 2, ¶ 77.

¹¹² See ¶ 1.2.

¹¹³ Hestermeyer, *Article III GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 1, 5 (Rudiger Wolfrum et al. eds., 2007).

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, pp. 18, WT/DS31/AB/R (Jun. 30, 1997).

¹¹⁷ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, pp. 14 – 15, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

¹¹⁸ AB Korea — Beef, *supra* note 71, ¶ 133.

Art. III:4. A 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 at issue 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.¹¹⁹

4.3 We recall that as the products are not in a competitive relation and regulatory purpose of PaCE was not to afford protectionism to the domestic products, they cannot be considered to be *like products*.¹²⁰ Further, we recall that PaCE was strictly applicable to all PIF products, whether imported or domestic. Any detrimental effect to the imported products was unrelated to its foreign origin. Therefore, PaCE does not accord less favourable treatment to the imported products as regards the domestic products.¹²¹ Hence, it is submitted that PaCE is not in violation of Article III:4 of GATT.

4.4 Alternatively, a Member is allowed to enact and adopt regulations, which though inconsistent with the general obligations under Art. III:4, can be justified by virtue of the exceptions enumerated in Art. XX (a) to (j) of GATT.¹²² The GATT 1994 and the TBT Agreement are integral parts of the same treaty which is the WTO Agreement. Provisions of the GATT and other Agreements can be seen as provisions of one treaty, the WTO Agreement.¹²³ Hence, the WTO Agreement including its Annex Agreements should be considered as a whole.¹²⁴ Further, the Preamble of the TBT Agreement states that the provisions of the TBT desire *to further the objectives of the GATT 1994*. Hence, an application of the exceptions as listed under the paragraphs of Art. XX cannot be said to be in conflict with the application of the provisions under Art. 2.1 and Art. 2.2 of the TBT.

¹¹⁹ *Id.*

¹²⁰ See ¶ 2.6. 2.16.

¹²¹ See ¶ 1.20.

¹²² Wolfrum, *Article XX GATT 1994 [INTRODUCTION]*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 61, 63 (Rudiger Wolfrum et al. eds., 2007).

¹²³ Appellate Body Report, *Argentina — Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (Dec. 14, 1999).

¹²⁴ *Id.*

I. PaCE falls under the scope of the exception of Art. XX (b).

4.5 Art. XX (b) deals with various sensitive issues such as public health, food safety, consumer protection and environmental protection.¹²⁵ It is the most relevant exception pertaining to the measure at issue. Art. XX (b) makes it very clear that WTO provisions can't prevent its Members from protecting *human, animal or plant life or health* as a matter of their national sovereignty.¹²⁶ Hence, Asgard can not be prevented from adopting a regulation that seeks to protect its infants' life.

4.6 The objectives of the WTO Agreement can be pursued through its primary obligations as well as through its exceptions.¹²⁷ In *EC — Hormones*,¹²⁸ the Appellate Body stated that merely because a provision is an *exception*, it doesn't warrant a stricter interpretation of the same than would be needed to interpret ordinary meaning of words of the provision, keeping in mind purposes of object and reasons of the statute. Hence, the exception under Art. XX (b) of GATT should not be construed in a narrower or stricter manner.

4.7 In order to determine if a measure falls within the scope of the exception under Art. XX (b), it has to satisfy a three-fold test which includes:

- i. 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;
- ii. that the measure, for which the exception was being invoked, was necessary to fulfil the policy objective; and
- iii. that the measure was applied in conformity with the requirements of the introductory clause of Art. XX.¹²⁹

II. PaCE was a regulation to protect human life and health.

4.8 Art. XX (b) relates to those policies '*within the range of those concerning the protection of human, animal and plant life or health*'.¹³⁰ In order to fall under Art. XX (b) of the GATT, the measure adopted must have subjective intention of protecting life or health of

¹²⁵ General Agreement on Tariffs and Trade 1994 art XX (b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

¹²⁶ Wolfrum, *Article XI GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 46, 66 (Rudiger Wolfrum et al. eds., 2007).

¹²⁷ Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 94, WT/DS246/AB/R (Apr. 7, 2004).

¹²⁸ Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 104, WT/DS26/AB/R (Jan. 16, 1998).

¹²⁹ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WT/DS2/R (Jan. 29, 1996).

¹³⁰ *Id.* at ¶ 6.21.

humans, animals or plants.¹³¹ If a measure has been adopted with the objective of protection of human health, it falls within the scope of this Article.¹³²

4.9 Tests were conducted by the ADOH to understand the cause of an increased occurrence of Type-1 diabetes. The ADOH report stated that there had been a gradual shift in infant diets, from breastfeeding towards PIFs. It stated that PIFs contained high levels of corn syrup and sugar content. These ingredients were not specified on the packaging of the PIFs.¹³³ Thus, parents were unaware of the ingredients that their children were ingesting. This prevented them from making an informed choice about the dietary and health concerns of their children.¹³⁴ Hence, PaCE was enacted with the purpose of regulating the packaging PIFs in a manner that made the exact contents of the products available to the consumers.¹³⁵ This would allow them to decide about using any PIF product, with full consciousness about its constituent ingredients. Therefore, PaCE is clearly aimed at the protection of infant health and hence, falls within the scope of this Article.

4.10 While examining any measure under this Article, the obligations of the Respondent country, under other international agreements may also be taken into consideration.¹³⁶ Asgard is a party to CSCPHN which sets forth an obligation to make provisions for protection of infant wellbeing.¹³⁷ Art. 12 of the CSCPHN recognizes infant health to be of prime importance. Therefore, Asgard must ensure that the contents of the infant food products are made available to the consumers to help them in making a conscious choice. It is possible for a measure to have two objectives namely, consumer information and protection of human health.¹³⁸ Asgard, in consonance with CSCPHN, implemented PaCE to further the objective of protecting infant wellbeing by making the consumers aware of the exact product contents.

4.11 The Appellate Body in *EC — Asbestos*,¹³⁹ established that ‘*inasmuch they include notion of protection, the words – policies designed to protect health – imply health risk*’. Therefore, if a measure is being adopted, there must be an actual risk to health, not a mere

¹³¹ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 102 (Rudiger Wolfrum et al. eds., 2007).

¹³² *Id.*

¹³³ Fact Sheet ¶ 3.

¹³⁴ *Id.*

¹³⁵ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹³⁶ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 106 (Rudiger Wolfrum et al. eds., 2007).

¹³⁷ Fact Sheet ¶ 2.

¹³⁸ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.407, WT/DS381/R (Sep. 15, 2011).

¹³⁹ Panel EC — Asbestos, *supra* note 37, ¶ 8.170.

hypothesis.¹⁴⁰ However, a preventive measure may be taken if the risk, despite it not being proved conclusively, appears nevertheless adequate based on available scientific evidence, at the time of adoption of such a measure.¹⁴¹ The research conducted by ADOH as well as NGOs and other interest groups revealed high levels of sugar and corn syrup in the PIFs.¹⁴² According to international standards, sugar and corn syrup not advisable as ingredients in such a high dosage in infant food products.¹⁴³ The Appellate Body in *Thailand — Cigarettes*,¹⁴⁴ held 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 Art. XX (b)’. The direct link between the level of sugar and corn syrup in the PIFs to the increase in the Type-1 diabetes among children is unclear. However, on the basis of the available scientific information, it can be safely assumed that the potential risk was actual and serious.¹⁴⁵ For an objective to be in the furtherance of protection of human health, the products posing the danger must also have some effect on health.¹⁴⁶ Clearly, the relationship between the escalated consumption of PIFs and upsurge in the incidence of diabetes can’t be ignored. Consequently, it proves that the risk posed by the PIFs actually existed. PaCE was enacted to protect the infants of Asgard from the risk that imported PIFs posed and hence it falls under exception Art. XX (b).

4.12 While adopting a measure, along with considering the health risks involved, it is also necessary to consider the risks in the context of prevailing social circumstances.¹⁴⁷ There was widespread outrage among the people in Asgard after the ADOH report became public.¹⁴⁸ Parents were worried about whether the consumption of PIFs was safe for their children.¹⁴⁹ The newspapers went to the extent of calling the Agatean Companies the *Killer Four*.¹⁵⁰ These studies lead to a movement calling for immediate governmental action. There was

¹⁴⁰ Panel EC — Asbestos, *supra* note 37, ¶ 5.571.

¹⁴¹ Panel EC — Asbestos, *supra* note 37, ¶ 8.167.

¹⁴² Fact Sheet ¶3(iv), 5.

¹⁴³ *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.

¹⁴⁴ Panel Thailand — Cigarettes, *supra* note 74, ¶ 73.

¹⁴⁵ See ¶ 2.11, 2.12.

¹⁴⁶ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 102 (Rudiger Wolfrum et al. eds., 2007).

¹⁴⁷ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 106 (Rudiger Wolfrum et al. eds., 2007).

¹⁴⁸ Fact Sheet ¶ 5.

¹⁴⁹ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

¹⁵⁰ Fact Sheet ¶ 14.

immense pressure on the Government from all the sectors of the society.¹⁵¹ In these circumstances, it was necessary for the Government take immediate and serious action. Therefore, it is submitted that PaCE fell within the range of policies designed to protect human, animal or plant life.

III. PaCE was necessary to fulfil the policy objective of safeguarding infant health and well-being.

4.13 The Asgardian Government enacted PaCE to protect the health of their infants. In *Thailand — Cigarettes*,¹⁵² the Panel established the requirement of a *least trade restrictiveness* approach. This means a measure can be considered as necessary only if no alternative measure existed which was less inconsistent with provisions of GATT. This constitutes a four pronged test for necessity in Art. XX (b). The test applies in seriatim, i.e., each prong builds on its predecessor.¹⁵³ First, there must be no measure that is an alternative to the measure in dispute. Second, assuming there is an alternative measure, it must be either consistent with GATT, or less inconsistent with GATT than the disputed measure. Third, assuming there is a GATT consistent, or less GATT inconsistent, alternative measure, it must be reasonable to expect the importing country to employ the alternative. Last, assuming the first 3 prongs are met, the alternative measure furthers the health policy goal of the importing country.¹⁵⁴

4.14 The ADOH report connected the rise of Type-1 diabetes with the imported PIFs.¹⁵⁵ There was widespread anxiety among parents which lead to a movement demanding action from the Government.¹⁵⁶ In response, the Asgardian Legislature drafted PaCE and called for the opinions from all the stakeholders.¹⁵⁷ When the draft bill was introduced in the Parliament, there was a strong opinion demanding an outright ban on the Imported PIFs.¹⁵⁸ The Legislature, keeping in mind the commercial interests of Agatea, implemented a much less stricter measure. The Government merely mandated that all PIFs reveal their ingredients in print on their packets.¹⁵⁹ This decision was taken in accordance with the available

¹⁵¹ Fact Sheet ¶ 5.

¹⁵² Panel Thailand — Cigarettes, *supra* note 74, ¶ 74.

¹⁵³ RAJ BHALLA, INTERNATIONAL TRADE LAW – INTERDISCIPLINARY THEORY AND PRACTICE 1415 (3rd ed. 2014).

¹⁵⁴ *Id.*

¹⁵⁵ Fact Sheet ¶ 3.

¹⁵⁶ Fact Sheet ¶ 5.

¹⁵⁷ Fact Sheet ¶ 6.

¹⁵⁸ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

¹⁵⁹ Fact Sheet, Exhibit 1, Art. 3, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

scientific information about PIF products. We recall that there was sufficient risk posed by the PIF products to the health of infants.¹⁶⁰ PaCE was enacted keeping in mind the balance between the demands of Asgard's populace and its international trade with Agatea.

4.15 In determining whether an alternative remedy is *reasonably available*, several factors may be taken into account. An alternative measure which was impossible to implement is not *reasonably available*.¹⁶¹ Necessity of such a measure has to be proved by the Members adopting the defence and is subject to scientific assessment.¹⁶² *'The determination of the existence of other measures consistent or less consistent with GATT largely depends on a scientific assessment of the risk'*.¹⁶³

4.16 It was impossible for Asgard to allow an extension of the deadline for compliance with PaCE packaging standards. If such extension was given, the natural consequence would be that the Agatean Companies would continue using stickers on the existing PIF products in Asgard. Stickers can be easily tampered with and cannot be authenticated. PaCE specifically mentions the terms *in print* so that the correct information as regards the constituent ingredients of PIF products can be revealed to the public.¹⁶⁴ Thus, pasting of stickers on the existing Imported PIFs cannot be accepted. Art. 3 of PaCE clearly required all the PIFs to reveal its ingredients on the package *in print*. Further, it was ruled by the Commissioner of ADOH and the High Court that pasting stickers didn't comply with provisions of PaCE.¹⁶⁵ PaCE treated every PIF producer equally and couldn't afford to give favourable treatment to the imported products.¹⁶⁶ Under these circumstances, policy allowing pasting of stickers on the PIF products could not have been reasonably adopted by the Asgardian Government. Consequently, this alternative remedy would not have furthered the health policy of Asgard. No value is higher than the basic right to life and health. An alternative measure that would involve a continuation of the very risk that the measure seeks to halt cannot be a *reasonably available* alternative.¹⁶⁷ Therefore, it is submitted PaCE was necessary to fulfil the health policy sought by the Government, that is, protection of infant health.

¹⁶⁰ See ¶ 2.11, 2.12.

¹⁶¹ AB EC — Asbestos, *supra* note 2, ¶ 169.

¹⁶² Stoll & Strack, *Article XX GATT 1994*, in 3 WTO — TECHNICAL BARRIERS AND SPS MEASURES 96, 110 (Rudiger Wolfrum et al. eds., 2007).

¹⁶³ Panel EC — Asbestos, *supra* note 37, ¶ 8.813.

¹⁶⁴ Fact Sheet, Exhibit 4, ORDER OF THE COMMISSIONER, ASGARD DEPARTMENT OF HEALTH KRULL, ASGARD, Nov. 10, 2014.

¹⁶⁵ Fact Sheet, Exhibit 4, ORDER OF THE COMMISSIONER, ASGARD DEPARTMENT OF HEALTH KRULL, ASGARD, Nov. 10, 2014; Clarification 1.

¹⁶⁶ See ¶ 1.19, 1.20.

¹⁶⁷ AB EC — Asbestos, *supra* note 2, ¶ 174.

4.17 In *Korea — Various Measures on Beef*,¹⁶⁸ the Appellate Body held that a Member may be able to justify its measure as necessary, even if other alternatives were available. These situations, where the measure taken might not be indispensable but is still necessary, involve *a process of weighing and balancing a series of factors*.¹⁶⁹ These factors include the contribution made by the compliance of the measure to the enforcement of the law or regulation at issue, importance of the common interests or values protected by that regulation and the impact of the regulation on imports and exports.¹⁷⁰

4.18 It has been established that material contribution of the measure at issue to the objective or the policy has to be taken into consideration.¹⁷¹ The Appellate Body in *Brazil — Retreaded Tyres*,¹⁷² explained that whether a measure is necessary is based on whether it ‘*is apt to produce a material contribution to the achievement of its objective*’.¹⁷³ We recall that objectives pursued by PaCE included making consumers, in this case, parents aware about ingredients of all the PIF products. This would help them make an informed decision about their children’s dietary routine.¹⁷⁴ Mandating all the PIF manufactures to reveal all the ingredients of their products on their packaging created an apt condition for fulfilment of its object. The regulation PaCE has been successful to a large extent in this context. The people of Asgard started consuming Domestic PIF because they trusted the brand which revealed all the ingredients of its product.¹⁷⁵

4.19 The more important the common values pursued by the measure, the easier it is to prove whether it is necessary to achieve those ends.¹⁷⁶ The objective of preservation of human life and health, is a value *both important and vital in the highest degree*.¹⁷⁷ The significance of the common interest pursued by the Government, namely the protection of public health, is such that it warrants adverse economic repercussions, even if they are of grave nature.¹⁷⁸ This is because the maintenance of public health takes precedence over all

¹⁶⁸ AB Korea — Beef, *supra* note 71, ¶ 161.

¹⁶⁹ *Id.* at 164.

¹⁷⁰ *Id.*

¹⁷¹ AB EC — Asbestos, *supra* note 2, ¶ 172.

¹⁷² Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WT/DS332/AB/R (Dec. 3, 2007).

¹⁷³ *Id.*

¹⁷⁴ See ¶ 2.6.

¹⁷⁵ Fact Sheet, Exhibit 6, *Extracts from a media report*, Eli Abraham, The New Asgard Times, Dec. 10 2014.

¹⁷⁶ AB EC — Asbestos, *supra* note 2, ¶ 172.

¹⁷⁷ *Id.*

¹⁷⁸ Stoll & Strack, *Article XX GATT 1994*, in 3 WTO – TECHNICAL BARRIERS AND SPS MEASURES 96, 112 (Rudiger Wolfrum et al. eds., 2007).

other considerations.¹⁷⁹ Therefore, protecting human health clearly has greater priority than trade liberalization.¹⁸⁰ The common interests pursued by PaCE was primarily to safeguard infant's safety and health.¹⁸¹ Due to a sudden outbreak of Type-1 diabetes among children below five years of age, the ADOH conducted a study to find its causes.¹⁸² The report revealed that the Imported PIFs had a high level of corn syrup and sugar.¹⁸³ High level of fructose (corn syrup) and sucrose (sugar) should not be added to PIFs unless they are necessary as it can be harmful to an infant's health.¹⁸⁴ In the last five years, parents had shifted from natural breast milk to a regular use of PIFs.¹⁸⁵ This lead to a logical inference that the imported PIFs might be linked with Type-1 diabetes. PaCE was thus enacted to safeguard infant health and safety.¹⁸⁶ Though it might have resulted in some expenditure for the Agatean Companies, preservation of infant health clearly stood above trade liberalization.

4.20 It should be acknowledged that while assessing whether a measure is *necessary* within the meaning of Article XX of GATT, collective strength of all the factors should be considered.¹⁸⁷ One of these factors is the trade impact of the measure under consideration.¹⁸⁸ Appellate Body in *Korea – Various Measures on Beef*,¹⁸⁹ established that a measure with *relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.*¹⁹⁰ The Agatean Companies have contended that the requirements under PaCE have created commercial hardships for them. They claim that they would have to incur unnecessary costs in repackaging the products. We recall that cost of re-packaging the PIF products is negligible given the annual turnover of the Agatean Companies.¹⁹¹ Hence, the trade impact is marginal on the imported products. In the light of the above arguments, it is submitted that PaCE was *necessary* to fulfil the objective of consumer awareness and safeguarding infant health.

¹⁷⁹ *Id.*

¹⁸⁰ Panel Thailand — Cigarettes, *supra* note 74, ¶ 73.

¹⁸¹ Fact Sheet, Exhibit 1, REGULATION NO.8/2014 PACKAGING OF COMMODITIES AND ITS ENFORCEMENT.

¹⁸² Fact Sheet ¶ 3.

¹⁸³ Fact Sheet ¶ 3 (iv).

¹⁸⁴ *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.

¹⁸⁵ Fact Sheet ¶ 3(i).

¹⁸⁶ See ¶ 2.11.

¹⁸⁷ AB Dominican Republic — Cigarettes, *supra* note 39, pp. 4.

¹⁸⁸ AB Dominican Republic — Cigarettes, *supra* note 39, pp. 3.

¹⁸⁹ AB Korea — Beef, *supra* note 71, ¶ 163.

¹⁹⁰ *Id.*

¹⁹¹ See ¶ 1.19.

IV. PaCE conforms to the Chapeau of Art. XX of GATT.

4.21 The Appellate Body has observed that the Chapeau of Art. XX serves as a balance of rights and duties to prevent the abuse of the exceptions provided under this Article.¹⁹² Hence, one must find the line of equilibrium between the right of a Member to invoke an exception under Art. XX and the rights of other Members under other substantive provisions. The Chapeau ensures that the competing rights of Members remain in balance.¹⁹³ The Chapeau primarily addresses the manner in which the measure at issue is applied, not the measure itself.¹⁹⁴ While the exceptions of Art. XX are a matter of legal right, their application should not frustrate the legal obligations under the substantive rules of GATT.¹⁹⁵ The limited and conditional exceptions under Art. XX from the substantive obligations of GATT is subject to the compliance of the requirements of the Chapeau.¹⁹⁶ For any measure to be qualified under any exception of Art. XX, it must conform to the requirements of the Chapeau.¹⁹⁷ Hence, compliance with the Chapeau is nothing but an expression of the principle of good faith.¹⁹⁸

4.22 The Chapeau prohibits application of a measure in a manner that would constitute (a) *arbitrary discrimination*; (b) *unjustifiable discrimination* (between countries where the same conditions prevail); or (c) *disguised restriction* on international trade.¹⁹⁹ Under Art. XX, it must be examined whether the Member enacting the regulation was in fact employing the measure to pursue a protectionist and trade.²⁰⁰

4.23 In *US — Gasoline*,²⁰¹ 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 the failure to consider the costs imposed by its measures upon the other Members as well as omission in considering cooperation with the governments of the other Members were

¹⁹² Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 156 – 159, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter AB US — Shrimp].

¹⁹³ *Id.*

¹⁹⁴ Report of the Panel, *United States — Imports of Certain Automotive Spring Assemblies*, ¶ 56, L/5333 (Jun. 11, 1982), GATT B.I.S.D. 30S/107.

¹⁹⁵ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, pp. 22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter AB US — Gasoline].

¹⁹⁶ Report of the Panel, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 4.76, WT/DS58/R (May 15, 1998).

¹⁹⁷ AB US — Shrimp, *supra* note 192, ¶ 156 – 157.

¹⁹⁸ *Id.* at ¶ 158 – 159.

¹⁹⁹ AB US — Gasoline, *supra* note 195, at 23.

²⁰⁰ Panel EC — Asbestos, *supra* note 37, ¶ 8.236.

²⁰¹ AB US — Gasoline, *supra* note 195, at 28.

sufficient to establish a violation of Art. III:4 as they constituted *unjustifiable discrimination* and a *disguised trade restriction*.²⁰²

4.24 We recall that PaCE was enacted with the objective of providing consumer information pertaining to the PIF products with the view to safeguard the health of infants.²⁰³ Asgard did not unilaterally apply the regulatory measure. The Asgardian Legislature invited comments on the draft legislation from all stakeholders.²⁰⁴ The representations made by the APMA were acknowledged by the Asgardian Legislature. The Legislature debated upon the need for implementing the standards for PaCE as well as the fairness of the time period given for compliance.²⁰⁵ It duly considered whether compliance with the standards of PaCE was economically and realistically viable or not.²⁰⁶ Asgard did not have any restrictive objective in its implementation of PaCE. Rather, its objective was to ensure that the Asgardian population was made aware of the risks associated with certain ingredients of PIF products at the earliest. Thus, it cannot be said that Asgard failed in its duty to negotiate or cooperate. The Agatean Companies had notice of the possible implementation of PaCE since July 2014; they were invited to make their representations;²⁰⁷ and further these representations were duly considered while keeping the health objective of PaCE in mind. Asgard implemented PaCE as it was the least restrictive trade measure which required the mere specification of all constituent ingredients of PIF products. The requirements of PaCE were necessary for its objective of safeguarding infant health.

4.25 Hence, PaCE complies with the Chapeau of Art. XX as it does not constitute arbitrary or unjustifiable discrimination and is not a disguised trade restriction on international trade. In light of the above arguments, it is submitted that PaCE is consistent with Art. III:4 of GATT.

²⁰² *Id.*

²⁰³ See ¶ 2.6.

²⁰⁴ Fact Sheet ¶ 6.

²⁰⁵ Fact Sheet, Exhibit 3, FALL SESSION OF THE PARLIAMENT 2014, *Extracts from debates: 28th – 29th August*.

²⁰⁶ *Id.*

²⁰⁷ Fact Sheet ¶ 6.

REQUEST FOR FINDINGS

Asgard requests the panel to:

1. Find that the PaCE is consistent under Article III:4 of the GATT. Alternatively, find that PaCE is justifiable under the exception of Article XX (b) of the GATT.
2. Find that PaCE is consistent under Article 2.1 of the TBT Agreement.
3. Find that PaCE is consistent under Article 2.2 of the TBT Agreement.