

BEFORE THE PANEL ESTABLISHED BY THE WTO DSB



ASGARD: MEASURES CONCERNING POWDERED INFANT FORMULA

COMPLAINANT: AGATEA

WT/DS/XXX

MEMORIAL FOR THE COMPLAINANT

7TH GNLU INTERNATIONAL MOOT COURT COMPETITION

2015

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List of Abbreviations

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

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

Index of Authorities

Agreements, Treaties & Conventions

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- Understanding on Rules and Procedure Governing the Settlement of Disputes, April 15, 1994, 33 I.L.M. 112(1994).
- Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
- Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 U.N.T.S. 120.
- World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002)
- General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

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Short Title	Full Case, Title and Citation
Australia- Salmon	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R (November 6, 1998).
Canada – Autos	Appellate Body Report, <i>Canada – Certain Measures Affecting The Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R (May 31 2000).
China — Publications and Audiovisual Products	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products</i> , WT/DS363/AB/R (January 19, 2010).
EC- Asbestos	Appellate Body Report, <i>European Communities – Measures Affecting</i>

	<i>Asbestos And Asbestos-Containing Products</i> , WT/DS135/AB/R (March 12 2001).
EC- Asbestos	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R (April 5, 2001).
EC- Hormones	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R (February 13, 1998).
EC- Sardines	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R (September 26, 2002).
EC- Seals	Appellate Body Report, <i>European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R (May 22 2014).
Italian- Agricultural Machinery	Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833 - 7S/60 (Oct. 23 1958).
Japan- Alcohol	Appellate Body Report, <i>Japan - Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996)
Korea- Beef	Appellate Body Report, <i>Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

Thailand- Cigarettes	Appellate Body Report, Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines, WT/DS371/AB/R (June 17 2011).
Thailand- Cigarettes	Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/R (July 15, 2011).
<i>United States - Section 337</i>	Panel Report, <i>United States - Section 337 Of The Tariff Act Of 1930</i> , L/6439 - 36S/345 (Nov. 7 1989).
US — FSC (Article 21.5 — EC II)	Appellate Body Report, United States – Tax Treatment For "Foreign Sales Corporations" <i>Recourse To Article 21.5 Of The DSU By The European Communities</i> , WT/DS108/AB/RW (Jan. 14 2002)
US- Clove Cigarettes	Appellate Body Report, <i>United States – Measures Affecting The Production And Sale Of Clove Cigarettes</i> , WT/DS406/AB/R (April 4 2012).
US- COOL	Appellate Body Report, United States – Certain Country Of Origin Labelling (Cool) Requirements, WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012)
US- COOL	Panel Report, United States- Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R, WT/DS386/R (June 29, 2012).
US- Gambling	Appellate Body Report, United States – Measures Affecting the Cross-Border

	Supply of Gambling and Betting Services, WT/DS285/AB/R (April 20, 2005).
US- Gasoline	Appellate Body Report, United States- Standards For Reformulated And Conventional Gasoline, WT/DS2/AB/R (May 20, 1996)
US- Gasoline	Panel Report, United States- Standards For Reformulated And Conventional Gasoline, WT/DS2/R (May 20, 1996)
US- Imports of Certain Automotive Spring Assemblies	GATT Panel Report, United States — Imports of Certain Automotive Spring Assemblies, (May 26, 1983).
US- Shrimps	Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998).
US- TUNA II	Appellate Body Report, United States – Measures Concerning The Importation, Marketing And Sale Of Tuna And Tuna Products, WT/DS381/AB/R(May 16 2012)

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Statement of Facts

The Parties

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

Circle Sea Code on Public Health and Nutrition

The Nine Realm Summit themed “Health” was held in Krull, the capital city of Asgard, in January 2014. One of the breakthroughs of the summit was the finalization of the Circle Sea Code on Public Health and Nutrition(CSCPHN). Article 12 of the CSCPHN dealt with infant wellbeing and health. Sub clause (g) of article 12 recognized that for the well being of infants, nutritious food and food supplements should be made available at all times.

Powdered Infant Formula(PIF) market in Asgard

The Asgardian PIF market consists of roughly 0.5 million consumers and till October 2014 was completely controlled by four Agatean companies named Castle, Viking, Flora and Theos via their products named Rincewind, Linacre, Diamanda and Cemantac respectively. In November 2014, Relicare, a domestic company entered the market with its product Likan. Under ideal market conditions, Likan could have captured 5-10% of the market in a year but due to the introduction of PaCE, as of March 2015, 60% of the market is controlled by Likan, while the remaining share is split among the Agatean companies, despite Likan being 10-20% more expensive than its competition.

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

A sudden spike in Asgard of Type-1 diabetes among children resulted in the Asgard Department of Health(ADOH) releasing a report which called for the exact ingredients and content in terms of percentage and weight to be made known to parents in order to make an informed decision about using PIFs for their children. The Asgard Department of Law(ADOL) introduced the draft of Regulation No.8/2014 Packaging of Commodities and it's Enforcement(PaCE) in July 2014. Article 9 of the same called for compliance with certain packaging requirements by 31st October 2014. All the four Agatean corporations, through their association Agatean Processed Food Members Association (APMA) made a

representation to the ADOL on 25th July 2014. They emphasized that they will incur huge costs in changing the entire packaging of PIF products as about 20 million units shall have to be recalled and repackaged, along with another 15 million units that have already been shipped. The cost per unit to change the packaging was about 1.5\$ excluding the shipping period. APMA also pointed out that adequate facilities to change the packaging are not available in Asgard, and offered to contribute and participate in further scientific research with regard to the same. Due to these reasons, APMA requested an extension in the compliance deadline to March 2015. However, these requests were ignored and PaCE was passed in the Asgardian Parliament without any amendments.

Post-Compliance Date Events

On 1st November 2014, all non-complying PIF products manufactured by APMA companies were seized by ADOH. On the same day, Relicare launched its own PIF “Likan” and registered brisk sales. The product ran out within a week. In December, it came to light that APMA had tried pasting stickers containing the requisite details of ingredients on existing products but the products were seized by the ADOH regardless, as merely stick of stickers did not ensure compliance with article 3 of PaCE. A latter appeal to the High Court of Krull by the companies was dismissed and the seized products were returned to the companies. APMA has ever since complied with PaCE and started shipping PIFs to Asgard from March 2015.

Panel Establishment

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

Measure of Issues

1. PaCE violates the national treatment obligation under article III:4 of GATT 1947
 - 1.1 PaCE satisfies the three tier test for violation of article III: 4
 - 1.1.1 The measure at issue is a law, regulation or requirement covered by article III: 4.
 - 1.1.2 The imported and domestic products are like products
 - 1.1.2.1 The properties, nature and quality of the products are the same
 - 1.1.2.2 The end-uses of the products are the same
 - 1.1.2.3 Consumers' tastes and habits with regard to the products are same.
 - 1.1.3 The imported products are accorded less favourable treatment:
 - 1.1.3.1 PaCE does not accord effective equality to imported products
 - 1.1.3.2 PaCE results in de facto discrimination against Agatean PIFs.
2. PaCE violates the national treatment obligation under article 2.1 of TBT
 - 2.1 PaCE satisfies the three tier test for violation of article 2.1
 - 2.1.1 The measure at issue is a technical regulation
 - 2.1.1.1 PaCE affects one or more products
 - 2.1.1.2 PaCE specifies the technical characteristics of products which allows them to be marketed in Asgard
 - 2.1.1.3 Compliance with PaCE is mandatory.
 - 2.1.2 The imported and domestic products are like products.
 - 2.1.3 The imported products are accorded less favourable treatment.
3. Regulation No. 8/2014 "Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is inconsistent with article 2.2 of the TBT Agreement and thus violative of WTO obligations.
 - 3.1. The measure formulated by Asgard, by way of the regulation, does not pursue a legitimate objective.
 - 3.2. Even if we say that the objective pursued was legitimate to a certain extent, the measure was more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create.
 - 3.2.1. The degree of contribution made towards the achievement of the legitimate objective.
 - 3.2.2. Trade restrictiveness of the technical regulation/ measure.

- 3.2.3. The nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.
- 3.2.4. Availability of an alternative measure.
- 3.3. The PaCE Regulation creates an unnecessary obstacle to trade.
- 3.4. The PaCE Regulation is a disguised restriction on international trade, as per the sixth recital to the preamble to the TBT Agreement.
- 4. The PaCE Regulation 8/2014 is inconsistent with article 2.8 of the TBT Agreement and therefore, is violative of the WTO obligation.
- 5. The PaCE Regulation 8/2014 is inconsistent with article 2.12 of the TBT Agreement and therefore, is violative of the WTO obligation.
- 6. Obligations under CSCPHN have to harmoniously read with WTO obligations.
- 7. The PaCE regulation 8/2014, apart from being inconsistent with article III:4 of the General Agreement under the GATT, does not fall under Article XX under the General Exceptions to the GATT.
 - 7.1. The PaCE regulation is not protected by any of the exceptions under article XX lit a to j.
 - 7.1.1. The PaCE regulation is not protected by any of the exceptions under article XX lit a to j, with the exception of lit b.
 - 7.1.2. The PaCE regulation cannot be justified under article XX lit b.
 - 7.1.2.1. The policy in respect of the measure for which the provision of article XX(b) was invoked does not fall within the range of policies designed to protect human life or health.
 - 7.1.2.2. The inconsistent measure, for which the exception was being invoked, is not necessary to fulfil the policy objective.
 - 7.1.2.3. The PaCE regulation is not in conformation with the introductory clause, i.e., the chapeau of article XX GATT.
 - 7.2. The PaCE Regulation 8/2014, is not in confirmation with the introductory clause/ chapeau of article XX.

Summary

Argument I

Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is inconsistent with article III: 4 of the GATT and thus violative of WTO obligations.

- The measure formulated by Asgard, by way of the regulation, accords less favourable treatment to imported products as compared to domestic products.
- The imported products and the domestic products are like products but are not afforded effective equality as mandated by WTO obligations despite the application of formally equal legal provisions as the domestic company was unduly protected and benefitted due to its existing unique situation.
- The PaCE Regulation creates a situation of de facto discrimination against imported products as the measure effectually modified the conditions of competition in the PIF market by virtually eliminating any competition for the domestic product for a period of 5 months (November 2014-March 2015) and thus drastically increasing their market share at the expense of the market share of Agatean companies.

Argument II

The PaCE Regulation 8/2014 is inconsistent with article 2.1 of the TBT Agreement and therefore, is violative of the WTO obligation.

- The measure formulated by Asgard, by way of the regulation, accords less favourable treatment to imported products as compared to domestic products.
- The imported products and the domestic products are like products but are not afforded effective equality as mandated by WTO obligations despite the application of formally equal legal provisions as the domestic company was unduly protected and benefitted due to its existing unique situation.
- The PaCE Regulation creates a situation of de facto discrimination against imported products as the measure effectually modified the conditions of competition in the PIF market by virtually eliminating any competition for the domestic product for a period of 5 months .

Argument III

Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is inconsistent with article 2.2 of the TBT Agreement and thus violative of WTO obligations.

- The measure formulated by Asgard, by way of the regulation, does not pursue a legitimate objective. The actual objective of the Asgard government behind formulation of the PaCE regulation was a de facto discrimination against the Agatean companies and in favour of Relicare, so as to promote its domestic company.
- Even if we say that the objective pursued was legitimate to a certain extent, the measure was more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create and the availability of a reasonable alternative.
- The PaCE Regulation creates an unnecessary obstacle to trade because inspite of the availability of a reasonable alternative measure, i.e., use of stickers, the Asgard government rejected that alternative and went forward with implementing the more trade restrictive measure, thus creating an unnecessary obstacle to trade.
- The PaCE Regulation is a disguised restriction on international trade, as per the sixth recital to the preamble to the TBT Agreement. Disguised restriction includes disguised discrimination and the Asgard government by adopting the PaCE regulation inflicted a de facto discrimination against Agatean companies, which amounts to disguised discrimination.

Argument IV

The PaCE Regulation 8/2014 is inconsistent with article 2.8 of the TBT Agreement and therefore, is violative of the WTO obligation.

- Despite the availability of a more cost effective and equitable alternative, Asgard stuck to a more trade distorting measure than was required to fulfil the relevant objective and thus violates article 2.8 along with the provisions of the Code of Good Practice.

Argument V

The PaCE Regulation 8/2014 is inconsistent with article 2.12 of the TBT Agreement and therefore, is violative of the WTO obligation.

- As per article 2.12 read with paragraph 5.2 of the Doha Ministerial Decision, the term *reasonable interval* has to be interpreted to mean a period of at least six months. That is, at least a period of six months from the date of publication of the regulation has to be given to the member countries for compliance with the technical regulation. However, Asgard gave only a period of 2 months.
- The Doha Ministerial Decision has a binding value as it was agreed by all WTO members.

Argument VI

Obligations under CSCPHN have to harmoniously read with WTO obligations.

Argument VII

The PaCE regulation 8/2014, apart from being inconsistent with article III:4 of the General Agreement under the GATT, does not fall under Article XX under the General Exceptions to the GATT.

- If one reads the provisions of lit a to j with the exception of lit b, it can be said prima facie, that the measure in question in the present case cannot be protected under any of these exceptions, excluding lit b. The PaCE regulation cannot be justified under article XX lit b as well because the policy in respect of the measure for which the provision of article XX(b) was invoked does not fall within the range of policies designed to protect human life or health. In addition, the inconsistent measure, for which the exception was being invoked, is not necessary to fulfil the policy objective.
- The PaCE Regulation 8/2014, is not in confirmation with the introductory clause/ chapeau of article XX because it does not meet the requirements under the chapeau. The measure of the government of Asgard was a measure of de facto discrimination against Agatea and in favour of Asgard (Relicare). This amounts to disguised restriction on trade.

Legal Pleadings

1. PaCE violates the national treatment obligation under article III:4 of GATT 1947

The complainant humbly submits that Regulation No. 8/2014 Packaging of Commodities and its Enforcement (herein after referred to as PaCE) violates the national treatment commitment undertaken by Asgard under article III:4 of the GATT. The broad and fundamental purpose of Article III is to avoid protectionism in the application of regulatory measures.¹ Specifically, article III:4 creates an obligation on a Member to accord “treatment no less favourable than that accorded to like products of national origin”.² The principle of National Treatment calls for every country to grant equal treatment of domestic and foreign goods. This forms the core of the WTO Legal framework of non-discrimination, which essentially prohibit members from laying down rules or regulations discriminating between goods and services, from different nations, applying on the entire body of laws, affecting or hampering the movement of goods and services. This obligation applies to both *de jure* and *de facto* discrimination.³

The complainants would further like to refer the Panel to article XVI:4 of the WTO Agreement,⁴ which states that a member should ensure the conformity of its laws with the obligations provided in the Annexed agreements. It is established by interpretation that for the purposes of complying with this article it is enough that the National laws are conforming to the substance of the obligations of the agreement.⁵

Arguendo, if the Panel considers that the CSCPHN has a binding obligation on Asgard to make their laws in conformity with it, it is contended that none of these treaties entrench an ‘overall supremacy’ of a relevant treaty as envisaged under this article.⁶ The complainant would like to refer the Panel to articles 26 and 27 of the VCLT⁷, where the former states that every treaty must be performed in good faith and the latter states that the party may not

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

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

³ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 44-46 (1ST ED, 2007).

⁴ Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154 [hereinafter the WTO Agreement].

⁵ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 55-60 (1ST ED, 2007).

⁶ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 58 (1ST ED, 2007).

⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

invoke its internal law as a justification for its failure to perform a treaty. It is stated in the context of article XVI:4 to other International obligations, the former places a higher burden, on the states to make their laws in conformity to the same, the failure of which results in a breach.⁸

The regulation at hand meets the three-tier test for violation of article III: 4 as laid down in *Korea-Beef*.⁹

1.1 PaCE satisfies the three tier test for violation of article III:4

As per *Korea-Beef*, for a violation of Article III:4 to be established, three elements must be satisfied: *firstly*, that the measure at issue must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; *secondly*, the imported and domestic products at issue must be "like products"; and *thirdly* the imported products must be accorded "less favourable" treatment than that accorded to like domestic products.¹⁰ PaCE satisfies all three elements of this test.

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

Agatea submits that as laid down by the panel in *Italy–Agricultural Machinery*, the use of the “word “affecting” would imply, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.”¹¹ The Panel and the Appellate body have thus interpreted the scope of application of Article III: 4 broadly as including all measures that may modify the conditions of competition.¹² PaCE clearly satisfies this element of the test as it is a regulation that aims to ensure that packaged food and food supplements exhibit their nutritional contents in a manner that lets the public take an informed decision¹³ and therefore, directly affects the “internal sale” and “distribution” of the products.

⁸ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 59 (1ST ED, 2007).

⁹ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

¹⁰ Id.

¹¹ GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, L/833 - 7S/60 (Oct. 23 1958). See also Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, ¶20-21, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996) and Appellate Body Report, *Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines*, ¶ 129, WT/DS371/AB/R (June 17 2011).

¹² PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 390 (1ST ED, 2005).

¹³ Exhibit 1, pg. 9, Compromis.

1.1.2 The imported and domestic products are like products

“Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. Article III protects expectations not of any particular trade volume but rather of an equal competitive relationship¹⁴ There must be consonance between the objective pursued by Article III, as enunciated in the “general principle” articulated in Article III: 1, and the interpretation of the specific expression of this principle in the text of Article III: 4. The determination of whether products are ‘like products’ under Article III: 4 is fundamentally, a determination about the nature and extent of the competitive relationship between these products.¹⁵ The Report of the Working Party on Border Tax Adjustments outlined an approach for analysing “like-ness” that has been followed and developed since by several panels and the Appellate Body. This approach has, in the main, consisted of employing four general criteria in analysing “likeness”¹⁶ These general criteria, or groupings of potentially shared characteristics, provide a framework for analysing the “likeness” of particular products on a case-by-case basis. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.¹⁷ These criteria are:

1.1.2.1 The properties, nature and quality of the products

The domestic product (Likan) and the imported products (Rincewind, Linacre, Diamanda and Cementac) in question share similar properties, nature and quality. All of these products meet the definition of a Powdered Infant Formula under article 3 of PaCE.¹⁸

1.1.2.2 The end- uses of the products

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

¹⁴ Appellate Body Report, European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, ¶ 97, WT/DS135/AB/R (March 12 2001).

¹⁵ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 390 (1ST ED, 2005).

¹⁶ Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, ¶ 18. *See also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 356 (1ST ED. 2005) *and* Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, footnote 44 and 45, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996).

¹⁷ Appellate Body Report, European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, ¶ 102, WT/DS135/AB/R (March 12 2001).

¹⁸ Exhibit 1, Pg. 9, Compromis.

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

The brisk sale of Likan in absence of other PIFs in the market¹⁹ and the subsequent regaining of market share by the four Agatean companies²⁰ clearly demonstrate that consumers share a common perception in respect of the products under question.

1.1.3 The imported products are accorded less favourable treatment

The “no less favourable” treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the MFN standard, or to domestic products, under the national treatment standard of Article III.²¹ The words “treatment no less favourable” in article III: 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis.²² Panels have repeatedly found that "treatment no less favourable" under Article III: 4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements.²³ At the same time, As per WTO obligations under article III:4 of the GATT, Members are barred from maintaining in their laws provisions that discriminate between national and imported products.²⁴ In *Canada-Autos*, the Appellate body clearly established that articles III and I of the GATT when read in conjunction, do not cover only “in law” or *de jure* discrimination.²⁵ The National Treatment obligation under article III of GATT applies to both *de facto* and *de jure* discrimination.²⁶ Implicit or *de facto* discrimination involves an internal law or regulation that on its face appears to be non-discriminatory, but which has a discriminatory

¹⁹ Pg. 6, Compromis.

²⁰ Answer 1, Pg.1, Clarifications to the Compromis.

²¹ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 361 (1ST ED, 2005).

²² SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 45 (1st ed, 2007). See also GATT Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.11, L/6439 - 36S/345 (Nov. 7 1989).

²³ Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 134, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000) and Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, ¶ 176, WT/DS406/AB/R (April 4 2012).

²⁴ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 45 (1ST ED, 2007).

²⁵ Appellate Body Report, *Canada – Certain Measures Affecting The Automotive Industry*, ¶ 78, WT/DS139/AB/R, WT/DS142/AB/R (May 31 2000).

²⁶ Appellate Body Report, *United States – Certain Country Of Origin Labelling (Cool) Requirements*, ¶ 286, WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012).

effect on goods, services or IPRs originating in different nations or originating domestically and abroad²⁷.

Agatea humbly submits that Asgard accords “less favourable” treatment to imported products. This sub-argument is *twofold*. *Firstly*, PaCE does not accord effective equality to imported products with respect to domestic products. *Secondly*, PaCE *de facto* discriminates against imported products by detrimentally affecting the conditions of competition in the PIF market.

1.1.3.1 PaCE does not accord effective equality to imported products

Panels on previous occasions have noted that absence of any formal difference in treatment did not necessarily mean that there was no less favourable treatment.²⁸ Previous Panels have also rejected the contention that a regulation at issue that treats imported products ‘equally overall’ is therefore, not inconsistent with Article III:4.²⁹ *Panels have recognised that there may be cases where the application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable.*³⁰ In light of this observation, Agatea submits that the Asgardian government was aware of two key facts before implementing PaCE:

- a) The APMA companies would not be able to comply with the deadline as per article 9 due to lack of facilities in Asgard as well as the logistical costs and time involved.³¹
- b) Relicare was in a unique position to comply with the regulation as the packaging design for the new product was still in process.³²

The existence of the above mentioned facts clearly demonstrate that there was no effective equality between the domestic product (Likan) and imported products (APMA companies produced PIFs) despite the application of formally equal legal provisions as the domestic company was unduly protected and benefitted due to its existing unique situation.

²⁷ GATT Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.10, L/6439 - 36S/345 (Nov. 7 1989).

²⁸ *Id.* at ¶ 5.11. See also Panel Report, *United States - Standards For Reformulated And Conventional Gasoline*, ¶ 6.25, WT/DS2/R (Jan. 29 1996).

²⁹ Panel Report, *United States - Standards For Reformulated And Conventional Gasoline*, ¶¶ 6.11 and 6.14, WT/DS2/R (Jan. 29 1996).

³⁰ GATT Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.11, L/6439 - 36S/345 (Nov. 7 1989) and Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 136, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

³¹ Pg. 4-5, Compromis.

³² Exhibit 2, ¶ 6, Pg.12, Compromis.

1.1.3.2 PaCE results in de facto discrimination against Agatean PIFs

A formal difference in treatment between imported and like domestic products is neither necessary, nor sufficient, to show a violation of Article III: 4. Article III: 4 does not require the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products.³³ Whether or not imported products are treated "less favourably" than like domestic products has to be assessed by examining whether a measure modifies the "conditions of competition" in the relevant market to the detriment of imported products.³⁴ The analysis of whether imported products are accorded less favourable treatment requires a careful examination "grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'"³⁵, including of the implications of the measure for the conditions of competition between imported and like domestic products.³⁶ For a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.³⁷ The Panel needs to take an all rounded perspective of the measure at hand by evaluating whether it changes the market conditions to such an extent to unreasonably favour a domestic player.

The implications of the contested measure for the equality of competitive conditions are, first and foremost, those that are discernible from the design, structure, and expected operation of the measure.³⁸ The Asgardian government knew the unique position held by Relicare and its product Likan with regard to their ability to comply with the enforcement deadlines under

³³ Appellate Body Report, European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products, ¶ 5.108, WT/DS400/AB/R, WT/DS401/AB/R (May 22 2014).

³⁴ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 46 (1st ed. 2007). See also Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

³⁵ Appellate Body Report, United States – Tax Treatment For "Foreign Sales Corporations" *Recourse To Article 21.5 Of The DSU By The European Communities*, ¶ 215, WT/DS108/AB/RW (Jan. 14 2002) See also Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 142, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

³⁶ Appellate Body Report, Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines, ¶ 129, WT/DS371/AB/R (June 17 2011).

³⁷ Appellate Body Report, United States – Certain Country Of Origin Labelling (Cool) Requirements, ¶ 270, WT/DS384/AB/R, WT/DS386/AB/R (June 29 2012). See also Appellate Body Report, Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines, ¶ 134, WT/DS371/AB/R (June 17 2011) and Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11 2000).

³⁸ Appellate Body Report, Thailand – Customs And Fiscal Measures On Cigarettes From The Philippines, ¶ 130, WT/DS371/AB/R (June 17 2011).

article 9 of PaCE.³⁹ As indicated by the APMA in its representation to the ADOH, the sheer expense, magnitude and logistic efforts involved, made it impossible for the Agatean companies to comply with the enforcement deadline.⁴⁰ The government therefore knew that implementing the regulation without any amendment would effectively make Likan the sole PIF available in the market. Panels have in the past held 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.⁴¹

Hence, even though the regulation, on the face of it, displayed formal equality in treatment, it implicitly discriminated against imported products as it virtually altered the conditions of competition in the PIF market to the detriment of imported products by effectively permitting Likan be the only product on the market. There was *de facto* discrimination against imported products as the measure effectually modified the conditions of competition in the PIF market by virtually eliminating any competition for the domestic product for a period of 5 months (November 2014-March 2015) and thus drastically increasing their market share at the expense of the market share of Agatean companies.⁴²

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

2. PaCE violate the national treatment obligation under article 2.1 of TBT

Article 2.1 of the TBT Agreement contains a national treatment and a most-favoured nation treatment obligation.⁴³ The preamble of the TBT Agreement is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement.⁴⁴ In furtherance of this, as per the 2nd, 5th and 6th recital of the preamble of the TBT agreement, the agreement overlaps with and furthers the objectives of the GATT. Hence, it is of utmost importance to read any provision of this agreement in light of the preamble of the agreement and other instruments such as GATT.⁴⁵ The text of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any

³⁹ Exhibit 2, ¶ 6, Pg. 12, Compromis.

⁴⁰ Pg. 4 and 5, Compromis.

⁴¹ Appellate Body Report, European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, ¶ 100, WT/DS135/AB/R (March 12 2001).

⁴² Exhibit 6, Pg. 18, Compromis.

⁴³ Appellate Body Report, United States – Measures Affecting The Production And Sale Of Clove Cigarettes, ¶ 87, WT/DS406/AB/R (April 4 2012).

⁴⁴ *Id.* at ¶ 89.

⁴⁵ Appellate Body Report, European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, ¶ 16 & ¶ 47, WT/DS135/AB/R (March 12 2001).

other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.⁴⁶ The regulation at hand meets the three tier test for violation of article III:4 as laid down in *US-Cloves*.⁴⁷

2.1 PaCE satisfies the three tier test for violation of national treatment obligation under article 2.1 of the TBT Agreement

As per *US-Cloves*, for a violation of Article 2.1 to be established, three elements must be satisfied: firstly, that the measure at issue must be a technical regulation; *secondly*, that the imported and domestic products at issue must be "like products"; and *thirdly* that the imported products must be accorded "less favourable" treatment than that accorded to like domestic products.⁴⁸ PaCE satisfies all three elements of this test.

2.1.1 The measure is a technical regulation

As per *EC-Asbestos*,⁴⁹ a measure constitutes a technical regulation if it meets a *threefold* argument. *Firstly*, the measure must affect one or more given products; *secondly*, the measure must specify the technical characteristics of the product(s) that allows them to be marketed in the Member that took the measure⁵⁰ and *thirdly*, compliance with the measure must be mandatory.

2.1.1.1 The measure affects one or more products

PaCE clearly affects PIF products, regardless of whether they are domestically produced or imported,⁵¹ as they statement of objects and reasons of the regulation reads that the regulation is applicable to all entities in the business of packaged food and food supplements that are conducting business in Asgard.⁵²

⁴⁶ Appellate Body Report, United States – Measures Affecting The Production And Sale Of Clove Cigarettes, ¶ 190, WT/DS406/AB/R (April 4 2012).

⁴⁷ *Id.* at ¶ 87.

⁴⁸ Appellate Body Report, United States – Measures Affecting The Production And Sale Of Clove Cigarettes, ¶ 87, WT/DS406/AB/R (April 4 2012).

⁴⁹ Appellate Body Report, European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, ¶ 61, WT/DS135/AB/R (March 12 2001).

⁵⁰ Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 U.N.T.S 120.

⁵¹ Article 2, Exhibit 1, Pg.9, Compromis.

⁵² Exhibit 1, Pg. 9, Compromis.

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

Article 3 of PaCE when read in consonance with article 9, mandates the technical characteristics i.e. the retail packaging requirements for PIFs that have to be complied with by 31st October 2014 in order to be allowed to be marketed in Asgard.⁵³

2.1.1.3 Compliance with the measure is mandatory

Article 9 of PaCE empowers the government of Asgard to take appropriate action in the event of non-compliance by 31st October 2014.⁵⁴ On 1st November 2014, ADOH officials raided all across Asgard and seized PIFs of all imported brands. None of the seized brands had been able to meet the two-month compliance deadline.⁵⁵ Also after the High Court of Krull dismissed the appeal and ordered release of seized PIFs to the respective Agatean companies, the APMA companies were given the discretion to repackage PIFs as per PaCE or dispose their products in other world markets.⁵⁶ This clearly indicates the mandatory nature of compliance with the regulation.

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

2.1.2 The imported and domestic products are like products

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

2.1.3 The imported products are accorded less favourable treatment

As shown earlier in argument 1.1.3, the imported products are accorded less favourable treatment with regard to domestic products.

3. Regulation No. 8/2014 “Packaging of Commodities and its Enforcement (PaCE), drafted and published by the Asgard Department of Law and Justice (ADOL), is inconsistent with article 2.2 of the TBT Agreement and thus violates WTO obligations

It is humbly submitted before the Panel, that, the PaCE Regulation drafted and published by ADOL, is inconsistent with article 2.2 of TBT Agreement and thus is violates of the WTO obligations. Article 2.2 establishes certain obligations with which WTO members must

⁵³ Article 3 and Article 9, Exhibit 1, Pg. 10, Compromis.

⁵⁴ Article 9, Exhibit 1, Pg. 10, Compromis.

⁵⁵ ¶ 11, Pg. 5, Compromis.

⁵⁶ Answer 1, Pg.1, Clarifications to the Compromis.

comply when preparing, adopting and applying technical regulations.⁵⁷ The members must ensure that the technical regulation does not create an unnecessary obstacle to international trade and that it is not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.⁵⁸

3.1 The measure formulated by Asgard, by way of the regulation, does not pursue a legitimate objective

The regulation 8/2014 was formulated and adopted with a view to safeguard the health and future of the young populace of Asgard.⁵⁹ On the face of it, this does seem like a legitimate objective sought to be pursued by the measure adopted by Asgard, under article 2.2 of TBT Agreement. However, the Asgard government had an ulterior objective behind formulating the measure, which cannot be termed as ‘legitimate’. A ‘legitimate objective’ refers to an aim or target that is lawful, justifiable or proper.⁶⁰ However, the actual objective of the Asgard government behind adopting this measure cannot be termed as lawful, justifiable or proper. Asgard formulated this measure in order to promote its domestic company, Relicare, to obtain a monopoly in the market (Relicare enjoys a present market share of 60% in PIF products and the four Agatean companies who previously held an oligopoly in the market, currently hold a share of only 40% in the PIF market of Asgard⁶¹), in the sale of PIFs, which Relicare could never have obtained had the PIFs imported from the four Agatean companies been there in the Asgardian market. The PIFs of the four companies were the only ones available in the Asgardian market, before coming in of Relicare, and therefore they held an oligopoly. In addition, the PIF manufactured by Relicare was 10% more expensive than the ones manufactured by the four Agatean companies. Therefore, had Relicare introduced there product (PIF) in the market, with the four Agatean companies holding the oligopoly, its product would not have recorded such sales, as were witnessed in the absence of any competition. The government of Asgard already knew that a domestic company, Relicare, was going to enter the market of PIFs and therefore in order to help its domestic company, the government formulated this regulation, which was soon after Relicare had announced its entry into the PIF market and had received approval from the government for the same. This

⁵⁷ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁵⁸ Id.

⁵⁹ Exhibit 1, Pg. 9, Compromis; Exhibit 3, Pg. 13, Compromis.

⁶⁰ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 313, WT/DS381/AB/R (May 16, 2012).

⁶¹ Clarification no. 1, Pg. 1, Clarifications to the Compromis.

act of the government was an act of *de facto* discrimination⁶² in favour of Relicare. Therefore, the objective of the Asgardian government behind the adoption of this measure/regulation cannot be termed as legitimate within article 2.2. While making an assessment of the objective that a member seeks to achieve, the panel should not be bound by the characterisation by the member of such objective⁶³ and must take account of all the evidence put before it in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the technical regulation at issue.⁶⁴ A relative analysis of the circumstantial evidence will show that the objective pursued was not legitimate.

3.2 Even if we say that the objective pursued was legitimate to a certain extent, the measure was more trade restrictive than necessary to fulfil the legitimate objective taking account of the risks non-fulfilment would create

It is submitted before this esteemed panel, that the measure was more trade restrictive than necessary. As has already been argued above, the objective of the regulation cannot be termed as legitimate. As per the Asgardian government, the object behind the regulation was consumer awareness and protection of human health and safety.⁶⁵ Even if we *assume* that the objective of the regulation was actually consumer awareness and protection of health and safety, and not *de facto* discrimination against the four Agatean companies, still this measure was more trade restrictive than necessary to fulfil this objective.

By its terms, article 2.2 requires an assessment of the necessity of the trade restrictiveness of the measure at issue. The assessment of 'necessity', in the context of article 2.2, involves a relational analysis⁶⁶ of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that it makes to the achievement of a legitimate objective; and the (iii) risks non-fulfilment would create. In a particular case, a panel's

⁶² GATT Panel Report, *United States - Section 337 Of The Tariff Act Of 1930*, ¶ 5.10, L/6439 - 36S/345 (Nov. 7 1989).

⁶³ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 314, WT/DS381/AB/R (May 16, 2012). *See also* Appellate Body Report, *United States – Gambling*, ¶ 304, WT/DS285/AB/R (Dec. 21, 2007).

⁶⁴ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 314, WT/DS381/AB/R (May 16, 2012).

⁶⁵ Exhibit 1, Pg. 9 Compromis; Exhibit 3, Pg. 13, Compromis.

⁶⁶ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 318, WT/DS381/AB/R (May 16, 2012).

determination of what is considered necessary will be based on a consideration of all these factors.⁶⁷ There needs to be a weighing and balancing of these factors.⁶⁸

3.2.1 The degree of contribution made towards the achievement of the legitimate objective

For an inquiry under article 2.2, it is necessary and prerequisite to determine the degree of contribution to the objective that a measure actually achieves. The degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something, that is revealed through the measure itself.⁶⁹ In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective.⁷⁰ That is, to what degree, if at all, the challenged technical regulation actually contributes to the achievement of the legitimate objective pursued by the member.⁷¹ It is quite clear from the parliamentary debates⁷² that this regulation was only the first step taken by the Asgard government towards ensuring safety and health of infants and this measure was only for creating awareness among the parents/consumers. It is humbly submitted that, this creation of awareness among the consumers does not contribute much towards the ultimate legitimate objective of protecting health and ensuring safety of infants in Asgard. That is, to prevent the Type 1 diabetes among the children in Asgard, which, as per the reports of the Asgard Department of Health⁷³, is caused due to the intake of PIFs. This is so because, even if the parents are aware of the contents and ingredients of the PIFs, they do not have an alternative or a substitute for the PIF. Therefore, even if they know the contents of the PIF, they will not completely stop the

⁶⁷ *Id.* See also Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 178, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000) and Appellate Body Report, , *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306, 308, WT/DS285/AB/R (April 20, 2005).

⁶⁸ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012). See also Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (April 5, 2001) and Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 162, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

⁶⁹ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 373, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012); See also Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 316, WT/DS381/AB/R (May 16, 2012).

⁷⁰ Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶ 390, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

⁷¹ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 317, WT/DS381/AB/R (May 16, 2012); See also Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, ¶ 252, , WT/DS363/AB/R (January 19, 2010).

⁷² Exhibit 3, Pg. 13-15, Compromis.

⁷³ ¶ 3, Pg. 3, Compromis.

purchase of the PIFs because they do not have any other choice. This means that the measure is of no use towards the fulfilment of the legitimate objective as it is making no contributions towards the legitimate objective and is merely a restriction on trade.

3.2.2 Trade restrictiveness of the technical regulation/ measure

‘Trade restrictiveness’ means having a limiting effect on trade.⁷⁴ Under article 2.2, what is actually prohibited are those restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.⁷⁵ The technical regulation in the present case does not make any notable contributions towards the achievement of the objective that is, safety and health of the children in Asgard. What the regulation purposes at doing, is making the consumers (the parents) aware of the ingredients of the PIFs. This can very well be achieved even through putting of stickers, as was proposed and done by the concerned companies, and there was no need of changing the entire packaging of the PIFs. So, even if we assume consumer awareness as being a legitimate objective, then the contribution the measure/regulation makes towards the achievement of this objective, can also be made through the use of stickers. However, what the regulation proposes to do- that is requiring the PIF manufacturers to print the percentage of ingredients constituting PIFs, by changing the entire packaging of the product- is something that exceeds what is necessary to achieve the degree of contribution that the regulation makes to the achievement of the objective pursued. Therefore, it is humbly submitted that the measure is more trade restrictive than necessary.

3.2.3 The nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure

A final requirement under article 2.2 is that the members must take into account the risks non- fulfilment of the legitimate objective would create when assessing the trade restrictiveness of the regulation.⁷⁶ While considering the risks non-fulfilment would create, a comparison of the challenged measure with a possible alternative measure should be made, in the light of the nature of the risks at issue and the gravity of the consequences that would arise from the non-fulfilment of the legitimate objective.⁷⁷ The legitimate objective pursued

⁷⁴ Appellate Body Report, United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico), ¶ 319, WT/DS381/AB/R (May 16, 2012).

⁷⁵ Id.

⁷⁶ WTO Technical Barriers and SPS Measures, 220 (Max Planck Commentaries on World Trade Law, Max Planck Institute for Comparative Public Law and International Law ed. 2007).

⁷⁷ Appellate Body Report, United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico), ¶ 321, WT/DS381/AB/R (May 16, 2012).

through the measure is creating consumer awareness, which is only the first step towards the much wider objective of protection of health and safety of the children in Asgard.⁷⁸ Looking at the present objective of consumer awareness, the non-fulfilment of it would not give rise to any risks, because even if this objective were further pursued through the present measure, it would hardly result in any notable or fruitful results towards the protection of human health and safety. This is because, even if the objective is fulfilled, through the measure, the people of Asgard will still buy the PIFs, as they do not have any alternative available. Therefore, even if the objective is not pursued and fulfilled, one would not be losing something of value. However, if the objective is pursued, then it would result in unnecessary obstacles to international trade, especially in the background of the availability of a reasonable alternative, i.e., use of stickers.

3.2.4 Availability of an alternative measure

The comparison with reasonably available alternative measures is a "conceptual tool" to be used for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary.⁷⁹ An alternative measure, however, as to be less trade restrictive than the challenged measure, makes an equivalent contribution to the relevant objective and is reasonably available.⁸⁰ It is humbly submitted that the Agatean firms did propose the use of stickers, instead of repackaging the entire product, which would have sufficiently fulfilled the objective of consumer awareness and therefore, making an equivalent contribution to the relevant objective and also being less trade restrictive and reasonably available. However, the Asgardian government rejected this proposal and stuck to its measure under the regulation. It is, therefore, humbly submitted before this esteemed panel, that taking into consideration the above factors, one can come to a conclusion that the measure is more trade restrictive than necessary.

3.3 The PaCE Regulation creates an unnecessary obstacle to trade

The existence of an unnecessary obstacle to international trade may be established based on a comparative analysis of the above-mentioned factors, which involve a comparison of the trade restrictiveness of, and the degree of achievement of the objective by, the measure at

⁷⁸ Exhibit 3, Pg. 13, Compromis.

⁷⁹ Appellate Body Report, United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico), ¶ 320, WT/DS381/AB/R (May 16, 2012).

⁸⁰ *Id.* at ¶¶ 320-322. See also Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 166, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000) and Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 194, WT/DS18/AB/R (November 6, 1998).

issue, with that of possible alternative measures that may be reasonably available and that are less trade restrictive than the challenged measure, taking into account the risks non-fulfilment would create.⁸¹ In keeping with this, if one compares the available alternative measure (use of stickers) with the challenged measure, one comes to a conclusion that, the alternative measure is far less trade restrictive than the measure adopted by Asgardian government and the degree of achievement of the objective is also not affected as, the alternative measure has an equitable contribution to relevant objective. However, the government of Asgard completely rejected the proposed alternative measure and went forward with the more trade restrictive measure, thus creating an unnecessary obstacle to trade.

3.4 The PaCE Regulation is a disguised restriction on international trade, as per the sixth recital to the preamble to the TBT Agreement

As per the sixth recital of the preamble of the TBT Agreement, subject to certain qualifications, a member shall not be prevented from taking measures necessary to achieve its legitimate objectives at the levels it considers appropriate.⁸² One of the qualifications under the sixth recital is that the measures adopted are not applied in a manner, which would constitute a disguised restriction on international trade. Disguised restriction includes disguised discrimination.⁸³ Asgard government states that their objective behind adoption of the regulation was protection of health and safety of children through consumer awareness, but it is humbly submitted that on a closer scrutiny it can be seen that the reality is otherwise. This measure was adopted as a means to favour Asgard's domestic company, Relicare, in establishing itself in the market of PIF products. Had the PIFs of Agatean companies been in the market at the time when Relicare entered, it would not have registered brisk sales⁸⁴, and gained such a prominent market share⁸⁵ (Relicare enjoys a present market share of 60% in PIF products, wherein earlier the four Agatean companies held an oligopoly in the market)⁸⁶ because firstly, Agatean companies had already established a monopoly in the market over the years and secondly, the price of the PIF produced by Relicare, Likan, was more expensive

⁸¹ Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, footnote 645 to ¶ 320, WT/DS381/AB/R (May 16, 2012); referring to Appellate Body Report, *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef*, ¶ 166, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

⁸² Appellate Body Report, *United States – Measures Concerning The Important, Marketing And Sale Of Tuna And Tuna Products (Mexico)*, ¶ 316, WT/DS381/AB/R (May 16, 2012).

⁸³ WTO, *WTO Analytical Index- Guide to WTO Law and Practice* (2007).

⁸⁴ ¶ 6, Pg. 6, Compromis.

⁸⁵ Exhibit 6, Pg. 18, Compromis.

⁸⁶ Clarification no. 1, Pg. 1, Clarifications to the Compromis.

as compared to the PIF manufactured by the Agatean companies. This measure of the government of Asgard was a measure of de facto discrimination against Agatea and in favour of Asgard (Relicare). This amounts to disguised restriction on trade and therefore, the measure is inconsistent with the requirements under the sixth recital under the preamble to the TBT agreement.

4. The PaCE Regulation 8/2014 is inconsistent with article 2.8 of the TBT Agreement and therefore, violates WTO obligations

It is humbly submitted before this esteemed panel that, the regulation 8/2014 formulated and adopted by the government of Asgard, is inconsistent with the provision under article 2.8 of the TBT Agreement read with Annex 3 of the TBT Agreement.

Another important aspect of technical regulation is contained in article 2.8, which provides that wherever appropriate, the members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics. The objective of this provision is to allow the producers to find the most cost effective way of fulfilling the requirements contained in a technical regulation.⁸⁷ What counts is the performance of the product, rather than the way in which this outcome is achieved. This is to be read with annex 3 of TBT, Code of Good Practice, sub-annex I: sub-annex I reflects article 2.8 of TBT in requiring that the standardising bodies specify standards based on product requirements in terms of performance rather than design or description characteristics wherever appropriate.⁸⁸ The reason for this is that output performance requirements are less trade distorting.⁸⁹ The technical regulation formulated and adopted by Asgard was based on product requirements in terms of design or descriptive characteristics, as it required the percentage of the ingredients in the PIFs to be printed on the product, for which the entire packaging of the product had to be changed. This measure of Asgard is not a regulation based on product requirements in terms of performance, as it in no way effects/improves the performance of the product, i.e., PIF. This was the situation despite the fact that there was a more cost effective and reasonable alternative measure available, as was put forth by Agatea (use of stickers), which was eventually rejected by Asgard. Asgard therefore, stuck to a more trade distorting measure than was required to fulfil the relevant objective and thus violates article 2.8 along with the provisions of the Code of Good Practice.

⁸⁷ WTO Technical Barriers and SPS Measures, 229 (Max Planck Commentaries on World Trade Law, Max Planck Institute for Comparative Public Law and International Law ed. 2007).

⁸⁸ Code of Good Practice, Annex 3, Technical Barriers to Trade.

⁸⁹ WTO Technical Barriers and SPS Measures, 251 (Max Planck Commentaries on World Trade Law, Max Planck Institute for Comparative Public Law and International Law ed. 2007).

5. The PaCE Regulation 8/2014 is inconsistent with article 2.12 of the TBT Agreement and therefore, violates WTO obligations

It is humbly submitted before this esteemed panel, that, the PaCE Regulation violates the provisions under article 2.12 of the TBT. Article 2.12 provides that the members must leave a reasonable interval between the publication of the technical regulation and their entry into force, except in case of urgent circumstances. The object of this requirement is to allow time for the producers in the exporting member countries to adapt their products or methods of production to the requirements of the importing member country.⁹⁰ In the Ministerial Decision on implementation related issues and Concerns adopted on 14th November 2001 in Doha, it was decided that, subject to the conditions specified in article 2.12 on technical regulations, the phrase “reasonable interval” had to be understood to mean normally a period of not less than six months, except when this would be ineffective in fulfilling the legitimate objective.⁹¹ The Asgard government published the draft of regulation 8/2014 in July⁹² and gave only 2 months’ time, that is, the month of September and October; post its enactment; for Agatean PIF manufacturers to comply with the regulation, despite being aware of the problems faced by the members of the APMA, the Asgardian government seized the Agatean products on 1st of November 2014.⁹³ This is a prima facie violation of the provision under article 2.12, which necessitates a period of six months to be given to the exporting member countries to comply with the technical regulations.

It is further submitted that the period of six months would not have been a hindrance in fulfilling the legitimate objectives pursued as the Agatean manufacturers had placed stickers on their products, which was dispensing with the required function for the time being.

It is humbly submitted before this esteemed panel that, with respect to the binding value of the Doha Ministerial Decision, the Panel would be guided by the Doha Ministerial Decision in its interpretation of the phrase 'reasonable interval', as the Doha Ministerial Decision was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO.⁹⁴ Moreover, paragraph 5.2 of the Doha Ministerial Decision could

⁹⁰ Committee On Technical Barriers To Trade, Third Triennial Review Of The Operation And Implementation Of The Agreement On Technical Barriers To Trade (adopted report), ¶ 24, G/TBT/13 (November 11, 2003). See also Committee On Technical Barriers To Trade, Decisions And Recommendations Adopted By The Committee Since 1 January 1995, Chapter X, G/TBT/1/Rev.8 (May 23, 2002).

⁹¹ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 5.2, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

⁹² ¶ 6, Pg. 4, Compromis.

⁹³ *Id.* at ¶ 11, Pg. 5.

⁹⁴ Panel Report, United States – Measures Affecting The Production And Sale of Clove Cigarettes, ¶ 7.576, WT/DS406/R (September 2, 2011)

be considered as a subsequent agreement of the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*⁹⁵, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.⁹⁶

6. Obligations under CSCP HN have to harmoniously read with WTO obligations

As has been stated by Joost Pauwelyn, in contemporary times international law also includes to a great extent the law on cooperation.⁹⁷ International trade law, like international environmental law and international human rights law are part of this international law of cooperation. Further it has also been seen and noted by many eminent authorities on international law and world trade law that over a period of time World Trade Law has assimilated into international law.⁹⁸ Further even the Appellate Body in *US- Gasoline* that a measure at hand should not be read in clinical isolation from public international law. It has further been stated as to how the World Trade Law shouldn't be compartmentalised or isolated from rest of international law.⁹⁹ General international law, composed of customary international law and general principles of law, is binding on WTO Members and is, in principle, part of the law applicable between WTO Members.¹⁰⁰

Scholars have envisaged the situation where WTO rules are in conflict with the obligations under other international agreements. For the same, it has been stated that the WTO rules have to be interpreted in such a way that they do not conflict with other rules of international law. Panels and the Appellate Body have the obligation to interpret the WTO provisions in taking into account all relevant rules of international law applicable to the relations between the WTO Members. One of those rules is the general principle against conflicting interpretation (Article 31.3(c) together with 30 of the Vienna Convention). Therefore, in most cases the proper interpretation of the relevant WTO provisions – themselves often drafted in terms of specific prohibitions leaving open a series of WTO compatible alternative measures

⁹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁹⁶ Panel Report, United States – Measures Affecting The Production And Sale of Clove Cigarettes, ¶ 7.576, WT/DS406/AB/R (April 4, 2012).

⁹⁷ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 61 (1st ed. 2005); See also J. PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER NORMS OF INTERNATIONAL LAW (2003).

⁹⁸ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 61-2 (1st ed. 2005); See also D. Mcrae, 'The WTO In International Law: Tradition Continued Or New Frontier?', Journal Of International Economic Law, 30 And 41, (2000).

⁹⁹ Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, ¶17, WT/DS2/AB/R (April 29, 1996).

¹⁰⁰ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 63 (1st ed. 2005)

– should lead to a reading of the WTO provisions so as to avoid conflict with other treaty provisions.¹⁰¹

In this case the explanation to A. 12 of the CSCPHN states that with regards to the requirements under A.12 ‘*The parties to the Code may take appropriate measures in this regard.*’ The issue that arises here is what is to be termed as ‘*appropriate measures*’. It is humbly submitted by the Complainants that the Respondents have used their obligations under the CSCPHN to evade their obligations under the WTO laws, even when it was possible to strike a balance between the two. It is urged that the term ‘*appropriate measures*’ should be understood by the respondents in terms of keeping in consonance with their obligations under the WTO laws.

Thus the claim of the respondents that the reason for enacting the PaCE is *inter alia* in pursuance of their obligations under the CSCPHN is flawed, as the respondents have to interpret and enforce their obligations under CSCPHN to be in consonance with their obligations under WTO rules, especially in the light of the fact that such an interpretation is available.

7. The PaCE regulation 8/2014, apart from being inconsistent with article III:4 of the General Agreement under the GATT, does not fall under Article XX under the General Exceptions to the GATT

Article XX exception is invoked when there is a violation of one or more of the substantive GATT obligations. The incongruity or the violation of the obligation under GATT general agreement can be taken as a given fact under article XX as, the violation or inconsistency of the technical regulation with article III:4 of the GATT, has already been argued and established above. Therefore, the inquiry under article XX is directed entirely towards the question of whether the violation is justified by an exception.

The analysis under article XX is two tiered: first, provisional justification by reason of characterisation of the measure under article XX lit a to j; and second, further appraisal of the same measure under the introductory clauses of article XX, that is the chapeau.¹⁰² The two-step inquiry/test affords some degree of certainty and predictability to the scrutiny of trade

¹⁰¹ PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 63 (1st ed. 2005); *See also*: G. Marceau, ‘Conflicts Of Norms And Conflicts Of Jurisdictions: The Relationship Between The WTO Agreement And Meas And Other Treaties’, Journal Of World Trade, 1129 (2001).

¹⁰² Appellate Body Report, *United States- Standards For Reformulated And Conventional Gasoline*, ¶ 118, WT/DS2/AB/R (May 20, 1996); *See also* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (November 6, 1998).

restrictive measures taken in the name of health and environment.¹⁰³ The chapeau is animated by the principle that while the exceptions of article XX can be invoked as a matter of legal right, they should not be so applied so as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of general agreement of GATT.¹⁰⁴ If the exceptions are not to be abused or misused, then the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exceptions, and the legal rights of the other parties concerned.¹⁰⁵

7.1 The PaCE regulation is not protected by any of the exceptions under article XX lit a to j

It is humbly submitted before this esteemed panel, that, the PaCE regulation 8/2014, cannot be justified under any of the exceptions enumerated under article XX lit a to lit j.

7.1.1 The PaCE regulation is not protected by any of the exceptions under article XX lit a to j, with the exception of lit b

It is humbly submitted before the esteemed panel, that, if one reads the provisions of lit a to j with the exception of lit b, it can be said prima facie, that the measure in question in the present case cannot be protected under any of these exceptions, excluding lit b. Article 31 and 32 of the Vienna Convention on the Law of Treaties [hereinafter VCLT]¹⁰⁶ represents the ‘customary rules of interpretation of public international law.’¹⁰⁷ Article 31(1) of the VCLT provides for a treaty to be interpreted, using the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.¹⁰⁸ Therefore, if we accord ordinary meaning to the provisions under lit a to j of article XX, it can be seen that these are not concerned with the subject matter of the PaCE regulation in any manner.

7.1.2 The PaCE regulation cannot be justified under article XX lit b

As far as lit b of article XX is concerned, prima facie one may say that the regulation may fall under lit b, but a stricter interpretation of the provision under article XX proves otherwise. Article XX lit b envisages a three-fold test, which requires to ascertain, (i) that the policy in respect of the measures for which the provision was invoked fell within the range of policies

¹⁰³ WTO, WTO Analytical Index- Guide To WTO Law And Practice (2007).

¹⁰⁴ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 156, WT/DS58/AB/R (November 6, 1998).

¹⁰⁵ John H. Jackson, World Trade And The Law Of Gatt, 741-3 (1969).

¹⁰⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

¹⁰⁷ Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, ¶ 17, WT/DS2/AB/R (April 29, 1996)

¹⁰⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

designed to protect human animal or plant life or health; (ii) The inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and (iii) That the measures were applied in conformity with the requirements of the introductory clause of article XX, i.e. the chapeau.¹⁰⁹ In order to justify the application of article XX(b), all the above elements have to be satisfied.¹¹⁰

7.1.2.1 The policy in respect of the measure for which the provision of article XX(b) was invoked does not fall within the range of policies designed to protect human life or health

Article XX(b) requires that the measures in question, be aimed at protecting humans. Inasmuch as they include the notion of protection, the words *policies designed to protect human life or health* imply the existence of a health risk.¹¹¹ There are two things, which need to be looked into: the *element of risk* and the *determination of the level of protection*.¹¹²

A preventive measure may be taken only if the risk, despite the fact that its reality and extent have not been fully demonstrated by conclusive scientific evidence, appears nevertheless to be adequately based on scientific data available at the time when the measure was taken. A risk may be evaluated in either qualitative or quantitative terms.¹¹³ As per the report of the ADOH, there a study had been conducted and ADOH finally concluded that, there was a possible risk to the health of the children in Asgard due to the spike in type 1 diabetes.¹¹⁴ The ADOH assumed that, the increase in consumption of PIFs in the preceding five years could be one of the possible causes of the spike in diabetes in Asgard.¹¹⁵ But, unless there was no concrete evidence regarding the same, they at least wanted to inform the parents regarding the ingredients of the PIFs, so that they can take an informed decision with respect to the use of PIF¹¹⁶ Therefore, there was an element of risk.

¹⁰⁹ Panel Report, United States- Standards For Reformulated And Conventional Gasoline, ¶ 6.20, WT/DS2/R (May 20, 1996); See also Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶¶ 8.167-8.169, WT/DS135/R (April 5, 2001).

¹¹⁰ Id.

¹¹¹ Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶¶ 8.170, 8.184, WT/DS135/R (April 5, 2001).

¹¹² Id. at ¶ 8.170. See also Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 158, WT/DS135/AB/R (April 5, 2001).

¹¹³ Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 167, WT/DS135/AB/R (April 5, 2001); See also Appellate Body Report, European Communities- Measures Concerning Meat and Meat Products (Hormones), ¶ 186, WT/DS26/AB/R, WT/DS48/AB/R (February 13, 1998).

¹¹⁴ ¶ 3, Pg. 3, Compromis.

¹¹⁵ The ADOH Report (June 2014), ¶ 3, Pg. 3, Compromis.

¹¹⁶ ¶ 3, Pg. 3, Compromis.

Once the existence of an identifiable and ascertainable risk has been established, the member needs to determine the level of protection that it considers appropriate in a given situation.¹¹⁷ The level of protection is actually an objective and the measure is the instrument chosen to attain or implement the objective.¹¹⁸ In the present case, the legitimate objective pursued is to protect the health of the children and prevent the instances of Type 1 diabetes in Asgard. The level of protection, which the Asgard government has formulated, is creating awareness among the consumers/ parents with respect to the ingredients of the PIF. For this, the government of Asgard adopted regulation 8/2014, which required the members manufacturing PIFs to print the percentage of ingredients of the PIF on the package or container of the PIF product. However, creating awareness among the consumers will not reduce the use of PIFs because the population in Asgard is highly dependent on the PIF for their children and there is no alternative to the PIFs, is available. Therefore, the level of protection is not appropriate at all for the risk identified. Also, the measure adopted with respect to the level of protection is an excessive measure, because, instead of re-packaging the entire product, the manufacturers could have simply put stickers, which would have served the same purpose. This, alternative measure was, however, rejected by the government of Asgard. Thus, the policy of the measure/regulation adopted by Asgard does not seem to fall under the range of policies designed to protect human life and health.

7.1.2.2 The inconsistent measure, for which the exception was being invoked, is not necessary to fulfil the policy objective

Article XX(b) explicitly requires the performance of the necessity test: measures must be necessary to protect human life or health.¹¹⁹ This involves the requirement of *least-trade restrictiveness, i.e.*, a measure could be considered to be necessary only if no alternative measure existed which was less inconsistent or consistent with the provisions of the GATT, and could reasonably be expected to be adopted by the member in question.¹²⁰ The extent to

¹¹⁷ Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 168, WT/DS135/AB/R (April 5, 2001). See also Appellate Body Report, Australia – Measures Affecting Importation of Salmon, ¶ 200, WT/DS18/AB/R (November 6, 1998).

¹¹⁸ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 200, WT/DS18/AB/R (November 6, 1998).

¹¹⁹ GATT Panel Report, *United States- Section 337 of The Tariff Act of 1930*, ¶ 5.26, L/6439 - 36S/345 (November 7, 1989).

¹²⁰ Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, ¶ 75, WT/DS371/AB/R (July 15, 2011).

which the alternative measure contributes to the realisation of the end pursued is to be taken into consideration.¹²¹

The Agatean firms proposed the use of stickers instead of printing the contents of the PIF- which required the changing of the entire package of the PIF products, for which the entire stock of PIF had to be called shipped back to Agatea from Asgard, which was highly trade restrictive. The use of stickers would have served the same purpose as that served by the printing of contents and would have been comparatively less trade restrictive. This measure of use of stickers, could have been reasonably adopted by the Asgardian government and also it would have contributed equally towards the realisation of the end pursued, i.e., safety and health of children through consumer awareness. Therefore, the measure adopted by the government of Asgard, was not necessary to fulfil the policy objective.

7.1.2.3 The PaCE regulation is not in conformation with the introductory clause, i.e., the chapeau of article XX GATT

Further, in order to comply with the requirements of lit b, a measure has to meet the conditions set out in the introductory clause of article XX in order to be exempted from the obligations under the GATT Agreement. The PaCE regulation, however, does not comply with the chapeau either, as has been argued below, and thus, cannot be protected under article XX as it fails the three tier test.

7.2 The PaCE Regulation 8/2014, is not in confirmation with the introductory clause/ chapeau of article XX

The chapeau is concerned, not with the measure or its specific contents, but with the manner in which that measure is applied.¹²² The exceptions under article XX are conditional or limited exceptions. That is to say, the ultimate availability of these exceptions is subject to the compliance by the invoking member with the requirements of the chapeau.¹²³ Under the terms of the chapeau, it is required that the measure in question is not applied in a manner, which *causes disguised restriction on international trade*. Disguised restriction includes disguised discrimination and has to be read in conjunction with arbitrary and unjustifiable

¹²¹ Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 172, WT/DS135/AB/R (April 5, 2001); See also Appellate Body Report, Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef Korean beef, ¶¶ 163, 166, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000).

¹²² GATT Panel Report, *United States — Imports of Certain Automotive Spring Assemblies*, ¶ 56, L/5333 - 30S/107 (May 26, 1983).

¹²³ GATT Panel Report, *United States- Section 337 of The Tariff Act of 1930*, ¶ 5.9, L/6439 - 36S/345 (November 7, 1989).

discrimination. Asgard government states that their objective behind adoption of the regulation was protection of health and safety of children through consumer awareness, but, it is humbly submitted that on a closer scrutiny it can be seen that the reality is otherwise, that this measure was adopted as a means to favour its domestic company, Relicare, in establishing itself in the market of PIF products. Had the PIFs of Agatean companies been in the market at the time when Relicare entered, it would not have registered brisk sales¹²⁴, and gained such a prominent market share¹²⁵ because firstly, Agatean companies had already established a monopoly in the market over the years and secondly, the price of the PIF produced by Relicare, Likan, was more expensive as compared to the PIF manufactured by the Agatean companies. This measure of the government of Asgard was a measure of de facto discrimination against Agatea and in favour of Asgard (Relicare). This amounts to disguised restriction on trade and therefore, the measure is inconsistent with the requirements under the chapeau.

¹²⁴ ¶ 6, Pg 6, Compromis.

¹²⁵ Ex. 6, Extracts from a Media Report, Pg. 18 Compromis.

Request for Findings

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

1. The government of Asgard, by adopting the PaCE regulation 8/2014, has violated the national treatment obligation under Article III:4 of the GATT and the same regulation is not capable of being justified under Article XX of the GATT.
2. The government of Asgard, by adopting the PaCE regulation 8/2014, has violated the national treatment obligation under Article 2.1 of the TBT Agreement.
3. The government of Asgard, by adopting the PaCE regulation 8/2014, has violated Article 2.2 of the TBT Agreement and the objective of the regulation is illegitimate.
4. The PaCE regulation 8/2014 is further inconsistent with Article 2.8 and Article 2.12 of the TBT Agreement.
5. The government of Asgard is liable to pay damages for loss suffered by the Agatea due the PaCE regulation.

Respectfully submitted,

X _____

Agent(s) on behalf of the Complainant.