TEAM CODE: 146R

BEFORE THE PANEL ESTABLISHED BY WTO DSB

ASGARD: MEASURES CONCERNING POWDERED INFANT FORMULA

COMPLAINANT: AGATEA

WT/DSxxx

WRITTEN SUBMISSION FOR THE RESPONDENT

SEVENTH GNLU INTERNATIONAL MOOT COURT COMPETITION

2015

TABLE OF CONTENTS

LIST OF ABBREVIATIONS v

INDEX OF AUTHORITIES vii

STATEMENT OF FACTS xi

MEASURE OF ISSUES xiii

SUMMARY OF PLEADINGS xiv

LEGAL PLEADINGS 1

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

1.1. PACE IS NOT A TECHNICAL REGULATION WITHIN THE MEANING OF THE TBT AGREEMENT 1

1.1.1. COMPLIANCE WITH PACE IS NOT MANDATORY 2

1.2. THE IMPORTED PIFS IMPORTED AND LIKAN ARE NOT LIKE PRODUCTS 2

1.2.1. PHYSICAL CHARACTERISTICS OF THE PRODUCTS ARE NOT SIMILAR 3

1.2.2. END USES OF THE PRODUCTS IN QUESTION ARE NOT SIMILAR 4

1.2.3. CONSUMER TASTES AND PREFERENCES ARE NOT SAME 4

1.2.4. THE PRODUCTS FALL UNDER THE SAME TARIFF CLASSIFICATION 5

1.2.5. ANALYSIS OF THE CROSS PRICE ELASTICITY OF DEMAND OF THE PRODUCTS INDICATES THAT THE PRODUCTS ARE NOT SUBSTITUTABLE 6

1.2.6. GROUPING OF PRODUCTS UNDER THE SAME HEADING UNDER ART.2 OF PACE IS OF NO CONSEQUENCE 7

1.3. *IN ANY CASE*, PACE DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO PIFS IMPORTED FROM AGATEA 7

1.3.1. THE CONDITIONS OF COMPETITION IN ASGARD'S MARKET WERE NOT MODIFIED TO THE DETRIMENT OF PIFS IMPORTED FROM AGATEA 8

1.3.1.1. GENUINE RELATIONSHIP BETWEEN THE MEASURE IN QUESTION AND UNFAVOURABLE IMPACT ON IMPORTED PIFS IS ABSENT 8

1.3.1.2. PACE DID NOT DISCRIMINATE AGAINST IMPORTED PIFS 9

1.3.2. THE MEASURE STEMS EXCLUSIVELY FROM A LEGITIMATE REGULATORY DISTINCTION 10

2. PACE IS CONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. 2.2 OF THE TBT AGREEMENT 11

2.1. PACE SEEKS TO ACHIEVE A LEGITIMATE OBJECTIVE 12

2.2. PACE IS NOT MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE 13

2.2.1. PACE CONTRIBUTES TO THE FULFILMENT OF THE LEGITIMATE OBJECTIVE 13

2.2.2. PACE IS NOT MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE 14

2.2.3. GRAVE CONSEQUENCES ARISE FROM NON-FULFILLMENT OF THE OBJECTIVE 15

2.2.4. THERE ARE NO REASONABLY AVAILABLE ALTERNATIVES 16

3. PACE IS CONSISTENT WITH ASGARD'S OBLIGATIONS UNDER ART. III:4 OF THE GATT 16

3.1. THE IMPORTED PIFS AND LIKAN ARE *NOT LIKE* PRODUCTS 17

3.2 PACE IS A "*LAW, REGULATION OR REQUIREMENT*" FOR THE PURPOSES OF ART. III:4 OF THE GATT 17

3.3. PACE DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO IMPORTED PIFS 17

3.3.1. PACE DOES NOT ACCORD PROTECTION TO LIKAN 18

3.3.1.1. ACCORDANCE OF PROTECTION IS A NECESSARY FACTOR IN EXAMINING LESS FAVOURABLE TREATMENT 18

3.3.1.2. PACE DOES NOT PROTECT LIKAN 19

3.3.2. THE ALTERED MARKET SHARE OF THE IMPORTED PIFS IS ATTRIBUTABLE TO THE CHANGED CONSUMER TASTES AND PREFERENCES AND NOT TO THE ASYMMETRIC IMPACT OF PACE 19

3.4. *IN ANY CASE*, PACE IS JUSTIFIED UNDER ART. XX(B) OF THE GATT 21

3.4.1. PACE FALLS WITHIN THE SCOPE OF ART. XX(B) OF THE GATT 21

3.4.1.1. PACE FALLS WITHIN THE POLICIES DESIGNED TO PROTECT HUMAN HEALTH AND LIFE 21

3.4.1.2. PACE IS 'NECESSARY' TO ACHIEVE THIS OBJECTIVE 21

3.4.2. PaCE satisfies requirements of the chapeau of Art. XX 21

Request for Findings 23

LIST OF ABBREVIATIONS

¶	PARAGRAPH
ACWL	ADVISORY CENTRE ON WTO LAW
ADOH	ASGARD DEPARTMENT OF HEALTH
ADOL	ASGARD DEPARTMENT OF LAW AND JUSTICE
ANNEX.	ANNEXURE
APMA	AGATEAN PROCESSED FOOD MEMBERS ASSOCIATION
ART.	ARTICLE
BERKELEY J. INT'L L	BERKLEY JOURNAL OF INTERNATIONAL LAW
CSCPHN	CIRCLE SEA CODE ON PUBLIC HEALTH AND NUTRITION
GATT B.I.S.D	GENERAL AGREEMENT ON TARIFFS AND TRADE BASIC INSTRUMENTS AND SELECTED DOCUMENTS
DSB	DISPUTE SETTLEMENT BOARD
EC	EUROPEAN COMMUNITY
ED.	EDITOR
EDN.	EDITION
FSC	FOREIGN SALES CORPORATION
Id.	IBIDEM
I.L.M.	INTERNATIONAL LEGAL MATERIAL
ISO/IEC	INTERNATIONAL ORGANIZATION FOR STANDARDIZATION/ INTERNATIONAL ELECTROTECHNICAL COMMISSION
NGO	NON-GOVERNMENT ORGANIZATION

J. WORLD TRADE	JOURNAL OF WORLD TRADE
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
PaCE	PACKAGING OF COMMODITIES AND ITS ENFORCEMENT
PIF	POWDERED INFANT FORMULA
TBT AGREEMENT	TECHNICAL BARRIERS TO TRADE
U. CHI. L. REV.	UNIVERSITY OF CHICAGO LAW REVIEW
U.N.T.S.	UNITED NATIONS TREATY SERIES
WTO	WORLD TRADE ORGANIZATION

WTO APPELLATE BODY REPORTS

1. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WT/DS332/AB/R (Dec. 3, 2007).
2. Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999).
3. Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes,* WT/DS302 (May 19, 2005).
4. Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).
5. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).
6. Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (Oct. 23, 2002).
7. Appellate Body Report, *Japan - Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Feb. 14, 1997).
8. Appellate Body Report, *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).
9. Appellate Body Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/AB/R (June 17, 2011).
10. Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).
11. Appellate Body Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 24, 2012).
12. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012).
13. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).
14. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (Nov. 6, 1998).

WTO PANEL REPORTS

1. Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).
2. Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R (May 29, 2002).
3. Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs,* WT/DS290/R (Mar. 15, 2005).
4. Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (Apr. 6, 1999).
5. Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R (Nov. 1, 1996).
6. Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/R, WT/DS386/R (Nov. 18, 2011).
7. Panel Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011).
8. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R (Jan. 29, 1996).

GATT PANEL REPORT

1. Report of the Panel, *US–Section 337 of the Tariff Act of 1930*, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345, 383 (1989).
2. Report of the Panel, *United States – Imports of Certain Automotive Spring Assemblies*, ¶ 56, L/5333 (June 11, 1982), GATT B.I.S.D. (30th Supp.) at 107, 119 (1983).
3. Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 4.28, DS21/R (Sep. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155, 182 (1991).

UNITED STATES CASES

1. United States of America v. Approximately 81,454 Cans of Baby Formula, Appeal of Kaloti Wholesale, Inc., 560 F.3d 638, 640 (7th Cir. 2009).

BOOKS

1. 3 Ludivine Tamiotti, *Article 2 TBT: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO- TECHNICAL BARRIERS AND SPS MEASURES (2007).
2. Benn McGrady, TRADE AND PUBLIC HEALTH (1st edn., 2011).
3. Catherine Button, THE POWER TO PROTECT- TRADE, HEALTH AND UNCERTAINTY IN THE WTO (1st edn., 2004).
4. Michael J. Trebilcock & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE (3d edn., 2005).
5. Mitsuo Matsushita *et al.,* THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY (2d edn., 2004).
6. Nicolas F. Diebold, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES - "LIKENESS IN WTO/GATS" (Dr. Lorand Bartels *et al.* eds., 1st edn., 2010).
7. Robert S. Pindyck *et al.,* MICROECONOMICS (7th edn., 2011).

ARTICLES

1. Alan O. Sykes, *The Least Trade Restrictive Means*, 70(1) U. CHI. L. REV. 403 (2003).
2. David Morris, *Diabetes, Chronic Illness and the Bodily Roots of Ecstatic Temporality*, 31(4) HUMAN STUDIES 399 (Dec. 2008).
3. Donald H. Regan, *Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariff and Trade*, 37 J. WORLD TRADE 737 (2003).
4. Dr. Corrina Hawkes, *Nutrition Labels and Health Claims: The Global Regulatory Environment,* WORLD HEALTH ORGANIZATION, GENEVA (2004).
5. Edward S. Tsai, *Like is a Four-Letter Word- GATT Article III's Like Product Conundrum*, 17 BERKELEY J. INT'L L. 26 (1999).
6. Frieder Roessler, *Beyond the Ostensible*, 37(4) J. WORLD TRADE 737 (2003).
7. Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US – COOL,* 8 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 1 (Mar. 2013).
8. Joel P. Trachtman *et al.*, *Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 737 (2003).

9. Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most Favoured nation Treatment or Equal Treatment?*, 36(5) J. WORLD TRADE 921 (2002).
10. O. Snorgaard & C. Binder, *Monitoring Of Blood Glucose Concentration In Subjects With Hypoglycaemic Symptoms During Everyday Life*, 300(6716) BRITISH MEDICAL JOURNAL (Jan. 6, 1990).
11. Philip E. Graves & Robert L. Sexton, *Cross Price Elasticity and Income Elasticity of Demand: Are Your Students Confused?*, 54(2) THE AMERICAN ECONOMIST 107 (Jan. 2009).
12. Richard Maffeo, *Back to Basics: Helping Families Cope with Type I Diabetes*, 97(6) THE AMERICAN JOURNAL OF NURSING (June 1997).
13. Susan M. Krebs-Smith *et al., The Effects of Variety in Food Choices on Dietary Quality,* 87(7) JOURNAL OF THE AMERICAN DIETETIC ASSOCIATION 897 (1987).
14. Wilfrid W. Payne, *Diabetes Mellitus In Childhood*, 2(3958) THE BRITISH MEDICAL JOURNAL (Nov. 14, 1936).
15. Yoshimichi Ishikawa, *Plain Packaging Requirements and Article 2.2 of the TBT Agreement,* 30 CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS 72 (2012).

AGREEMENTS AND CONVENTIONS

1. Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079.
2. General Agreement on Trade and Tariffs, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

MISCELLANEOUS

1. National Implementation of the International Code of Breast-Milk Substitutes (2011).
2. Report of the Working Party, *Border Tax Adjustments*, L/3464 (Dec. 2, 1970).
3. World Health Assembly Res. WHA34.22, International Code on Marketing of Breast-Milk Substitutes, 34th Sess., May 21, 1981.

THE PARTIES

The Respondent Asgard is a developing country, with a population of 10 million. It is a member of a group of nine island-nations located in the Circle Sea – all of which are members of the WTO. The Complainant Agatea is a developed country located in the Indian sub-continent. Castle, Viking, Flora and Theos are four corporations located in Agatea which control ninety percent of the global market in dairy and health supplement products. They export Powdered Infant Formula (hereinafter referred to as "**PIFs**") to Asgard under the trade-names Rincewind, Linacre, Diamanda and Cementac (hereinafter referred to as "**imported PIFs**"). Prior to November 2014, all of Asgard's requirements for PIFs were being met by imports from Agatea.

THE NINE REALMS SUMMIT

In January 2014, Asgard hosted the Nine Realms Summit. On the final day, all the Circle Sea nations finalized the Circle Sea Code on Public Health and Nutrition (hereinafter referred to as "**CSCPHN**"). Art. 12 of the CSCPHN called on the parties to ensure that nutritious food was available within their jurisdictions to infants at all times. Moreover, information regarding the nutritious content of food was to be made publicly accessible.

SPIKE IN TYPE-1 DIABETES AMONG CHILDREN OF ASGARD

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

RESPONSE FROM THE GOVERNMENT OF ASGARD

In response, the Asgard Department of Law and Justice (hereinafter referred to as "**ADOL**") prepared the draft Regulation No. 8/2014 "*Packaging of Commodities and its Enforcement"* (**PaCE**) in July, 2014. On July 25, 2014, the *Agatean Processed Food Members Association* ("**APMA**") which represented the four importers, requested the ADOL to extend the deadline of October 31, 2014 to comply with the packaging requirements. The reasons cited for the request were loss of some amount of money, time and reputation that would result from a

recall of products already available for sale in or in transit to Asgard. This request was rejected by the ADOL since health of infants could not be compromised at any cost and adequate time had been given to all the producers.

PaCE was passed by the Parliament of Asgard on August 30, 2014. It required all the producers of PIFs to list out the ingredients and contents in terms of weight and percentage on the labels of the PIFs. The objective, as stated in the Statement of Objects and Reasons was to *"ensure that packaged food and food supplements exhibit their nutritional content in a manner that lets the public take an informed decision"*.

SEIZURE OF IMPORTED PIFS & ENTRY OF DOMESTIC PRODUCER

On June 26, 2014, ADOH approved Relicare's (an industrial company in Asgard) application for introducing its PIF called 'Likan' in the Asgardian market. Relicare's chairman announced that the new PIF would be launched in the market by the end of October 2014. The product was released on November 1, 2014. On the same day, ADOH officers conducted raids all across Asgard and seized all the imported PIFs for non-compliance with the requirements of PaCE. As a result, Likan registered brisk sales.

The fact that the four importers had pasted stickers on the PIFs listing out the ingredients did not affect compliance with Art. 3 of PaCE which required information about ingredients to be "*in print*" and therefore could not be interpreted to include stickers. The High Court of Krull dismissed the appeal of the importers and ordered the release of goods. In doing so, it left it to the discretion of the companies to repackage their products as per PaCE or dispose them in other world markets. The companies have, since March, 2015, complied with PaCE.

AGATEA'S REACTION

In presumed retaliation, Agatea planned to impose strict packaging and enforcement rules on energy drinks. This policy was formulated mindful of the fact that BigBull and Tadpole being products imported from Asgard held fifty-five percent of the Agatean market.

REQUEST FOR ESTABLISHMENT OF PANEL

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

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

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

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

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

- A measure is said to be inconsistent with Art. 2.1 when it is a technical regulation, the imported and domestic products in question are like in nature, and the measure accords less favourable treatment to the imported products.
- Compliance with the measure must be mandatory for it to qualify as a technical regulation. The legislative intention behind a measure is an important factor in determining the objective of the measure. The ruling party considered compliance with PaCE to be voluntary in nature and the words used in the Statement of Objects and Reasons of PaCE are not indicative of mandatory compliance. Thus, PaCE is not a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.
- PIFs imported from Agatea and Relicare's Likan are not like products within the meaning of Art. 2.1 of the TBT Agreement. The physical characteristics and health effects are different for both. The end use and consumer taste and preference of the imported PIFs and Likan also vary.
- An analysis of the cross price elasticity of the products indicates that the imported and domestic PIFs are not substitutable. Merely grouping them together under PaCE is only an analytical tool and is immaterial towards determining likeness of the products.
- PaCE did not modify the conditions of competition to the detriment of imported PIFs. A genuine relationship between PaCE and an unfavourable impact on competitive opportunities for imported PIFs is absent.
- A smaller market share of imported PIFs was due to their failure to comply with PaCE. It cannot be attributed to the foreign origin of imported PIFs. PaCE was origin-neutral in nature and had been applied uniformly to the imported and the domestic PIFs.
- Furthermore, PaCE stemmed from a legitimate regulatory distinction. It was implemented by Asgard in order to fulfil its obligations under the CSCPHN and had a legitimate objective of enabling the consumers to make an informed choice.
- The action of Asgardian Government to seize PIFs that did not comply with PaCE was justified as there was an existence between distinction (among imported PIFs and Likan) and the pursuit of the objective of enabling the consumers to make an

informed choice. Therefore, PaCE did not accord less favourable treatment to PIFs imported from Asgard.

II. PaCE is consistent with Asgard's Obligations under Art. 2.2 of the TBT Agreement

- A measure is said to be consistent with Art. 2.2 when it seeks to achieve a legitimate objective and is not more trade-restrictive than necessary to fulfil that objective, taking account of the risks arising from its non-fulfilment.
- PaCE was promulgated to safeguard health of the children by allowing the parents to make an informed choice about PIFs. Protection of human health has been recognised as a legitimate objective by the TBT Agreement. Thus, PaCE seeks to achieve a legitimate objective.
- The labelling requirements imposed by PaCE helped the parents make an informed choice about the PIFs. A majority of parents shifted to Likan from imported PIFs after they declared their ingredients on the labels. This indicates that PaCE contributed to the fulfilment of the objective.
- PaCE is not more trade restrictive necessary since it did not deny competitive opportunities to imported PIFs. It was applied equally to both both domestic and foreign products.
- Non-fulfillment of the objective would lead to grave consequences. The nature of risk, increase in instances of Type-1 diabetes among infants, is an important one. There are no reasonably available alternatives.
- PaCE is not an unnecessary obstacle to international trade.

III. PaCE is consistent with Asgard's obligations under Art. III:4 of the GATT

- A measure is said to be inconsistent with Art. III:4 of the GATT if the imported and domestic products are like in nature, the measure is under the ambit of Art. III:4 and the measure accords less favourable treatment to the imported products.
- Likan and the imported PIFs are not like products as they do not satisfy the traditional test of likeness since they have different physical characteristics, end uses, and consumer tastes and preferences. Additionally, the analysis of other relevant uncategorized evidence such as cross-price elasticity endorses the fact that products are not like.

- The provisions of the measure at issue, PaCE, which constitutes a law, affect internal sale, offering for sale, purchase, and distribution of the imported products. Hence, it is within the ambit of Art. III:4.
- The imported PIFs have not been accorded less favourable treatment as compared to Likan. This is because provisions of PaCE do not entail to protect the domestic product, Likan. It has been equally applied to all PIFs.
- The altered market share of the imported PIFs is attributable to the changed consumer tastes and preferences and not to the provisions of PaCE.

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

1. In the instant case, the regulation PaCE of the respondent mandated all PIF producers to declare the contents and ingredients of their products on the labels in order to help parents make an informed choice.[1] It is submitted that this provision is consistent with obligations of Asgard under Art 2.1 of the TBT Agreement.

2. Art. 2.1 of the TBT Agreement seeks to ensure that no country imposes such technical regulations that treat imported products less favourably than like domestic products.[2] For a measure to be inconsistent with Art 2.1, it must be proved that the measure is a 'technical regulation' **[1.1]**, the imported and domestic products are like in nature **[1.2]** and the measure accords less favourable treatment to the imported products **[1.3]**.[3] It is submitted that in this case, these conditions are not fulfilled and hence, PaCE is consistent with Asgard's obligations under Art. 2.1 of the TBT Agreement.

1.1. PACE IS NOT A TECHNICAL REGULATION WITHIN THE MEANING OF THE TBT AGREEMENT

3. Art. 2 of the TBT Agreement applies only when the measure in question is a technical regulation. Therefore, in the present case, in order to prove a violation of Art. 2.1, it must be shown that PaCE is, at the outset, a technical regulation. It is submitted that PaCE is not a technical regulation as defined in Annex 1.1 of the TBT Agreement.

4. The term 'technical regulation' has been defined as a "*document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory*".[4] Therefore, for a measure to be termed as a technical regulation, it must be in the form of a document that applied to an identifiable product or group of products, it must lay down product

[1] Exhibit 1, Fact on Record.
[2] Agreement on Technical Barriers to Trade, art. 2.1, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079.
[3] Appellate Body Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 87, WT/DS406/AB/R (Apr. 24, 2012) [hereinafter *US-Clove* Appellate Body Report]; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 202 , WT/DS381/AB/R (May 16, 2012) [hereinafter *US-Tuna* Appellate Body Report]; Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements,* ¶ 267, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter *US-COOL* Appellate Body Report].
[4] Agreement on Technical Barriers to Trade, annex. 1.1, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079.

characteristics and compliance with it must be mandatory **[1.1.1]**. Admittedly, PaCE is a document that lays down product characteristics. However, it is submitted that compliance with PaCE is not mandatory. Hence, PaCE is not a technical regulation.

1.1.1. COMPLIANCE WITH PACE IS NOT MANDATORY

5. It has been held that the objective of any legislation must be determined by considering the "*texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure*".[5]

6. The discussion in the Parliament of Asgard regarding implementation of PaCE indicates that the ruling party considered compliance with PaCE to be voluntary in nature. PaCE was perceived as an "*opportunity for companies to voluntarily adopt best practices*".[6] Making compliance mandatory was not the legislative intention behind PaCE. Furthermore, the Statement of Objects and Reasons of PaCE has referred to these measures as a 'standard' for reforming packaging and ensuring safety of infants.[7]

7. Further, it is submitted that the words used in PaCE are not indicative of mandatory compliance. The word 'shall' indicates mandatory compliance.[8] However, in Art. 3 of PaCE, the word 'shall' is absent and instead, 'may' has been used. Moreover, the Statement of Objects and Reasons of PaCE also states that entities involved in production of PIFs "*may adopt these standards*". These words indicate that compliance with PaCE was not mandatory.

8. Therefore, it is submitted that, PaCE does not satisfy all the elements to qualify as a technical regulation under Annex 1.1 of the TBT Agreement. It cannot be subjected to obligations under Art 2.1 and Art. 2.2 of the TBT Agreement, as the said obligations are imposed only on technical regulations.[9]

1.2. THE IMPORTED PIFS IMPORTED AND LIKAN ARE NOT LIKE PRODUCTS

9. It is submitted that the imported PIFs and the domestic PIF are not like products. Likeness of products is to be determined bearing in mind the physical characteristics of the

[5] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 371; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 314.
[6] Mr. Reid's statement, Exhibit 3, Fact on Record.
[7] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[8] Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs,* ¶ 7.453, WT/DS290/R (Mar. 15, 2005) [hereinafter *EC – Trademarks and Geographical Indications (Australia)* Panel Report]; Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 194, WT/DS231/AB/R (Oct. 23, 2002) [hereinafter *EC-Sardines* Appellate Body Report].
[9] Catherine Button, THE POWER TO PROTECT- TRADE, HEALTH AND UNCERTAINTY IN THE WTO, 85 (2004).

products **[1.2.1]**, their end uses **[1.2.2]**, the consumer tastes and preferences in relation to the products **[1.2.3]**, and their tariff classification **[1.2.4]**.[10] However, this is not a *closed list.* In this context, it was categorically stated by the Appellate Body in *EC-Asbestos* that *"the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence".* Hence, two more factors that can be examined in order to prove unlikeness of the products are analysis of cross-price elasticity of the products[11] **[1.2.5]** and grouping of products under the same heading vide Art.2 of PaCE **[1.2.6]**.[12]

10. Further, although these criteria address different aspects of the product in principle, they are interrelated.[13] In the light of the proposition enunciated in *EC-Asbestos,* it is settled that to conclusively determine the products at hand to be like, an analysis of *all* the relevant criteria should be made.[14] It follows that to prove that products are unlike, any one of these criteria may be disproved. It is submitted that in the present case, the physical characteristics, the end uses, the consumer tastes and preferences are not the same with respect to the imported PIFs and Likan. Hence, they are not like products.

1.2.1. PHYSICAL CHARACTERISTICS OF THE PRODUCTS ARE NOT SIMILAR

11. 'Characteristics' of a product are objectively definable features, qualities, attributes or other distinguishing marks that a product encompasses.[15] Health risks posed by a product have been held to be an important physical characteristic that must be considered while determining the likeness of products.[16]

12. Nutritional adequacy corresponds to the quality of the product.[17] In the present case, ADOH report had stated that imported PIFs were a health risk to the infants.[18] It is submitted

[10] Report of the Working Party, *Border Tax Adjustments*, ¶ 18, L/3464 (Dec. 2, 1970); *US-Clove* Appellate Body Report, *supra* note 3, ¶ 168; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 101, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos* Appellate Body Report].
[11] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 113.
[12] Appellate Body Report, *Japan - Taxes on Alcoholic Beverages,* ¶¶ 141-144, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Feb. 14, 1997) [hereinafter *Japan-Alcoholic Beverages II* Appellate Body Report].
[13] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 102.
[14] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 109.
[15] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 67.
[16] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 43.
[17] Susan M. Krebs-Smith *et al., The Effects of Variety in Food Choices on Dietary Quality,* 87(7) JOURNAL OF THE AMERICAN DIETETIC ASSOCIATION 897 (1987).
[18] ¶ 3, Fact on Record.

that excessive hunger or polyphagia is considered to be a symptom of Type-1 diabetes.[19] In the instant case, post the consumption of Likan, the toddlers have shown less frequent hunger pangs.[20] This clearly indicates that lesser health risks are associated with Likan. Health risks associated with a product are held to be an important physical characteristic.[21] This indicates a qualitative difference among the domestic PIF and imported PIFs.

13. Additionally, Relicare has claimed that its product is healthier. This is supported by the fact that in March 2015, when the imported PIFs complied with PaCE and re-entered the market, they were able to regain just forty percent of the market that they had once dominated as sole suppliers. This may be due to lower levels of corn syrup and sugar in Likan. Hence, the imported PIFs pose a greater health risk. The physical characteristics of the products not being same, they are not like products.

1.2.2. END USES OF THE PRODUCTS IN QUESTION ARE NOT SIMILAR

14. Capability of performing a specific function plays a pivotal role in determining the product's end use.[22] In the case at hand, Likan is a complete substitute to human milk whereas the imported PIFs are merely partial substitutes.[23] When infants are fed with Likan, they do not require any other nutritional supplements. This is not the case with partial substitutes to human milk i.e., imported PIFs. This is evident from the fact that the frequency of hunger pangs observed in infants declined when the parents shifted to Likan.[24] Therefore, it is submitted that the end uses of the products are not similar.

1.2.3. CONSUMER TASTES AND PREFERENCES ARE NOT SAME

15. The consumer tastes and preferences are influenced by the health risks associated with the products.[25] In the instant case, even though Likan is ten percent more expensive than the imported PIFs, it is the preference for a majority of the parents.[26] Relicare had declared the

---

[19] O. Snorgaard & C. Binder, *Monitoring Of Blood Glucose Concentration In Subjects With Hypoglycaemic Symptoms During Everyday Life*, 300(6716) BRITISH MEDICAL JOURNAL 16, 17 (Jan. 6, 1990); David Morris, *Diabetes, Chronic Illness and the Bodily Roots of Ecstatic Temporality*, 31(4) HUMAN STUDIES 399, 412 (Dec. 2008); Richard Maffeo, *Back to Basics: Helping Families Cope with Type I Diabetes*, 97(6) THE AMERICAN JOURNAL OF NURSING 36, 37 (June 1997); Wilfrid W. Payne, *Diabetes Mellitus In Childhood*, 2(3958) THE BRITISH MEDICAL JOURNAL 960, 962 (Nov. 14, 1936).

[20] Exhibit 6, Fact on Record.

[21] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 43.

[22] *US-Clove* Appellate Body Report, *supra* note 3, ¶ 131.

[23] ¶ 9, Fact on Record.

[24] Exhibit 6, Fact on Record.

[25] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 47.

[26] Exhibit 6, Fact on Record.

ingredients and contents of Likan. As a result, parents reposed trust in the product.[27] On the other hand, due to the ADOH report and failure of the Agatean companies to declare the contents and ingredients of their products changed the public perception to their detriment. This can be inferred from the fact that when the imported PIFs finally complied with PaCE and re-entered the market in March, their share declined from hundred percent to mere forty percent.[28] Moreover, the report of ADOH supports the fact that the high content of corn syrup and sugar in the imported PIFs is a cause of increasing instances of Type-1 diabetes among children. It was described as an 'emergency situation'.[29] Independent studies conducted by NGOs and other organisations have reached similar conclusions.[30] The impact of imported PIFs on the health of the children also influenced the consumer tastes and preferences.

16. The flavour of a product is directly related to the diverse perceptions of the product by consumers. Likan is available in all variants that are offered by imported PIFs. Additionally, Likan also offers carrot flavour and is planning to introduce more vegetable flavoured formulas in the market.[31] This implies that perception of Likan amongst Asgardian consumers differ as compared to imported PIFs. Since consumer tastes and preferences towards the products are not the same, they are not like products.

1.2.4. THE PRODUCTS FALL UNDER THE SAME TARIFF CLASSIFICATION

17. The Harmonized Tariff Schedule of the World Customs Organization *vide* tariff classification number 2106.90 provides the classification for "*food preparations not elsewhere specified or included".* This is supplemented by Customs Ruling of Director of New York Seaport under which the tariff classification for *"powdered infant formula"* was provided as 2106.90.6099 under the Harmonised Tariff Schedule of the United States.[32] This is analogous to the classification under the World Customs Organisation. Therefore, *'powdered infant formula'* is classified under the label *"food preparations not elsewhere specified or included".*

[27] Exhibit 6, Fact on Record.
[28] Clarification no. 1, Fact on Record.
[29] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[30] ¶ 3, Fact on Record.
[31] Exhibit 6, Fact on Record.
[32] Office of Director New York Seaport, Letter to Mr. Maraney regarding the tariff classification of infant formula preparation (1990) *available at* http://rulings.cbp.gov/detail.asp?ru=857631&ac=pr.

18. In the present case, it is submitted the products of the Agatean companies and Relicare satisfy the definition of a PIF under Art. 2 of PaCE. Hence, both kinds of products fall under the same tariff classification.[33]

1.2.5. ANALYSIS OF THE CROSS PRICE ELASTICITY OF DEMAND OF THE PRODUCTS INDICATES THAT THE PRODUCTS ARE NOT SUBSTITUTABLE

19. Cross-price elasticity of demand of product *"measures the responsiveness in the quantity demand of one good when a change in price takes place in another good"*.[34] Substitute goods have positive cross price elasticity. This means that increase in price of one good leads to an increase in demand of the other.[35] It is an economic tool of market analysis.[36] If we understand it in the reverse manner, it means that if increase in price of a good leads to increase in demand of the other, the goods are substitutes of each other. The nutritional adequacy of a product is directly related to its impact on health and hence, plays a pivotal role in determining the characteristics of a product.[37]

20. In the present case, when the imported PIFs finally complied with PaCE and finally entered the market in March, their market share reduced to forty percent. This is in spite of the fact that Likan is ten percent more expensive than the imported PIFs. The reason for this can be attributed to the difference in nutritional adequacy of the products. This is evident by Relicare's claims that portray Likan as a complete substitute to human milk and *"more nutritious, healthy, and better suited to the needs of Asgard's young populace"*.[38] In an ideal market scenario, if the two kinds of products had been substitutable, the increased price of Likan would have resulted in increase in demand of the imported PIFs, which did not happen. Therefore, it is submitted that the two kinds of products are not substitutable.

---

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

[34] Robert S. Pindyck *et al.,* MICROECONOMICS, 34,35 (7th edn., 2011); Philip E. Graves & Robert L. Sexton , *Cross Price Elasticity and Income Elasticity of Demand: Are Your Students Confused?*, 54(2) THE AMERICAN ECONOMIST 107 (Jan. 2009).

[35] Pindyck, *supra* note 32.

[36] Nicolas F. Diebold, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES - "LIKENESS IN WTO/GATS", 334 (Dr. Lorand Bartels *et al.* eds., 1st edn., 2010); *Japan-Alcoholic Beverages II* Appellate Body Report, *supra* note 12, ¶ 109.

[37] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 113.

[38] Exhibit 2, Fact on Record.

1.2.6. GROUPING OF PRODUCTS UNDER THE SAME HEADING UNDER ART.2 OF PACE IS OF NO CONSEQUENCE

21. The mere fact that the products have been grouped under the same heading in PaCE does not confer them the label of 'like products'. It is merely a *"preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis".*[39] The Appellate Body in *Korea-Alcoholic Beverages* described such grouping as an *"analytical tool"*.[40] Therefore, it is submitted that the grouping of Likan and the imported PIFs under Art. 2 of PaCE is merely an *analytical tool* and does not imply that the products are like in nature.

22. It is submitted that in the present case, the physical characteristics, the end uses, the consumer tastes and preferences are not the same with respect to the imported PIFs and Likan. Hence, they are not like products. Additionally, the analysis of cross-price elasticity implies that on account of varying nutritional adequacy of the products i.e., qualitative difference, the share of Likan has risen unusually and the products are not substitutable.

1.3. *IN ANY CASE*, PACE DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO PIFS IMPORTED FROM AGATEA

23. A technical regulation is said to accord less favourable treatment to imported products if it modifies conditions of competition in the relevant market to the detriment of imported products or denies effective equality of opportunities for imported products **[1.3.1]** and if it does not stem exclusively from a legitimate regulatory distinction **[1.3.2]**.[41] Further, the "*design, architecture, revealing structure, operation and application*" of the regulation should show that the detriment to the competitive opportunities of the imported products reflects discrimination against the imports.[42] It is submitted that in the instant case, that these conditions are not satisfied.

[39] Panel Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 10.60, WT/DS8/R, WT/DS10/R, WT/DS11/R (Nov. 1, 1996) [hereinafter *Japan- Alcoholic Beverages II* Panel Report].
[40] *Japan-Alcoholic Beverages II* Appellate Body Report, *supra* note 12, ¶¶ 141-144.
[41] *US-Clove* Appellate Body Report, *supra* note 3, ¶¶ 166, 176, 182; *US-Tuna* Appellate Body Report*, supra* note 3, ¶¶ 214, 298.
[42] *US-Clove* Appellate Body Report, *supra* note 3, ¶ 182.

1.3.1. THE CONDITIONS OF COMPETITION IN ASGARD'S MARKET WERE NOT MODIFIED TO THE DETRIMENT OF PIFS IMPORTED FROM AGATEA

24. In order to prove that a measure at issue modified the conditions of competition in the relevant market to the detriment of imported products, it must be shown that there exists a genuine relationship between the measure and the unfavourable impact on competitive opportunities for imported products.[43] It must be analysed whether it is the governmental measure at issue that affected the conditions of competition for the imported and domestic like products.[44]

25. Moreover, if the alleged detrimental effect on the imported products cannot be attributed to its foreign origin, but to some extraneous factor, the effect cannot be evidence of less favourable treatment.[45] Assuming but not conceding that the imported PIFs and Likan are like in nature, it cannot be concluded that PaCE led to a modification of the conditions of competition to the former's detriment.[46]

1.3.1.1. GENUINE RELATIONSHIP BETWEEN THE MEASURE IN QUESTION AND UNFAVOURABLE IMPACT ON IMPORTED PIFS IS ABSENT

26. In the present case, it is submitted that a genuine relationship between the measure in question, PaCE and an unfavourable impact on competitive opportunities for imported PIFs is absent. Relicare's Likan is genuinely better than all the imported products. It is a complete substitute to human milk and more nutritious.[47] It meets the dietary requirements of the infants.[48] It complied with the labelling requirements and published the ingredients used in making the PIF. Parents have chosen to buy Likan even after knowing the ingredients it contains. The steady consumer loyalty proves that Likan gained the trust of parents due to its superiority in providing nutrition to infants, and not because of any alteration in the

---

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

[44] *Korea –Various Measures on Beef* Appellate Body Report, *supra* note 41, ¶ 149.

[45] *EC – Trademarks and Geographical Indications (Australia)* Panel Report*, supra* note 8, *¶* 7.464; Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes,* ¶ 96, WT/DS302 (May 19, 2005) [hereinafter *Dominican Republic-Import and Sale of Cigarettes* Appellate Body Report] *used in* United States' oral statement at the second substantive meeting of the Panel, *US-Clove* Appellate Body Report, *supra* note 3, ¶50.

[46] Report of the Panel, *US–Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345, 383 (1989) [hereinafter *US – Section 337* GATT Panel Report].

[47] ¶ 9, Fact on Record.

[48] Exhibit 6, Fact on Record.

conditions of competition brought about by PaCE. This is evident from the fact that consumers have continued to purchase it for their children, even after imported PIFs became available in the market from March 2015.

1.3.1.2. PaCE DID NOT DISCRIMINATE AGAINST IMPORTED PIFs

27. Further, PaCE was origin-neutral, and did not discriminate between the PIFs produced by Relicare and the Agatean companies. The alleged detriment cannot be attributed to the foreign origin of those products. It is not sufficient for the complainants to simply demonstrate that PaCE has had some detrimental effect on the sale of imported products.[49] It is possible to distinguish between like products, without affording any protection to the domestic products or according less favourable treatment to imported products.[50]

28. PaCE does not distinguish between domestic PIF and imported PIFs. Art. 3 of PaCE provides that 'all' PIFs, imported as well as domestic, must comply with the labelling requirements.[51] The reason Likan gained a considerable market share was because it adhered to the regulations and was committed to the objective of providing an informed choice to the parents. Furthermore, there is no evidence to show that ADOH and Relicare had colluded to prepare for Likan's launch at an opportune moment. In fact, Relicare had taken the decision to launch Likan even before the ADOH released its report identifying PIFs as the cause of increased risk of diabetes among infants.[52]

29. Moreover, a smaller market share of imported products cannot convert an origin-neutral measure into one affording less favourable treatment in the legal sense.[53] In the present case, though the imported PIFs have lost sixty percent of the market share, it is not because of their foreign origin. They lost this share because of their failure to comply with PaCE. Reasonable amount of time was given to the Agatean producers of PIFs to implement the measures on the packaging of these products. They were also endowed with the financial might to implement these measures within the time period.[54] It was their reluctance to incur some additional cost for the benefit of health of infants of Asgard that led to non-compliance with PaCE. The domestic producer was able to comply with the regulation on time. As a

[49] Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements,* ¶ 7.264, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter *US-COOL* Panel Report].
[50] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 268.
[51] Art. 3, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[52] Clarification no. 14, Fact on Record.
[53] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 55. *See Dominican Republic-Import and Sale of Cigarettes* Appellate Body Report, *supra* note 43, ¶ 9.
[54] Exhibit 2, Fact on Record.

consequence, their products were seized and they lost some market share to the domestic producer.

30. Therefore, it is submitted that the design, architecture, revealing structure, operation and application of PaCE are not indicative of any such detriment to the competitive opportunities of imported products. PaCE applies uniformly to both imported PIFs and indigenous PIFs and it did not deny competitive opportunities to PIFs imported from Agatea.

1.3.2. THE MEASURE STEMS EXCLUSIVELY FROM A LEGITIMATE REGULATORY DISTINCTION

31. Any distinction, especially the ones that are based exclusively on particular product characteristics or on particular processes and production methods, would not *per se* constitute less favourable treatment.[55] For the purpose of ascertaining the inconsistency of a measure with Art. 2.1, it must be shown that the detrimental impact is based on legitimate regulatory distinction.[56] Similarly, it must also be proved that the measure was not applied even-handedly.[57] This can be achieved by establishing that the rationale for distinction was not related to the pursuit of the objective.[58]

32. In the present case, the objective of PaCE was to protect the health of 500,000 infants of Asgard by ensuring that the parents had an opportunity to make an informed choice while purchasing PIFs for their children. The measure was implemented by Asgard due to its obligations under the CSCPHN.[59] According to various studies conducted by the ADOH as well as by NGOs and public interest groups, an alarming spike in Type-1 diabetes was found among children below the age of five.[60] The reason for the same has been concluded to be PIFs.[61] Labelling requirements act as means to assist consumers to make healthy food choices.[62] Similarly in the instant case, the measure was implemented to enable parents to choose between the PIFs or even whether to use PIF or not after being informed about the contents of the product.

---

[55] *US – Clove Cigarettes* Appellate Body Report, *supra* note 3, ¶ 169.

[56] *US – Clove Cigarettes* Appellate Body Report, *supra* note 3, ¶ 169.

[57] *US – Clove Cigarettes* Appellate Body Report, *supra* note 3, ¶ 215; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 225; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WT/DS58/AB/R (Nov. 6, 1998).

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

[59] ¶ 2, Fact on Record.

[60] ¶¶ 3, 5, Fact on Record.

[61] ¶ 3, Fact on Record.

[62] *See* Dr. Corrina Hawkes, *Nutrition Labels and Health Claims: The Global Regulatory Environment,* WORLD HEALTH ORGANIZATION, GENEVA (2004); Benn McGrady, TRADE AND PUBLIC HEALTH, 173 (1st edn., 2011).

33. In the case of *United States of America (Plaintiff-Appellee)* v. *Approximately 81,454 Cans of Baby Formula, Defendant. Appeal of: Kaloti Wholesale, Inc,*[63] the appellant had mislabelled the expiry date and contents of cans of baby food using stickers. The solvents used to change the label, along with the unhygienic condition of the warehouse where re-labelling took place was considered dangerous to the health of babies. It is possible that the similar malpractices could have happened in this case as well. Stickers could have been mislabelled or removed before they reached the consumers. It would thereby negate the objective of PaCE and endanger health of the infants. PaCE clearly specified the ingredients to be 'printed', to ensure the consumers could make an informed choice upon reading the labels. There is a reasonable nexus between the requirement of packaging that states the ingredients of the PIF and the protection of health. Therefore, the government was justified in insisting upon ingredients to be printed, and not stuck by way of stickers on the containers of PIFs.

34. Furthermore, the foreign companies had expressed concerns about the cost of complying with PaCE. However, the costs for market participants will not be constant the entire time. Such costs would be greater immediately after a regulatory change and would subsequently decline with time.[64] Therefore, it is submitted that these concerns hold no ground. The cost is necessary to achieve a legitimate objective of protecting health of infants and is in line with its obligations under the CSCHPN.

35. Resultantly, there is a nexus between the distinction (among imported PIFs and Likan) and the pursuit of the objective of enabling the consumers to make an informed choice; hence, it is submitted there is an existence of a legitimate regulatory distinction. Therefore, it is submitted that, PaCE did not accord less favourable treatment to PIFs imported from Agatea and is consistent with Art. 2.1 of the TBT Agreement.

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

36. It is well established that for a measure to be consistent with Art 2.2 of the TBT, it must seek to achieve a legitimate objective **[2.1]** and it should not be more trade restrictive

[63] United States of America (Plaintiff-Appellee) v. Approximately 81,454 Cans of Baby Formula, Defendant. Appeal of: Kaloti Wholesale, Inc, 560 F.3d 638, 640 (7th Cir. 2009).
[64] *US-COOL* Panel Report, *supra* note 47, ¶ 7.269.

than necessary to fulfill that legitimate objective **[2.2]**.[65] It is submitted that in the present case, PaCE complies with both the conditions.

2.1. PaCE SEEKS TO ACHIEVE A LEGITIMATE OBJECTIVE

37. The first step in examining the legitimacy of the objective is the identification of the objective of the measure at issue. The objective of any measure can be determined by considering text of the statute, legislative history, and other evidence regarding the structure and operation of the measure.[66] Moreover, the respondent member's characterisation of the objective can be taken into account, although the Panel is not bound by it. A 'legitimate objective' refers to *"an aim or target that is lawful, justifiable, or proper"*.[67]

38. In the present case, the objective of PaCE has been clearly postulated as safeguarding the health of the 500,000 children[68] by allowing parents to make an informed choice about PIFs.[69] Studies conducted by ADOH and several NGOs and public interest groups have indicated that high levels of corn syrup and sugar content in the PIFs have resulted in an increase in incidence of Type-1 diabetes among children.[70] The measure has been adopted to protect against this risk. Additionally, the respondents are a party to the Circle Sea Code which calls upon all members to take steps to ensure relevant information regarding the nutritious content of food is made publically available.[71] It is not in doubt that the present measure has been implemented in consonance with this obligation.

39. Art 2.2 of TBT Agreement explicitly lists 'protection of human health' as a legitimate objective. Moreover, the Panel in *US-COOL*[72] held that providing information to the consumers by way of labels is also a legitimate objective within the meaning of Art. 2.2. Art. VI:4 of the GATS lists out 'protection of consumers' as a legitimate objective. Therefore, it is submitted that PaCE has been implemented to pursue a legitimate objective.

---

[65] Panel Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 7.333, WT/DS406/R (Sept. 2, 2011) [hereinafter *US-Clove* Panel Report]; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 314, 318, WT/DS381/R (June 13, 2012) [hereinafter *US-Tuna* Panel Report].
[66] *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 314.
[67] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 370.
[68] ¶ 1, Fact on Record.
[69] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[70] ¶¶ 3, 4, Fact on Record.
[71] ¶ 2, Fact on Record.
[72] *US-COOL* Panel Report, *supra* note 47, ¶ 7.640.

2.2. PaCE IS NOT MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE

40. The assessment of the necessity of a measure requires 'weighing and balancing' factors such as the degree of contribution made by the measure to the legitimate objective **[2.2.1]**, the trade-restrictiveness of the measure **[2.2.2]**, and the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure **[2.2.3]**.[73] This test is mainly used for assessment under Art XX. However, the jurisprudence of Art XX of GATT has been held to be applicable to Art 2.2 of TBT Agreement as well.[74] Additionally, a comparative analysis of the measure at issue and the alternatives is also used to establish its necessity **[2.2.4]**.[75] It is submitted that since both relational and comparative analysis prove the necessity of PaCE, it is not more trade-restrictive than necessary.

2.2.1. PaCE CONTRIBUTES TO THE FULFILMENT OF THE LEGITIMATE OBJECTIVE

41. A measure is said to contribute to the achievement of the legitimate objective when there is '*a genuine relationship of ends and means between the objective pursued and the measure at issue*'.[76] The degree of contribution can be determined from the design, structure, and operation of the measure.[77] A measure need not make any minimum degree of contribution to the objective. Even if *some* contribution has been made, this test is said to have been satisfied.[78] Moreover, the sixth recital in the Preamble of the TBT Agreement permits the members to pursue the legitimate objectives *"at the levels [the Member] considers appropriate"*.[79]

---

[73] *Korea-Beef* Appellate Body Report, *supra* note 41, ¶ 164; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 321; Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US – COOL,* 8 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 1, 11 (Mar. 2013).

[74] *US-Clove* Panel Report, *supra* note 63, ¶ 7.368; *US-COOL* Panel Report, *supra* note 47, ¶ 7.667; 3 Ludivine Tamiotti, *Article 2 TBT: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO- TECHNICAL BARRIERS AND SPS MEASURES 219 (2007).

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

[76] *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 56, ¶ 210.

[77] *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 317.

[78] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 461.

[79] Sixth Recital, Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079; Button, *supra* note 9, at 85.

42. The Statement of Objects and Reasons of PaCE mentions that the objective is to safeguard health of the children.[80] PaCE mandates that all the producers declare the ingredients of PIFs on the labels for this purpose. This would help parents make an informed decision about using PIFs for their children. It is argued that it has not even been a year since PaCE was implemented. This is too short a time to assess the positive impact of this measure on health of the children. Moreover, it is difficult to produce statistical results to show that parents are making an informed choice about PIFs after seeing the labels. The high sales of PIFs can be a result of the faith and confidence that the parents have reposed in Relicare since it is better than the imported PIFs. The only intervening factor in the four month period from November 2014 to March 2015 was PaCE. The ingredients of all the PIFs were printed on the labels. However, parents did not shift back to these imported PIFs. [81] This indicates that a majority of the parents have rejected the PIFs with high contents of corn syrup and sugar, which is what PaCE sought to achieve. Therefore, it is submitted that the measure has made at least *some* contribution to the objective.

2.2.2. PaCE IS NOT MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE

43. The term 'trade-restrictive' refers to a measure "*having a limiting effect on trade"*.[82] Measures that are 'trade-restrictive' include those that impose any form of *limitation of imports, discriminate against imports* or *deny competitive opportunities* to imports.[83]

44. In the present case, PaCE has been applied in the same manner to both domestic and foreign products. It does not seek to impose any limitation on imports or deny competitive opportunities to importers. Moreover, a long-enough period of two months has been given to all the producers to comply with the regulation. These four companies are the largest producers of dairy and health supplements. They control ninety percent of the world market of these products.[84] A few million dollars that they will have to spend on changing the labels cannot be accepted as a reason to grant them an extension. The additional cost can be justified by the nature of risk at issue. Protection of health of the infants is of prime importance.

---

[80] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[81] *See* Clarification No. 1, Fact on Record.
[82] Panel Report, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.129, WT/DS90/R (Apr. 6, 1999); *US-COOL* Appellate Body Report, *supra* note 3, ¶ 371; *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 319.
[83] *US-Tuna* Panel Report, *supra* note 63, ¶ 4.96.
[84] ¶ 11, Fact on Record.

45. Additionally, stickers cannot be permitted as they will not be able to make an equivalent contribution to the objective. They can be easily removed or fabricated. Inequitable implementation of the policy would result if the importers were permitted to merely paste stickers whereas Relicare was incurring cost in order to fully comply with the labelling requirement under PaCE.

46. The International Code for Marketing of Breast-Milk Substitutes was promulgated by World Health Organisation to ensure availability of safe and adequate nutrition for infants. A large number of countries in the world have made laws in accordance with this Code and many have made compliance with it voluntary.[85] The fact that the measure is in consonance with internationally-accepted health and marketing standards supports the conclusion that the measure is not more restrictive than necessary.[86]

47. The fact that this is an opportunity given to producers to declare the contents of their PIFs till the exact detrimental effects of PIFs on the health were established also denotes that the measure was reasonable and proportionate.[87] For the above reasons, PaCE is not more trade-restrictive than necessary to achieve the legitimate objective.

2.2.3. GRAVE CONSEQUENCES ARISE FROM NON-FULFILLMENT OF THE OBJECTIVE

48. The third factor in relational analysis is that of the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure in question.[88] Art. 2.2 of TBT Agreement provides that in assessing the risks, *available scientific and technical information* could be a relevant element of consideration.

49. In the present case, the objective sought to be achieved is the protection of health of the infants from diabetes causing PIFs. Study conducted by ADOH and sampling and lab testing have indicated that PIFs contain high levels of corn syrup and sugar which contributed to an increase in Type-1 diabetes among children.[89] Clearly, the nature of risk is an important one. The short-term effects of parents making an informed choice may not be visible, but the measure will contribute to reducing the incidence of diabetes among children in the long run.

[85] *See* National Implementation of the International Code of Breast-Milk Substitutes, *available at* http://www.unicef.org/nutrition/files/State_of_the_Code_by_Country_April2011.pdf.
[86] World Health Assembly Res. WHA34.22, International Code on Marketing of Breast-Milk Substitutes, art. 9.4, 34th Sess., May 21, 1981.
[87] Exhibit 3, Fact on Record.
[88] *US-Tuna* Appellate Body Report, *supra* note 3, ¶ 320; *US-COOL* Appellate Body Report, *supra* note 3, ¶ 377.
[89] ¶ 3, Fact on Record.

Non-fulfillment of the objective will lead to adverse consequences. Children will be unknowingly subjected to high levels of corn-syrup and sugar. Therefore, it is submitted that the measure is necessary for the protection of health of the children.

2.2.4. There are no reasonably available alternatives

50. A measure is not considered necessary if there are reasonably available and less trade-restrictive alternatives.[90] The alternatives should be capable of making an equivalent contribution to the objective.

51. In the present case, instead of banning the products altogether, the government chose the less-restrictive way by adopting PaCE. It has given an opportunity to the producers to come clean by declaring the contents of their products.[91] Further, temporary stickers cannot be permitted as they will fail to achieve the objective to the same level as they can be easily manipulated. Hence, the companies might paste them but there is no guarantee that by the time the product reaches the consumers, it will have the stickers intact. Therefore, it is submitted that this is the least trade-restrictive way and no other reasonably available alternative will be able to achieve the objective at the same level.

52. Moreover, scholarly opinion suggests that when the measure seeks to achieve a highly valued interest *such as* protection of human life, presumption is in favour of this measure. If there is speculation whether the suggested alternative would be able to achieve the objective as efficaciously, the challenged measure is upheld.[92] This is because for an objective as important as protection of health of infants, the cost of erroneous decisions could be very high.

3. PaCE is consistent with Asgard's obligations under Art. III:4 of the GATT

53. PaCE mandates all the producers of PIFs to declare the ingredients of their products on the labels in order to help parents make an informed choice. This was done in furtherance of the objective of protecting the infants against the risk of Type-1 diabetes.

54. It is well-established that to prove that a measure is inconsistent with GATT, it must be proved that the imported and domestic products are like in nature **[3.1]**, the measure is a *"law, regulation or requirement which is affecting the internal sale, offering for sale,*

---

[90] *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 304.
[91] Exhibit 3, Fact on Record.
[92] Alan O. Sykes, *The Least Trade Restrictive Means*, 70(1) U. Chi. L. Rev. 403, 416 (2003).

purchase, transportation, distribution or use (of the imported products)" and is therefore under the ambit of Art. III:4 **[3.2]** and the measure accords less favourable treatment to the imported products **[3.3]**.[93] It is submitted that the since these conditions are not satisfied in the present case, PaCE does not violate Art. III:4 of the GATT.

3.1. THE IMPORTED PIFS AND LIKAN ARE *NOT LIKE* PRODUCTS

55. In order to show that unfavourable treatment has been accorded to the imported products, it must be proved that the imported products and the domestic products are like in nature. In E*C-Sardines,*[94] the Appellate Body observed that if the measure at issue is a technical regulation under TBT, the analysis of the claims put forth under TBT Agreement would precede the analysis under Article III:4 of the GATT.

56. In the present case, the measure at issue is PaCE. In Section 1.2 above it has also been proved that the imported products and Likan are not like products. It is submitted that the same arguments shall apply for proving the unlikeness of products under Art. III:4 of the GATT as well.

3.2 PACE IS A "*LAW, REGULATION OR REQUIREMENT*" FOR THE PURPOSES OF ART. III:4 OF THE GATT

57. In order to show that a measure is *inconsistent* with Art. III:4 of the GATT, it must be proved that the measure is a *"law, regulation or requirement which is affecting the internal sale, offering for sale, purchase, transportation, distribution or use* (of imported products)*".*

58. In the present case, the measure at issue, PaCE was passed by the Parliament of Asgard on August 30, 2014.[95] Hence, it is a *"law, regulation or requirement"* for the purposes of Art. III:4 of the GATT. However, the impact of this measure is not to the detriment of the imported PIFs. This will be demonstrated in Section 3.3. It is submitted that PaCE falls within the ambit of Art. III:4 of the GATT.

3.3. PACE DOES NOT ACCORD LESS FAVOURABLE TREATMENT TO IMPORTED PIFS

59. A measure is said to accord less favourable treatment to imported products if it accords protection to the domestic products **[3.3.1]** and there is asymmetric impact of the

[93] *Korea-Beef* Appellate Body Report, *supra* note 41, ¶ 113.
[94] Panel Report, *European Communities – Trade Description of Sardines,* ¶ 7.16, WT/DS231/R (May 29, 2002) [hereinafter *EC-Sardines* Panel Report].
[95] ¶ 10, Fact on Record.

measure on the imports **[3.3.2]**. It is submitted that PaCE does not protect Likan and the altered change in market shares of imported PIFs can be attributed to the changed consumer tastes and preferences rather than the asymmetric impact of PaCE.

3.3.1. PaCE does not accord protection to Likan

3.3.1.1. Accordance of Protection is a necessary factor in examining less favourable treatment

60. The Appellate Body in *EC-Bananas III*, observed that independent consideration of the phrase *"so as to afford protection to domestic production"* is not required if it does not specifically refer to Art. III:1.[96] However, in *Japan - Alcoholic Beverages II*, the Appellate Body held that rest of Art. III is informed by the general principles envisaged under Art. III:1.[97] This was endorsed by the Appellate Body in *EC-Asbestos* where it was opined that *"if there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products"*.[98] The latter proposition, i.e., protection of the domestic product needs to be established to prove less favourable treatment, has received scholarly support. According to Frieder Roessler, the former Executive Director of the Advisory Centre on WTO Law (ACWL), Geneva, the reference in Art. III:2 is with respect to *"domestic products"* whereas in Art. III:4 it is with respect to *"products of national origin"*.[99] If the approach laid down in *EC-Bananas III* is applied, it would result in attributing different meaning to the two phrases. Therefore, it is submitted that the approach of the Appellate Body in *EC-Bananas III* is flawed. The approach put forth in *EC-Asbestos* is to be followed. It requires establishment of protection of domestic product to prove violation of Art. III:4 of GATT.[100] It is submitted that less favourable treatment under Art. III:4 of GATT should be informed by the anti-protectionist principle in Art. III:1 of GATT and does not entail just any kind of worse treatment.[101]

---

[96] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 216, WT/DS/AB/R (Sept. 9, 1997) [hereinafter *EC-Bananas III* Appellate Body Report].
[97] *Japan-Alcoholic Beverages II* Appellate Body Report, *supra* note 12, ¶ 111.
[98] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 100.
[99] Frieder Roessler, *Beyond the Ostensible*, 37(4) J. WORLD TRADE 737, 776 (2003).
[100] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 100.
[101] Michael J. Trebilcock & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 102, 665 (3rd edn., 2005); Edward S. Tsai, *Like is a Four-Letter Word- GATT Article III's Like Product Conundrum*, 17 BERKELEY J. INT'L L. 26, 53 (1999); Donald H. Regan, *Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariff and Trade*, 37 J. WORLD TRADE 737, 748 (2003); Amelia & Joel P. Trachtman *et al.*, *Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 737,796 (2003).

3.3.1.2. PaCE does not protect Likan

61. The Appellate Body in *Thailand - Cigarettes (Philippines)* emphasised that the 'fundamental thrust and effect of the measure itself' needs to be scrutinised to determine less favourable treatment.[102] Such scrutiny involves consideration of the 'design, structure, and expected operation' of the measure at hand.[103] The protective application of measure can be determined by *design, architecture* and *revealing structure* of the measure. The purpose of the measure is also *intensely pertinent* to evaluate its protectionist attributes.[104]

62. In the present case, the *design* and *structure* of PaCE is origin neutral. This can be inferred from the terms used in Statement of Objects and Reasons *"all entities in the business of packaged food and food supplements that are conducting business in Asgard"*.[105] The Statement of Objects and Reasons envisage that the objective of PaCE is to *"ensure that packaged food and food supplements exhibit their nutritional content in a manner that lets the public take an informed decision"*.[106] Thus, the measure has been equally applied to all the products.

63. In any event, Relicare does not require protection as it is a well-known and established group in Asgard. This is evident from the fact that it provides employment to seven percent of the country's population.[107] The entry of Relicare at such a crucial time is merely coincidental, and there is no evidence to the contrary.[108] Therefore, it is submitted that PaCE does not accord protection to the domestic product, Likan.

3.3.2. The altered market share of the imported PIFs is attributable to the changed consumer tastes and preferences and not to the asymmetric impact of PaCE

64. In *EC-Asbestos*, Canada's contention that the consumer tastes and preferences are irrelevant in examining the effect of a measure since *"the existence of the measure has disturbed normal conditions of competition between the products"* was rejected by the

[102] *Thailand- Cigarettes* Appellate Body Report, *supra* note 41, ¶ 129.
[103] *Thailand Cigarettes* Appellate Body Report, *supra* note 41, ¶ 71.
[104] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, ¶ 71, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) [hereinafter *Chile-Alcoholic Beverages* Appellate Body Report].
[105] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[106] *Id.*
[107] Exhibit 2, Fact on Record.
[108] ¶ 11, Fact on Record.

Appellate Body.[109] It follows that importance should be accorded to consumer tastes and preferences. Moreover, the asymmetric impact test is irrelevant in this examination. The test envisages that *"the treatment received by imports is only less favourable than that accorded to like domestic products if the burden arising from the measure is heavier for imports than for domestic products"*.[110]

65. In the instant case, the importers of PIFs failed to comply with the labelling requirements under PaCE. In consonance with Art. 9 of PaCE, these products were seized. When they finally complied with PaCE and re-entered the market in March 2015, they lost their market share from hundred percent to forty percent in the PIF market in Asgard.

66. That this was a result of changed consumer tastes and preferences is evident from the fact that in March, a majority of the consumers refused to return to these imported PIFs which they had been purchasing for the past five years. *The New Asgard Times* reported that if these producers had complied with PaCE, Relicare, in an ideal market scenario, would have been able to capture just five to ten percent of the market.[111] However, Relicare, in spite of being ten percent more expensive than the imported products managed to capture sixty percent of the market.[112] The newspaper also reported that the parents preferred to purchase Likan since it was 'more filling' and available in many variants and flavour.[113]

67. This clearly indicates that the consumer tastes and preferences were biased towards Likan. As a result of this and despite there being no extra burden on the importers due to PaCE, the imported PIFs lost their market share. PaCE had been applied equally to all producers.

68. In light of the above submissions, it is clear that PaCE does not protect Likan and the altered change in market shares of imported PIFs can be attributed to the changed consumer tastes and preferences rather than the asymmetric impact of PaCE. Therefore, PaCE does not accord less favourable treatment to the imported PIFs.

---

[109] *EC-Asbestos* Appellate Body Report, *supra* note 10, ¶ 67.
[110] Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most Favoured nation Treatment or Equal Treatment?*, 36(5) J. WORLD TRADE 921, 925 (2002).
[111] Exhibit 6, Fact on Record.
[112] Exhibit 6, Fact on Record.
[113] Exhibit 6, Fact on Record.

3.4. *IN ANY CASE*, PACE IS JUSTIFIED UNDER ART. XX(B) OF THE GATT

69. For a measure to be protected under Art XX, a two-tier test needs to be proved. It must come under one or another of the particular exceptions listed under Article XX **[3.4.1]** and it must satisfy the requirements imposed by the opening clauses of Article XX **[3.4.2]**.[114] Art. XX(b) of the GATT provides an exception when the measure at issue is necessary to protect human, animal or plant life or health. It is submitted that even thought PaCE is inconsistent with Art. III:4, it is justified under Art. XX(b).

3.4.1. PACE FALLS WITHIN THE SCOPE OF ART. XX(B) OF THE GATT

70. A measure is said to fall under Art. XX(b) of the GATT when it falls within the policies to protect human health and life **[3.4.1.1]** and when the measure is 'necessary' to achieve this policy objective **[3.4.1.2]**.[115]

3.4.1.1. PACE FALLS WITHIN THE POLICIES DESIGNED TO PROTECT HUMAN HEALTH AND LIFE

71. It has been shown above in Section 2.1 that PaCE seeks to achieve the objective of protection of health of the infants. This is a legitimate objective under Art. XX(b).

3.4.1.2. PACE IS 'NECESSARY' TO ACHIEVE THIS OBJECTIVE

72. Necessity of a measure is examined by adopting a weighing and balancing test. The factors to be analysed are contribution of the measure to the objective, relative importance of the interests and values pursued by the measure and trade restrictiveness of the measure.[116] It has been demonstrated in Section 2.2 that the measure is necessary for achieving the objective of protection of health of the infants.

3.4.2. PACE SATISFIES REQUIREMENTS OF THE CHAPEAU OF ART. XX

73. A measure may fall within the exceptions listed under Art. XX. However, it can be held to be consistent with provisions of the GATT only if it does not result in arbitrary or

---

[114] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US-Gasoline* Appellate Body Report]; *Korea-Beef* Appellate Body Report, *supra* note 41, ¶ 156; *Brazil-Tyres* Appellate Body Report, *supra* note 56, ¶ 139.

[115] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.198, 7.199, WT/DS246/R (Dec. 1, 2003); Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WT/DS2/AB/R (Jan. 29, 1996).

[116] *Korea-Beef* Appellate Body Report, *supra* note 41, ¶¶ 139-143.

unjustifiable between countries where same conditions prevail or it is not a disguised restriction on international trade.[117]

74. A measure that is publicly announced cannot be considered to be a disguised restriction on international trade.[118] Disguised restriction on international trade includes restrictions that amount to arbitrary or unjustifiable discrimination taken under the guise of a measure which is formally within the terms of exception listed in Art. XX of the GATT. [119] A measure is said to cause arbitrary or unjustifiable discrimination when the reasons given for discrimination bear no rationale connection to the objectives laid down under Art. XX.[120]

75. It has been demonstrated in Section 1.3.2 that PaCE stems from a legitimate regulatory distinction. The objective of the Parliament was not to make PaCE trade restrictive or to protect the domestic producer.[121] The objective was to guard the children against the risk of Type-1 diabetes caused by the PIFs. The report of ADOH and studies conducted by various other NGOs had indicated that high level of corn syrup and corn in the PIFs has lead to an increase in instances of Type-1 diabetes among children.[122] Thus, PaCE was necessary for the fulfillment of objective. Moreover, since PaCE was publicly announced it cannot be said to be a disguised restriction.

Therefore, since PaCE falls within the scope of Art. XX(b) and it satisfies requirements of the chapeau of Art. XX, it is justified under Art. XX of the GATT.

---

[117] General Agreement on Trade and Tariffs, art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.
[118] Report of the Panel, *United States – Imports of Certain Automotive Spring Assemblies*, ¶ 56, L/5333 (June 11, 1982), GATT B.I.S.D. (30th Supp.) at 107, 119 (1983); Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 4.28, DS21/R (Sep. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155, 182 (1991).
[119] *US – Gasoline* Appellate Body Report, *supra* note 112, ¶ 25.
[120] *Brazil – Tyres* Appellate Body Report, supra note 56, ¶ 227
[121] Statement of Objects and Reasons, Packaging of Commodities and its Enforcement (Regulation No. 8/2014).
[122] ¶¶ 3,4, Fact on Record.

REQUEST FOR FINDINGS

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

a) Find that the technical measure at issue did not accord less favourable treatment to imported products than that accorded to like domestic products and hence, is consistent with Article 2.1 of the TBT Agreement.

b) Find that the technical regulation at issue did not create unnecessary obstacles to trade and hence, is consistent with Article 2.2 of the TBT Agreement.

c) Find that the regulation at issue did not accord less favourable treatment to imported products than that accorded to like domestic products and hence, is consistent with Article III:4 of the GATT 1994.

All of which is respectfully affirmed and submitted,

Counsel for the Respondent,

146R.