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8th GNLU INTERNATIONAL LAW MOOT COURT COMPETITION, 2016

BEFORE THE PANEL ESTABLISHED BY WTO DSB

WINGARDIUM: MEASURES CONCERNING DOMESTIC SOURCING OF SOLAR CELLS AND PLAIN PACKAGING OF CRYSTALLINE SILICON CELLS

WT/DSxxx

LEVIOSA

(COMPLAINANT)

v.

WINGARDIUM

(RESPONDENT)

WRITTEN SUBMISSION ON BEHALF OF THE COMPLAINANT

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LIST OF ABBREVIATIONS

¶	PARAGRAPH
Annex	ANNEXURE
Art.	ARTICLE
CLI	CONSORTIUM OF LEVIOSIAN INVESTORS
EC	EUROPEAN COMMUNITY
EEC	EUROPEAN ECONOMIC COMMUNITY
ed.	EDITOR
edn.	EDITION
FIT	FEED-IN-TARIFF SCHEME
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE 1994
I.L.M.	INTERNATIONAL LEGAL MATERIAL
Id.	IBIDEM
kWh	KILOWATT HOUR
SCM	AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES
TBT	AGREEMENT ON TECHNICAL BARRIERS TO TRADE
TRIMS	THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES
TRIPS	THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS
U.N.T.S.	UNITED NATIONS TREATY SERIES
WG/SM/P-1	THE ENABLING DOCUMENT FOR THE WINGARDIUM NATIONAL SOLAR MISSION
WHO	WORLD HEALTH ORGANIZATION
WNSM	WINGARDIUM SOLAR MISSION
WSO	WINGARDIUM STANDARDS ORGANISATION
WTO	WORLD TRADE ORGANIZATION

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STATEMENT OF FACTS

THE PARTIES

The Complainant Leviosa is a developed country with a population of 250 million. The Respondent Wingardium is a developing country with a population of 500 million. It ranks fourth in terms of carbon emissions in the world. Both countries are members of the WTO. Leviosa is the largest exporter of Crystalline Silicon Solar Cells. In 2013, Wingardium initiated the Wingardium National Solar Mission ("**WNSM**"). Article 4 of the enabling document ("**WG/SM/P-1**") promotes domestic manufacturing as a main objective of the Mission.

THE WINO-LEVIOSIAN ENERGY COOPERATION AGREEMENT

In January 2013, the President of Leviosa visited Wingardium to develop a partnership between both nations based on energy security. The meeting resulted in the execution of the Wino-Leviosian Energy Cooperation Agreement. The Consortium of Leviosian Investors ("**CLI**") won tenders for 60% of Phase-I of the WNSM. The CLI met all Quality, Health, and Safety Standards established by the Wingardium Standards Organisation ("**WSO**").

LOSS FOR CLI

For two years, Leviosian investors suffered enormous losses ($5 billion) due to the domestic content law under WG/SM/P-I. In June 2015, the Leviosian President requested the Wingardian President to reconsider the domestic content requirement, for the benefit of the Leviosian investors. He offered Leviosa's committed support to the development of domestic industry so that Wingardium could execute Phase-II of WSNM solely relying on local manufacturers.

REVIEW OF DOMESTIC REQUIREMENT & BACKLASH IN WINGARDIUM

On 2nd July 2015, an Executive Order was passed by the President of Wingardium to remove the domestic content requirement. Due to this decision, the Wingardium domestic Crystalline Silicon cells and solar panels industry was compelled to lay off more than half their workforce. The opposition's campaign against the Wingardium Government resulted in a policy paralysis, hostile investor sentiment and negative credit status for Wingardium.

REINSTATEMENT OF ORIGINAL SCHEME IN WG/SM/P-I

To improve the state of affairs of Wingardium, on 4th January 2016, an Executive Order was passed. The Order reinstated the original scheme in WG/SM/P-I. Leviosa had transferred sufficient Know-How to establish 25 domestic manufacturing companies in Wingardium for the production of Crystalline Silicon Solar Photovoltaic Modules. Despite this commitment, Wingardium's stringent domestic content requirement was raised to 50%.

LEVIOSA'S REACTION AND ENERGY COOPERATION DEAL WITH REDONDO

As a result of the order, Leviosian investors suffered heavy losses. On 12th January 2016, the Leviosian President wrote to the Wingardian President that his decision violated his country's commitment under the WTO. He further wrote that a dispute would be brought before a WTO dispute settlement panel if the domestic content requirement was not removed.

The President of Wingardium secured an Energy Cooperation Deal with Redondo, a neighbouring country, for the supply of Thin Film Technology.

SPREAD OF ALLERGIES & PLAIN PACKAGING OF SOLAR CELLS

A preliminary study by the Department of Health of Wingardium revealed that Crystalline Silicon Solar cells cause allergies, and in some cases skin cancer for individuals in close contact with panels containing these cells. The study suggested that the reliance on these cells should be reduced. Plain packaging of all solar cells would reduce brand recognition and promote the use of Thin Film technology solar cells.

The Wingardium Department of Health issued a directive on 1st February 2016, calling for the plain packaging of all solar cell products in the interest of public health. As a result, the Leviosian investors' market share in the Wingardium solar industry fell to 10% in March 2016, from 75% in December 2013.

REQUEST FOR ESTABLISHMENT OF PANEL

In late March 2016, Leviosa requested consultations with Wingardium under WTO Dispute Settlement Understanding (DSU), which were unsuccessful. Leviosa then requested for the establishment of a WTO Panel. DSB established the panel in June 2016. The WTO Director General composed the Panel in July 2016.

MEASURE OF ISSUES

1. Whether the WNSM programme measures are in violation of Wingardium's obligation under Article III:1 of GATT?

2. Whether the domestic content requirement under WNSM program measures is inconsistent with Article III:4 of GATT?

3. Whether the domestic content requirement under WNSM program measures is inconsistent with Article III:5 of GATT?

4. Whether the WNSM programme measures are trade related investment measures which are inconsistent with Wingardium's obligation under article 2.1 of TRIMS Agreement?

5. Whether the plain packaging measure issued by the Wingardium Department of Health is in violation of article 2.2. of the TBT Agreement?

6. Whether the plain packaging measure amounts to trademark infringement?

7. Whether the plain packaging directive of solar cells is inconsistent with Wingardium's obligations under article 20 of the TRIPS Agreement?

8. Whether the directives issued by Wingardium is inconsistent with Article IX:4 of the GATT 1994?

9. Whether the FIT scheme is inconsistent with the SCM Agreement?

SUMMARY OF PLEADINGS

1. THE WNSM MEASURES IS IN VIOLATION OF WINGARDIUMS OBLIGATION UNDER ARTICLE III:1 OF GATT

- The measures under WNSM Programme require mixture, processing or use of Solar cells and modules, and hence they fall under the category of Article III:1.
- The products are similar and in direct competitive relation to each other.
- The local content requirement protects domestic product over imported products which has been detrimental to the value of imported solar cells and modules.
- Hence the measures under the WNSM Programme are trade restrictive and afford protection to domestic production as equal competitive opportunities have not been provided for like imported products.

2. THE DOMESTIC CONTENT REQUIREMENT UNDER THE WNSM IS INCONSISTENT WITH ARTICLE III:4 OF GATT

- Imported and domestic solar cells and modules are '*like products'*
- WNSM impose "requirements" on solar panel developers "affecting" the "internal" "sale," "purchase," or "use" of solar cell and modules.
- This requirement accords imported solar cells and modules treatment less favourable than to "like products" of Wingardium origin.
- Since the WNSM Programme has altered the conditions of competition in favor of Wingardium-produced solar cells and modules to the detriment of those produced in Leviosa and elsewhere, it thereby accords imported equipment less favorable treatment than it accords to like products of Wingardium origin.

3. THE DOMESTIC CONTENT REQUIREMENT IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER GATT ARTICLE III:5

- GATT III:5 prevents Members from maintaining internal quantitative regulations relating to use of product in specified amounts or proportions which requires that any specified amount of any product must be supplied from domestic sources.

- The domestic content requirement mandates that 50% of the equipment used to manufacture crystalline silicon PV modules must be supplied from Wingardium.
- Therefore, the requirement is an internal quantitative regulation prohibited under GATT Article III:5.

1. <u>THE WNSM PROGRAMME MEASURES ARE INCONSISTENT WITH WINGARDIUMS OBLIGATION UNDER ARTICLE 2.1 OF TRIMs AGREEMENT</u>

- The WNSM Programme measures qualify as investment measures as domestic content requirement is important in the development of a robust domestic production industry.
- These measures are "related to trade in goods" because they impose domestic content requirements related to the purchase, sale, or use of goods.
- Since these measures are "investment measures related to trade in goods" and they are also inconsistent with Article III of the GATT 1994, which has already been established, the WNSM measures are inconsistent with Article 2.1 of the TRIMs Agreement.

2. <u>THE PLAIN PACKAGING MEASURE ISSUED BY THE WINGARDIUM DEPARTMENT OF HEALTH IS IN VIOLATION OF ARTICLE 2.2. OF TBT</u>

- The Plain Packaging measure is a Technical Regulation.
- The Plain Packaging measure does not seek to achieve a legitimate objective as the said measure, which is issued in the interest of public health, is based on inconclusive health findings.
- The Plain Packaging Measure is more trade restrictive than necessary to fulfil the objective of protecting public health. The directive makes no contribution to the objective, has a limiting effect on trade, there are no risks arising from the non-fulfilment of the objective, and less trade restrictive measures are available.

3. <u>THE PLAIN PACKAGING MEASURE AMOUNTS TO TRADEMARK INFRINGEMENT</u>

- The plain packaging directive is inconsistent under article 16.1 of the TRIPS Agreement. Leviosa is the owner of registered trademarks on solar cell products used in the course of trade. Plain packaging mandates the use of similar signs on solar cell products which creates a "Likelihood of Confusion".
- The directive is inconsistent with article 29(8) of The Wingardium Trademark Act. Plain packaging is detrimental to the distinctive character of the trademark and against the reputation of the trademark.

4. <u>PLAIN PACKAGING OF SOLAR CELLS IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER ARTICLE 20 OF THE TRIPS AGREEMENT</u>

- Plain Packaging is a special requirement restricting the use of a trademark in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.
- Plain Packaging requirement encumbers the use of Trademark by prohibiting the use of trademark stating that "laminate for the package must be transparent and not coloured, marked, textured or...".
- The encumbrance on the use of Trademark is unjustified as Plain Packaging is out of all proportion to the loss of distinctiveness it causes.

5. <u>PLAIN PACKAGING IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER GATT ARTICLE IX:4</u>

- The directive related to the use of trademarks and the certain other information including *marks of origin*. Thus it relates to the marking of imported goods.
- Compliance with the directives would *materially reduce* the value of product and *increases their cost of production*.

6. <u>THE FIT SCHEME IS INCONSISTENT WITH THE SCM AGREEMENT</u>

- The FIT Scheme is a subsidy as the government offers a financial contribution by purchase of goods under the scheme. The said scheme also confers a benefit on the receiver.
- The subsidy as provided by the scheme is prohibited under Article 3.1(b) and Article 3.2 of the SCM Agreement.

LEGAL PLEADINGS

1. THE DOMESTIC CONTENT REQUIREMENT IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER ARTICLE III:4 OF THE GATT

GATT Article III:4 provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[1]

To determine a breach of Article III:4, the following elements must be satisfied: the imported and domestic products at issue are "like products" [1.1], the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use" [1.2] and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products [1.3]. [2]

The domestic content requirement under the WNSM satisfies these criteria and are consequently inconsistent with Article III:4 of GATT.

1.1. THE IMPORTED AND DOMESTIC SOLAR CELLS AND MODULES ARE 'LIKE PRODUCTS'

It is established that "where a difference in treatment between domestic and imported products is based exclusively on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria -- that is, the physical properties, end-uses and consumers' tastes and habits. Instead, it is sufficient for the purposes of satisfying the "like product" requirement, to demonstrate that there can or will be domestic and imported products that are like." [3]

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[1] General Agreement on Trade and Tariffs, art. III:4, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M.

[2] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133 WT/DS161/AB/R (Dec. 11, 2000).

[3] Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 6.164 WT/DS276/R (Apr. 6, 2004).

Similarly, the Panel in *India – Autos* stated, "Origin being the sole criterion distinguishing the products, it is correct to treat such products as like products within the meaning of Article III:4. [4]

The WNSM measure depends solely on the criterion of the country of origin of products. 50% of the solar cells and modules using Crystalline Silicon technology must be locally produced.[5] There is no difference between the domestic and imported products. Further, since Leviosa's technology is being used to develop Wingardium's industry, the products produced in both countries would be increasingly similar.

Therefore, domestic and imported products can be called "like".

1.2. THE DOMESTIC CONTENT MEASURE IS A REQUIREMENT AFFECTING INTERNAL SALE

GATT jurisprudence suggests two distinct situations which would satisfy the term "requirement" in Article III:4 - obligations which an enterprise is "legally bound to carry out", and those which an enterprise voluntarily accepts in order to obtain an advantage from the government. [6]

In order to participate in the WNSM, a solar panel developer must voluntarily accept an obligation to use solar cells and modules manufactured in Wingardium. Under the Wino-Leviosian Energy Cooperation Agreement, Leviosa is a part of the WNSM.[7] By submitting a bid application, Leviosa signaled its "voluntary acceptance" of the obligation to comply with the provisions of the WNSM.[8] Leviosa is legally bound to carry out that commitment made under the provisions of the WNSM.

"Affecting" means to have "an effect on", encompassing measures that modify the conditions of competition between domestic and imported goods in the market.[9] The term "affecting" under Article III:4 operates to connect identified types of government action (*i.e.*,

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[4] Panel Report, *India – certain measures affecting the automotive sector*, ¶ 7.174 WT/DS146/R (Dec. 21, 2001) (emphasis added) [Hereinafter *India-Autos* Panel Report].
[5] Annexure VI, Fact on Record.
[6] *India – Autos* Panel Report, *supra* note 4, ¶ 7.184; Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, ¶ 10.73 WT/DS139/R (Feb 11, 2000).
[7] ¶ 9, Fact on Record.
[8] *Id.*
[9] Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, ¶ 158 WT/DS139/ABR (May 5, 2000).

"laws, regulations and requirements") with specific transactions, activities and uses relating to products in the marketplace (*e.g.*, "sale", "purchase", or "use").[10]

In the present dispute, a concrete link exists between the domestic content requirements under the WNSM Programme and the internal sale, purchase, or use of solar cells and modules in Wingardium. Under the WNSM, a developer satisfies the applicable domestic content requirements by *using* solar cells and modules made in Wingardium. The requirement affects "internal use" because it applies with respect to the use of equipment for projects approved only inside the territory of Wingardium.

The domestic content requirement is therefore a measure affecting the use of solar cells and modules within the meaning of GATT 1994 Article III:4.

1.3. IMPORTED PRODUCTS ARE ACCORDED "LESS FAVOURABLE" TREATMENT

According 'treatment no less favourable' means according conditions of competition no less favourable to the imported product than to the like domestic product. [11] Thus, the focus of this analysis in this dispute is whether the WNSM Programme measures *modify the conditions of competition* in the relevant market to the *detriment* of imported products.[12]

In *India – Autos*, the panel found that "the very nature of [an] indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products".[13] The Panel found that the domestic content requirements clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favour of domestic products.[14]

The domestic content requirement accords less favourable treatment to imported solar cells and modules than that accorded to like products of Wingardium origin by incentivizing the use of Wingardium-manufactured equipment, versus imported equipment, through a Feed-in-Tariff Scheme.[15] This modifies the conditions of competition in favour of Wingardium - manufactured cells and modules to the detriment of such imported equipment. In order to

[10] *Id.*, ¶ 208.
[11] Panel Report, *Turkey – Measures Affecting the Importation of Rice*, ¶ 7.232 WT/DS/R133 (Sep. 21, 2007).
[12] Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1532 WT/DS363/R (Aug. 12, 2009).
[13] *Id.*, ¶ 7.201.
[14] *Id.*, ¶ 7.*202*
[15] Annexure VI, Fact on Record.

accrue benefit under the WNSM, the developers will have to abide from the domestic content requirement.[16] These measures thus create an incentive in favour of the domestically manufactured equipment, and thereby according less favourable conditions of competition, therefore less favourable treatment, to imported equipment.

It is submitted that all elements satisfied, the domestic content requirement is inconsistent with Wingardium's obligations under GATT Article III:4.

2. THE DOMESTIC CONTENT REQUIREMENT OF WNSM IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER GATT ARTICLE III:1

In *Canada — Periodicals,* the Appellate Body pointed out the fundamental purpose of Article III *is to ensure equality of competitive conditions between imported and like domestic products.*[17] GATT Article III:1 states that internal measures should not be applied *so as to afford protection to domestic production*.[18] The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in the other paragraphs of Article III." [19]

The following elements must be satisfied to prove the violation of Article III:1 – the measure requires the mixture, processing, or use of equipment in a specified proportion [2.1], the products are similar or in direct competitive relations with each other [2.2] , and the measure affords protection to domestic production [2.3].

It is submitted that Wingardium's domestic content requirement satisfies all of the above elements, and is therefore in violation of GATT Article III:1.

2.1. THE MEASURE REQUIRES THE USE OF EQUIPMENT IN A SPECIFIED PROPORTION

The domestic content requirement mandates the use of 50% local equipment in the production of Cyrstalline Silicon PV modules.[20] 50% of the cells and modules used in the

[16] *Id.*
[17] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, ¶ 8 WT/DS31/AB/R (Jun. 30, 1997) (emphasis added).
[18] General Agreement on Trade and Tariffs, art. III:1, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (emphasis added).
[19] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 110 WT/DS8/AB/R (Oct. 4, 1996)
[20] Annexure VI, Fact on Record.1

production of modules must be produced in Wingardium. Therefore, it is submitted that the measure requires the use of products in a specified proportion.

2.2. THE PRODUCTS ARE SIMILAR TO EACH OTHER

For the purpose of Article III:4, it was demonstrated in 1.1 that the Crystalline Silicon solar cells and modules, domestic and imported, are "like" products. It is therefore submitted that the products are similar for the purpose of Article III.

2.3. THE DOMESTIC CONTENT REQUIREMENT AFFORDS PROTECTION TO DOMESTIC PRODUCTION

In *EEC- Animal Feeding*, the Panel noted:

"Since a specified amount of denatured milk was required to be purchased from domestic sources, such a regulation was found to be in contravention of the provisions of article III:1." [21]

Under Article 4.1 of the WNSM, it is mandatory to ensure 50% of local content in all plants/installations using Crystalline Silicon technology.[22] 50% of the market for Crystalline Silicon technology products is reserved for domestic producers. Therefore, imported products compete in a market where only 50% of the share is available. Such protection accorded to domestic products denies equal competitive opportunities for imported solar cells and modules. This has adverse effects on imported products from countries such as Leviosa. In two years since the CLI entered Wingardium's market, they incurred a $5 billion loss.[23] In March 2016, their market share in the Wingardium solar industry dipped to 10% from 75% in December 2013.[24] The decline in their market share is a result of the protection offered to Wingardium's products under the WNSM.

It is submitted that since the domestic content requirement affords protection to Wingardium's products, the requirement is inconsistent with Wingardium's obligations under GATT Article III:1.

[21] Panel Report, *EEC - Measures on Animal Feed Protein* ¶ 4.6-4.8 L/4599 - 25S/49 (adopted Mar. 14, 1978)
[22] Annexure VI, Fact on Record.
[23] ¶ 10, Fact on Record.
[24] ¶ 17, Fact on Record.

3. THE DOMESTIC CONTENT REQUIREMENT IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER GATT ARTICLE III:5

GATT Article III:5 reads:

No state party shall maintain any internal quantitative regulation relating to mixture, processing or use of product in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.[25]

The WNSM provides for a domestic content requirement enforced by Article 4.1.[26] It is specified that developers must use 50% local content in solar panels made from Crystalline Silicon Solar Cells.[27] This means that 50% ("specified amount or proportion") of the equipment used to manufacture crystalline silicon PV modules ("product which is the subject of the regulation") must be supplied from Wingardium ("domestic sources"). Therefore, the requirement is an internal quantitative regulation prohibited under GATT Article III:5.

It is submitted that the domestic content requirement under the WNSM is inconsistent with Wingardium's obligations under GATT Article III:5.

4. THE DOMESTIC CONTENT REQUIREMENT IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER ARTICLE 2.1 OF TRIMS

The requirements under the WNSM program are also inconsistent with article 2.1 of TRIMs agreement as they are trade related investment measures which are inconsistent with Article III of GATT. The domestic content requirement measures are explicitly mentioned as WTO-inconsistent TRIMs under annexure 1(a) of TRIMs Agreement.

Article 2.1 of TRIMs provides:

[25] General Agreement on Trade and Tariffs, art. III:5, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.
[26] Clarification no.5, Fact on Record.
[27] Annexure VI, Fact on Record.

Without prejudice to other rights and obligations under GATT 1994, *no Member shall apply any TRIM that is inconsistent with the provisions of Article III* or Article XI of GATT 1994.[28]

Article 2.1 requires two elements to be shown to establish a violation thereof: the existence of an investment measure related to trade in goods (i.e., a TRIM) [4.1] and the inconsistency of that measure with Article III the GATT 1994 [4.2]. [29]

As it has been established that the domestic content requirement under the WNSM is inconsistent with GATT Articles III:1, III:4, and III:5, the remaining question is whether the relevant measure may be considered "investment measures related to trade in goods" – *i.e.*, TRIMs. It is submitted that the requirement is a TRIM.

4.1. THE DOMESTIC CONTENT REQUIREMENT IS A TRIM

In *Canada – Renewable Energy*, the Panel found that the measures at issue constituted "investment measures" as those measures had the objective of encouraging the production of renewable energy generation equipment in Ontario.[30]

The WNSM highlights the importance of domestic content requirement for the production of solar panels in Wingardium.[31] Those that comply with the requirement are entitled to benefits under the FIT Scheme.[32] The aim of the requirement is to encourage the production of renewable energy generation equipment in Wingardium through investment, to develop Wingardium's solar industry. Therefore, it is submitted that the domestic content requirement is a TRIM.

Domestic content requirements are "necessarily 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade".[33]

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[28] TRIMS Agreement: Agreement on Trade-Related Investment Measures, art. 2.1, Apr. 15, 1994, 1868 U.N.T.S. 186.
[29] Panel Report, *Indonesia – Certain measures affecting the Automobile Industry*, ¶ 14.64 WT/DS54/R (Jul. 2, 1998) [Hereinafter *Indonesia-Autos* Panel Report].
[30] Panel Reports, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector - Canada - Measures Relating to the Feed-in Tariff Program*, ¶ 7.109 WT/DS412/R;WT/DS426/R (Dec. 19, 2012) [Hereinafter *Canada-Renewable* Energy Panel Report].
[31] ¶ 6, Fact on Record.
[32] ¶ 6, Fact on Record.
[33] *Indonesia*-Autos, Panel Report, *supra* note 2, ¶ 14.82.

As demonstrated above, the WNSM imposes domestic content requirements which incentivize the use of domestic goods over imported goods. Therefore, developers would favour the use of domestic goods to avail of the benefits offered by the FIT Scheme.

Therefore, the requirement is an *investment measure related to trade in goods*.

4.2. THE DOMESTIC CONTENT REQUIREMENT IS INCONSISTENT UNDER GATT ARTICLE III

As established above, the requirement violates GATT Article III. This can be further confirmed by referring to the Illustrative List contained in the Annex 1(a) of the TRIMs Agreement.[34] Where a measure has the characteristics that are described in Paragraph 1(a) of the Illustrative List, it follows that it will be in violation of Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement.[35]

As established earlier, the domestic content requirement has "the characteristics that are described in Paragraph 1(a)." Developers are required to purchase or use solar cells and modules made in Wingardium (*i.e.*, "products of domestic origin*"*) in order to accrue benefits from the same.

It is submitted that the domestic content requirement under the WNSM is inconsistent with Article 2.1 of the TRIMs Agreement.

5. THE PLAIN PACKAGING MEASURE IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

5.1 THE DIRECTIVE IS A TECHNICAL REGULATION

A measure must be a "technical regulation" to fall under Article 2.2 of the TBT.[36] Technical regulation is defined:

[34] TRIMS Agreement: Agreement on Trade-Related Investment Measures, Annex 1(a), Apr. 15, 1994, 1868 U.N.T.S. 186.
[35] *Canada-Renewable Energy* Panel Report, *supra* note 3, ¶ 7.120.
[36] Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 175, WT/DS231/AB/R (Oct. 23, 2002) [hereinafter *EC-Sardines* Appellate Body Report].

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.[37]

The document must apply to an "identifiable product or group of products" [5.1.1], lay down one or more "characteristics of the product" [5.1.2], and compliance with the product characteristics must be "mandatory" [5.1.3].[38] It is submitted that all elements are satisfied in the present case.

5.1.1. THE DIRECTIVE IS A DOCUMENT THAT APPLIES TO AN IDENTIFIABLE GROUP OF PRODUCTS

A document is "something written, inscribed, etc., which furnishes evidence or information upon any subject".[39] The Directive is a written document which provides packaging requirements of solar cell products and modules.[40] A technical regulation must state the products covered under it.[41] The Directive states that these measures apply to modules and cells of both Thin Film and Crystalline Technology.[42]

It is submitted that the Directive is a document that applies to an identifiable group of products.

5.1.2. THE DIRECTIVE LAYS DOWN CHARACTERISTICS OF THE PRODUCT

Characteristics include "features", "qualities", "attributes", or other "distinguishing mark" of a product.[43] The definition of a technical regulation gives examples of product characteristics, including "terminology, symbols, packaging, marking or labelling requirements".[44]

The Directive mandates plain packaging of solar cells and modules.[45] It mandates the use of trademarks in a standardized format, and health warnings on the package.[46] These are

[37] Agreement on Technical Barriers to Trade, annex. 1.1, Jan. 1, 1995, 1868 U.N.T.S. 120, 18 I.L.M. 1079.
[38] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 70, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos* Appellate Body Report]; *EC-Sardines* Appellate Body Report, *supra* note 1, ¶ 176; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 185, WT/DS381/AB/R (May 16, 2012) [hereinafter *US – Tuna II* Appellate Body Report].
[39] 1 Shorter Oxford English Dictionary, 731 (A. Stevenson ed., 6th edn., 2007).
[40] Annexure VIII, Fact on Record.
[41] *EC – Asbestos* Appellate Body Report, *supra* note 3, ¶ 70.
[42] ¶ 6, Annexure VIII, Fact on Record.
[43] *EC – Asbestos* Appellate Body Report, *supra* note 3, ¶ 67.
[44] *Id.*

packaging, marking, labelling requirements. Thus, the Directive lays down characteristics of the product.

5.1.3. COMPLIANCE WITH THE PRODUCT CHARACTERISTICS IS MANDATORY

Compliance is an "act in accordance with or with a request, command".[47] "Mandatory" means "obligatory in consequence of a command, compulsory".[48] The document should provide that products *must possess* or must *not possess* certain "characteristics".[49]

The Directive states that the Laminate *must* be transparent and *not* marked in any way.[50] 90% of the package *must* contain health warnings and instructions.[51] Certain trademarks *must* be displayed in a uniform format.[52] The mandatory nature of the Directive is evident from the language used.

Since the measure satisfies all elements, it is a technical regulation.

5.2. THE DIRECTIVE IS INCONSISTENT WITH TBT ARTICLE 2.2

To be consistent with TBT Article 2.2, a technical regulation must pursue a "legitimate objective" [5.2.1] and not be more trade-restrictive than "necessary" to fulfil that legitimate objective [5.2.2].[53] The Directive fails to satisfy both these conditions.

5.2.1. THE DIRECTIVE DOES NOT SEEK TO ACHIEVE A LEGITIMATE OBJECTIVE

A "legitimate objective" refers to an aim that is lawful, justifiable, or proper.[54] The panel must consider all evidence, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the technical regulation.[55]

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[45] Annexure VIII, Fact on Record.
[46] ¶ 6, Annexure VIII, Fact on Record.
[47] 1 Shorter Oxford English Dictionary, 473 (A. Stevenson ed., 6th edn., 2007) *cited in US-Tuna* Appellate Body Report, *supra* note 3, ¶ 185.
[48] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications For Agricultural Products and Foodstuffs*, ¶ 7.453, WT/DS290/R (Apr. 20, 2005) [hereinafter *EC – Trademarks and Geographical Indications (Australia)* Panel Report].
[49] *EC – Asbestos* Appellate Body Report, *supra* note 3, ¶ 69.
[50] ¶ 6, Annexure VIII, Fact on Record.
[51] *Id.*
[52] *Id.*
[53] Panel Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 7.333, WT/DS406/R (Sept. 2, 2011) [Hereinafter *US-Clove Cigarettes* Panel Report]; *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 7.388, WT/DS381/R (Sept. 15, 2011) [hereinafter *US-Tuna* Panel Report].
[54] *US – Tuna II* Appellate Body Report, *supra* note 3, ¶ 313.
[55] *US – Tuna II* Appellate Body Report, *supra* note 3, ¶ 314.

The measure is based on studies which revealed health hazards of Crystalline Silicon solar cells.[56] Reports reveal that cadmium - the main chemical in Thin Film technology – is highly carcinogenic.[57] Health risks include pneumonitis, pulmonary edema, and death.[58] The Directive states, however, that there are *no known health warnings* associated with Thin Film technology.[59] Thin Film products would contain no warnings, even when they pose high risks to workers. This would leave uninformed consumers exposed to the hazards of such products.

Wingardium's Health Department states that the measure would promote use of *locally manufactured* Thin Film technology solar cells.[60] Concurrently, Wingardium secured an Energy Cooperation Deal with Redondo, a neighbouring country, for the supply of Thin Film technology.[61]

After the Directive was enacted, Leviosa's market share dropped to 10%. This is a direct result of plain packaging. It modifies competitive relations to the detriment of Crystalline Silicon technology products – of which Leviosa has a majority share.[62]

The purported objective of the measure is to protect public health. However, it is submitted that the real objective of the Directive is to restrict international trade. Therefore, the Directive does not pursue a legitimate objective under TBT Article 2.2.

5.2.2. THE DIRECTIVE IS MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFILL THE OBJECTIVE

To assess whether a measure is more trade-restrictive than necessary involves a "relational analysis" of the degree of contribution made to the legitimate objective [5.2.2.1], the trade-restrictiveness of the measure [5.2.2.2], the nature of the risks and the gravity of the consequences that would arise from non-fulfilment of the objective [5.2.2.3].[63] A

[56] Annexure VIII, Fact on Record.
[57] Electric Power Research Institute report to the California Energy Commission, Palo Alto, CA, *Potential Health and Environmental Impacts Associated with the Manufacture and Use of Photovoltaic Cells*, 4-4 (2003). [Hereinafter Electric Power Research Institute].
[58] VASILIS FTHENAKIS, PRACTICAL HANDBOOK OF PHOTOVOLTAICS: FUNDAMENTALS AND APPLICATIONS: OVERVIEW OF POTENTIAL HAZARDS, 7 (Tom Markvart and Luis Castaner eds., 1st ed. 2003) [Hereinafter Fthenakis].
[59] Footnote 2, Annexure VIII, Fact on Record.
[60] ¶ 16, Fact on Record.
[61] *Id.*
[62] ¶ 10, Fact on Record.
[63] Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 471, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [Hereinafter *US-COOL* Appellate Body Report].

"comparative analysis" of the challenged measure and possible alternative measures is also used [5.2.2.4].[64] The Directive fails to satisfy all elements of both analyses.

5.2.2.1. THE DIRECTIVE MAKES NO CONTRIBUTION TO THE LEGITIMATE OBJECTIVE

A contribution to the achievement of an objective exists when there is a *genuine relationship* of ends and means between the objective pursued and the measure at issue.[65]

The mere fact that there is information available to the public does not mean that the public is better informed. A drop in Leviosa's market share to 10%[66] doesn't signify that workers are protected from risks associated with solar cells and modules. Further, [5.2.1] shows that the measure does not protect consumers from hazards related to Thin Film products.

The Health Department states that a ban on Crystalline Silicon technology was not imposed since it would lead to unemployment for *domestic manufacturers* involved in the production process.[67] It suggested that plain packaging would promote of the use of *locally manufactured* Thin Film technology solar cells.[68] This indicates that the measure aims at promoting the local industry, which is not its purported objective. A *genuine relationship* is not established between the measure and the aim of protecting public health.

The Directive does not contribute to the objective of protection of public health.

5.2.2.2. THE DIRECTIVE IS MORE TRADE-RESTRICTIVE THAN NECESSARY

Trade-restrictive means "having a limiting effect on trade".[69] Trade-restrictive measures include those that deny competitive opportunities to imports.[70] A regulation is more restrictive than necessary when the objective can be achieved through less trade-restrictive alternatives.[71]

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[64] *US – Tuna II* Appellate Body Report, *supra* note 3, ¶ 322.
[65] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*,¶ 145, WT/DS332/AB/R (Dec. 3, 2007) [Hereinafter *Brazil-Retreaded Tyres* Appellate Body Report].
[66] ¶ 17, Fact on Record.
[67] ¶ 16, Fact on Record.
[68] *Id.*
[69] *US-COOL* Appellate Body Report, *supra* note 29, ¶ 375; *US – Tuna II* Appellate Body Report, *supra* note 3, ¶ 319.
[70] *US-Tuna* Panel Report, *supra* note 17, ¶ 7.455; Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*,¶ 7.572, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [Hereinafter *US-COOL* Panel Report].
[71] *US-Tuna* Panel Report, *supra* note 18, ¶ 5.204.

Risks associated with solar cells are limited to occupational hazards which can be protected against.[72] Plain packaging prevents consumers from recognizing Leviosa's products. Leviosa's market share dipped to a mere 10% after the measure was enacted. [73] This indicates a disadvantage to Leviosa's imported products. The Directive denies Leviosa of competitive opportunities.

Further, there are less-restrictive alternatives which equally fulfill the objective. Efficient use of materials, employee training, safety procedures would minimize the risk to workers.[74] Mandatory health warnings, without a plain packaging requirement, would clearly indicate health risks. This would help consumers to make informed decisions. These alternatives effectively contribute to public health protection. Therefore, the measure is more trade-restrictive than necessary to achieve the stated objective of public health.

5.2.2.3. NO RISK ARISES FROM NON-FULFILMENT OF OBJECTIVE

The third factor in the relational analysis assesses the risks non-fulfilment of the objective would create.[75] In assessing such risks, elements of consideration are "*inter alia*: available scientific and technical information, related processing technology or intended end-uses of products". [76]

The objective of the Directive is to protect public health. However, the plain packaging measure used to implement the objective is unimportant. In [5.2.2.1] it is demonstrated how this measure fails to make an impact on the objective. Even if the measure were not enacted, it would not lead to adverse consequences. It is submitted that there are no risks arising from the non-fulfilment of the objective.

5.2.2.4 LESS TRADE-RESTRICTIVE ALTERNATIVES TO THE PLAIN PACKAGING MEASURE ARE AVAILABLE

An assessment of trade-restrictiveness includes a comparison of the challenged measure and possible alternatives.[77] Alternatives must be reasonably available, less trade-restrictive, and make an equivalent contribution to the legitimate objective.[78]

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[72] Electric Power Research Institute, *supra* note 22; Fthenakis, *supra* note 23.
[73] ¶ 17, Fact on Record.
[74] Fthenakis, *supra* note 23, at 13.
[75] *US – Tuna II* Appellate Body Report, *supra* note 3, ¶ 321.
[76] *Id.*
[77] *US-Tuna II,* Appellate Body Report, *supra* note 3, ¶ 322.

[5.2.2.2] identifies less trade-restrictive, reasonably available alternatives. These provide a greater contribution to the fulfilment of the objective. Improved safety systems and employee training can be provided without difficulty. Leviosa is unlikely to hesitate in complying with a mandatory health warning requirement. The Leviosian Tribune notes the country's willingness to arrive at a *mutually beneficial decision* between both countries.

It is submitted that plain packaging is inconsistent with Wingardium's obligations under TBT Article 2.2.

6. PLAIN PACKAGING AMOUNTS TO TRADEMARK INFRINGEMENT

The plain packaging requirement was enacted in the interest of public health.[79] It is submitted that the requirement is inconsistent with Wingardium's obligations under TRIPS Article 16.1 [6.1] and under Article 29(8) of the Wingardium Trademark Act[80] [6.2].

6.1. THE DIRECTIVE IS INCONSISTENT UNDER ARTICLE 16.1 OF THE TRIPS AGREEMENT

Article 16.1 requires members to protect against unauthorized use of registered trademarks used in the course of trade [6.1.1], where signs are identical or similar to those of the markholder [6.1.2] and this use of the mark causes a likelihood of confusion [6.1.3].[81]

It is submitted that the Directive is inconsistent under TRIPS Article 16.1 on all three counts.

6.1.1 LEVIOSA IS THE OWNER OF REGISTERED TRADEMARKS ON SOLAR CELL PRODUCTS USED IN THE COURSE OF TRADE

An "owner" is the person who holds the title of the property constituted by the trademark.[82] "In the course of trade" means every act or operation that is aimed at or results from buying and selling products or services in a professional manner.[83]

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[78] *Id.*
[79] ¶16, Fact on Record.
[80] *In pari materia* the Indian Trademark Act (1999)
[81] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications For Agricultural Products and Foodstuffs*, ¶ 7.601, WT/DS290/R (Mar. 20, 2005).
[82] Panel Report, *United States — Section 211 Omnibus Appropriations Act of 1998*, ¶ 187, WT/DS176/R (Aug. 6, 2001).
[83] NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF TRADEMARKS AND DESIGNS, 347 (Kluwer eds. 2nd ed. 2011) [Hereinafter Carvalho].

In 2006, Leviosa developed a unique Solar Panel technology.[84] Leviosa is the largest exporter of Crystalline Silicon solar cells in the world.[85] Its manufacturers received a "lion's share" for the supply of Crystalline Silicon solar cells in Wingardium.[86] Leviosa would not bring a dispute before a WTO Panel alleging trademark infringement unless its investors were owners of registered trademarks. Therefore, it can be reasonably deduced that Leviosa is the owner of registered trademarks on solar cell products, used in the course of trade.

6.1.2 PLAIN PACKAGING MANDATES THE USE OF SIMILAR SIGNS ON SOLAR CELL PRODUCTS

A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.[87] Plain packaging prohibits the use of trademarks[88], which deprives the owner of the trademark's basic function – its "capacity to distinguish."[89] Even the brand name must be written in a standardized format.[90] This would make products look not similar, but almost *identical*.

It is submitted that plain packaging mandates the use of similar signs for all solar cell products.

6.1.3 THE USE OF SIMILAR SIGNS CAUSES A "LIKELIHOOD OF CONFUSION"

"Likelihood of confusion" means that a potential consumer could be led to buy one product instead of another.[91] There is likelihood when a fact seems "like truth, fact or certainty."[92]

Plain packaging prevents the use of trademarks as well as other design elements, which could cause consumer confusion.[93] Further, brand names can only be used in a standardized format.[94] It is shown in [6.1.2] how this impairs the distinguishing function of trademarks. It is likely that plain packaging would lead a consumer to choose one product instead of

[84] ¶ 3, Fact on Record.
[85] ¶ 4, Fact on Record.
[86] ¶ 10, Fact on Record.
[87] WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 68 (2nd ed. 2008).
[88] ¶6, Annexure VIII, Fact on Record
[89] Memorandum from Lalive to Philip Morris International Management SA, *Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention* 9 (July 2009).
[90] ¶ 6, Annexure VIII, Fact on Record.
[91] Carvalho, *supra* note 5, at 350.
[92] *Id.*
[93] International Trademark Association ("INTA"), Legislation and Regulation Subcommittee for Europe & Central
Asia, *Response to the UK Department of Health Consultation on the future of Tobacco Control*, 2 (September 2008).
[94] *Id.*

another. It is submitted that the use of similar signs mandated by the Directive causes a likelihood of confusion.

The Directive is inconsistent with Wingardium's obligations under TRIPS Article 16.1.

6.2 THE DIRECTIVE IS INCONSISTENT WITH ARTICLE 29(8) OF THE WINGARDIUM TRADEMARK ACT

Article 16.1 sets minimum standards for infringement of registered trademarks that Members must include in their domestic laws.[95] When domestic regimes implement these standards, they add to the exact words of the TRIPS to make the law function.[96]

Article 29(8) of the Wingardium Trademark Act is applicable. Article 29(8) provides that a registered trademark is infringed by advertising if it is unfair or dishonest or detrimental to its character [6.2.1] or reputation [6.2.2].[97]

6.2.1. PLAIN PACKAGING IS DETRIMENTAL TO THE DISTINCTIVE CHARACTER OF TRADEMARKS

The stronger a mark's distinctive character is, the easier it will be to accept that detriment has been caused to it.[98] Leviosa is the largest exporter of Crystalline Silicon solar cells.[99] Countries have executed successful solar missions using their technology.[100] Thus, the trademarks used on Leviosian products are well-known and have a strong distinctive character. As shown in [6.1.2], plain packaging deprives trademarks of their distinctive character by mandating the use of similar signs.

It is submitted that plain packaging is detrimental to the distinctive character of trademarks.

6.2.2. PLAIN PACKAGING IS AGAINST THE REPUTATION OF TRADEMARKS

[95] Susy Frankel & Daniel Gervais, *Plain Packaging and the Interpretation of the TRIPS Agreement*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 5, 1186 (November, 2013).
[96] *Id.*
[97] Hindustan Unilever Limited v. Reckitt Benckiser (India) Limited, (2013) 682 Indlaw (Calcutta HC) (India).
[98] Report by Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention*, 10 (2010).
[99] *Id.*
[100] ¶ 4, Fact on Record.

The only interests in trade symbols worth protecting are those against loss of sales or reputation.[101] Reputation means attraction to customers based on differences over competitors in quality, variety, reliability.[102]

To *reduce the attractiveness* of Crystalline Silicon products is an objective of the measure.[103] [6.2.1] shows that the distinctive character of Leviosian investors' trademarks is lost due to plain packaging. This requirement prevents consumers from recognizing high quality products. Health warnings occupying majority of the package space[104], further dissuade consumers from purchasing the product. A fall in Leviosia's share in Wingardium's solar industry[105] is a direct result of plain packaging.

It is submitted that plain packaging is against the reputation of trademarks. Plain packaging is inconsistent with Article 29(8) of the Wingardium Trademark Act.

7. PLAIN PACKAGING IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER ARTICLE 20 OF THE TRIPS AGREEMENT

In order to assess whether a plain packaging measure violates Article 20, a WTO panel would consider whether the measure is **[7.1]** a "special requirement" that **[7.2]** "encumbers" the use of a trademark, and if so, **[7.3]** whether it is justified.[106]

7.1 PLAIN PACKAGING IS A "SPECIAL REQUIREMENT"

The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary" or "distinctive in some way".[107] A requirement of plain packaging of solar cells would fall within the above definition.

[101] Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE LAW JOURNAL 1165, 1201 (1948).
[102] *Id.*, 1187 n.85.
[103] ¶5, Annexure VIII, Fact on Record
[104] *Id.*
[105] ¶17, Fact on Record.
[106] Report by Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (30 November 2010) 12 [hereinafter Gervais Report].
[107] Panel Report, *United States — Section 110(5) of US Copyright Act*, ¶ 6.109, WT/DS160/R (15 June 2000).

The Directive prohibits the use of marks and trademarks on the product and laminate. [108] It mandates standardized format for brand, company, and variant names.[109] Such marks could not be used at all to distinguish between products and ensure that consumers can easily identify the source and quality of the goods they are purchasing.[110]

The requirements would fall under two *prima facie* examples given in Article 20, namely "use in a special form" and "use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings".[111] It is therefore submitted that the Directive is a "special requirement" under TRIPS Article 20.

7.2 PLAIN PACKAGING "ENCUMBERS" THE USE OF TRADEMARKS

To encumber is to "hamper, impede, or burden".[112] A measure preventing the use of a trademark encumbers the trademark's capability to distinguish the goods of one undertaking from those of another.[113] A measure prohibiting all non-word marks has been described as the ultimate encumbrance.[114]

Wingardium's Directive prohibits the use of trademarks.[115] The brand, business, company and variant names may appear on retail packaging, but must be displayed in a uniform typeface, font, size, colour, placement.[116] This is clearly detrimental to the capability of the products' trademarks to distinguish between products of different producers. Such a requirement is not a mere "encumbrance" - it amounts to an impermissible interference with the trademark owners' rights under TRIPS.[117]

It is submitted that the Directive is an encumbrance under Article 20 of the TRIPS Agreement.

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[108] ¶ 6, Annexure VIII, Fact on Record.
[109] ¶ 6, Annexure VIII, Fact on Record.
[110] Memorandum from Lalive to Philip Morris International Management SA, *Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention* (23July 2009) 11 [Hereinafter Lalive Report]
[111] Agreement on Trade-Related Aspects of Intellectual Property Rights, art.20, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.
[112] Gervais Report, *supra* note 1, at 13.
[113] *Id.*
[114] *Id.*; Nuno Pires de Carvalho, THE TRIPS REGIME OF TRADEMARKS AND DESIGNS, 418 (Kluwer eds. 2nd ed. 2011).
[115] ¶6, Annexure VIII, Fact on Record.
[116] *Id.*
[117] Lalive Report, *supra* note 5, at 10.

7.3 PLAIN PACKAGING UNJUSTIFIABLY ENCUMBERS THE USE OF TRADEMARKS

In order to be justifiable, an encumbrance must be proportional to the loss it causes in the distinctiveness of a trademark.[118] This means that the justification found by a government for imposing encumbrances on the use of a certain mark will be assessed vis-à-vis the loss of distinctiveness.[119]

Plain packaging is out of all proportion to the loss of distinctiveness it causes.[120] With a standardized format and mandatory increased health warnings covering 90% of the package[121], packages look increasingly identical. Consumers could easily mistake the product of one undertaking for the product of another. Plain packaging therefore results in a complete loss of the trademark's distinctiveness.

Further, Plain packaging is disproportionate in other respects. There is no evidence to show that plain packaging would have a noticeable effect on the purported objective of public health [5.2.2.1]. Other less intrusive measures which do not infringe trademark rights are available to achieve the same purpose [5.2.2.4].

Therefore, it is submitted that the plain packaging measure is an unjustifiable encumbrance under TRIPS Article 20.

8. PLAIN PACKAGING IS INCONSISTENT WITH WINGARDIUM'S OBLIGATIONS UNDER GATT ARTICLE IX:4

GATT Article IX.4 places limits on the nature of inconveniences to trade resulting from the act of affixing marks of origin to a good.[122] An assessment of Article IX:4 would consider whether the challenged measure falls within the scope of coverage of "marking of imported products" [8.1] and whether the measure imposes damage to imported products in the manner put forward in the provision [8.2].

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[118] Lalive Report, *supra* note 5, at 11.
[119] Lalive Report, *supra* note 5, at 11 no.19.
[120] Lalive Report, *supra* note 5, at 12.
[121] ¶6, Annexure VIII, Fact on Record.
[122] Wendy A. Johnecheck, *Consumer Information, Marks of Origin and WTO Law: A Case Study United States – Certain Country of Origin Labeling Requirements Dispute*, Food Policy and Applied Nutrition Program Discussion Paper No. 43, 19 (Mar. 2010).

It is submitted that Wingardium's plain packaging requirement fulfils both elements.

8.1. PLAIN PACKAGING RELATES TO THE MARKING OF IMPORTED PRODUCTS

Wingardium's plain packaging requirement prohibits the use of trademarks on all solar cell products.[123] The measure permits the use of certain information, including "country of origin information".[124] The measure applies to manufacturers and suppliers of domestic and imported products.[125]

It is therefore submitted that Wingardium's requirement constitutes a measure relating to marking of imported products.

8.2. PLAIN PACKAGING DAMAGES IMPORTED PRODUCTS

GATT Article IX:4 imposes an obligation on Members to enact regulations which do not "materially reduce" the value of the products, or "unreasonably increase" the cost of production.[126]

"Materially reduce" could be interpreted to mean a substantial decline in value of imported products due to a decline in demand. The plain packaging requirement mandates the use of health warnings and handling instructions for equipment on 90% of the retail packaging.[127] The remaining 10% space can be used to display other information permitted under the requirement, including country of origin information.[128]

Leviosa is the world's largest exporter of Crystalline Silicon solar cells.[129] Its PV technology is used by several countries.[130] Any solar cell product or module containing Leviosa's mark of origin would therefore be trusted as a high quality product. Further, because trademarks are prohibited, marks of origin gain importance for identification of products. Font size would have to be significantly decreased to fit all the information in the remaining space. A consumer could easily miss a mark of origin displayed in miniscule font, and purchase

[123] Annexure VIII, Fact on Record.
[124] *Id.*
[125] *Id.*
[126] General Agreement on Trade and Tariffs, art. IX:4, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.
[127] Annexure VIII, Fact on Record.
[128] *Id.*
[129] ¶ 4, Fact on Record.
[130] *Id.*

products of another undertaking. A requirement altering the way marks of origin are used would lead to a decrease in demand.

Further, the measure requires a complete change in the package design. The package for all solar cells and modules would have to be redesigned. Since the measure does not allow for an interim period for compliance, the products that are already in the market would have to be repackaged to ensure compliance. Considering Leviosa owns a large share in the solar industry, this measure would unreasonably increase the cost of production.

It is submitted that the plain packaging requirement would *materially reduce* the value of Leviosa's products, and *unreasonably increase* the cost of production to ensure compliance. The requirement is therefore inconsistent with Wingardium's obligations under GATT IX:4.

9. THE FIT SCHEME IS INCONSISTENT WITH THE SCM AGREEMENT

Wingardium initiated a scheme similar to Ontario's FIT Scheme to promote the use of renewable energy.[131] It is enforced through Article 5 of the WNSM.[132]

It is submitted that the FIT Scheme is a subsidy [9.1] which is prohibited under Article 3.1(b) and Article 3.2 of the SCM Agreement [9.2].

9.1. THE FIT SCHEME IS A SUBSIDY

To fall within the scope of the SCM Agreement, a measure must be termed as a subsidy. Article 1.1 makes clear that the definition of a subsidy has two distinct elements: a financial contribution (or income or price support) [9.1.1] which confers a benefit [9.1.2].[133]

Wingardium's FIT Scheme is a subsidy within the definition in the SCM.

9.1.1. THE FIT SCHEME OFFERS A FINANCIAL CONTRIBUTION

According to SCM Article 1.1(a)(1)(iii), A measure is a subsidy if there is a financial contribution where a government *purchases goods*.[134]

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[131] ¶ 6, Fact on Record.
[132] *Id.*
[133] Panel Report, *United States — Measures Treating Export Restraints as Subsidies*, ¶ 8.20, WT/DS194/R (June 29, 2002); Panel Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, ¶ 7.44, WT/DS212/R (Jul. 31, 2002).

"Purchase" means "to acquire in exchange for payment in money or an equivalent; to buy".[135] The ordinary meaning of "purchase" suggests that government "purchases [of] goods" will arise when a government possesses goods through some kind of payment.[136] For electricity, the purchase of electricity means the transfer of the entitlement to the electricity.[137]

Under the FIT Scheme, for each kWh of electricity delivered into Wingardium's electricity system, a supplier of electricity receives a payment. The funds transferred to suppliers are intended to pay for the electricity delivered into the electricity grid.[138] Once a supplier delivers electricity into the grid, it loses all rights and entitlements to that electricity.[139] Wingardium's Government obtains these entitlements, and takes possession of the electricity. It then transmits and distributes electricity to customers.[140]

It is submitted that the Government of Wingardium purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

9.1.2. THE FIT SCHEME CONFERS A BENEFIT ON SUPPLIERS

The meaning of "benefit" encompasses some form of advantage.[141] A financial contribution confers a benefit if the terms of the contribution are more favourable than the terms available to the recipient in the market.[142] In this case, the suppliers of electricity who are party to the FIT are the recipients.[143]

Through the FIT Scheme, suppliers of electricity are paid a guaranteed price per kWh of electricity delivered into Wingardium's system under a contract with the Government. The

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[134] Agreement on Subsidies and Counterveiling Measures, Annex 1A, art.1.1(a)(1)(iii), Jan 1, 1995, 1869 U.N.T.S. 14 (emphasis added).
[135] Panel Reports, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector - Canada - Measures Relating to the Feed-in Tariff Program*, ¶ 7.225 WT/DS412/R;WT/DS426/R (Dec. 19, 2012) [Hereinafter *Canada-Renewable Energy* Panel Reports].
[136] *Id*., ¶ 7.227.
[137] *Id.*, ¶ 7.229.
[138] *Id*., ¶ 7.223.
[139] *Id*., ¶ 7.232.
[140] *Id*., ¶ 7.239.
[141] Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 9.112 WT/DS70/R (Apr. 14, 1999).
[142] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 157 WT/DS70/AB/R (Aug. 2, 1999); Panel Report, *Korea - Measures Affecting Trade in Commercial*, ¶ 7.427 WT/DS273/R (Mar. 3, 2005); Appellate Body Report, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector - Canada - Measures Relating to the Feed-in Tariff Program*, ¶ 5.163 WT/DS412/R ; WT/DS426/R (May 6, 2013) [Hereinafter *Canada-Renewable Energy* Appellate Body Report].
[143] Steve Charnovitz and Carolyn Fischer, *Canada–Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, RESOURCES FOR THE FUTURE DISCUSSION PAPER 14-38, 20 (October 2014) [Hereinafter Charnovitz and Fischer].

contract secures wholesale electricity at a set price that reflects a rate of return attractive to investors.[144] The advantage occurs because the price in the contract is above the wholesale price of power in Wingardium.[145] Suppliers receive a higher price through the FIT Scheme than the price in the market.

It is submitted that Wingardium's FIT Scheme offers a *financial contribution* and confers a *benefit*, and therefore is a subsidy as defined in SCM Article 1.1.

9.2 THE FIT SCHEME IS A SUBSIDY PROHIBITED BY ARTICLE 3.1(b) AND ARTICLE 3.2

Article 3.1(b) prohibits subsidies contingent upon the use of domestic over imported goods."[146] When a member confers a prohibited subsidy, other members may complain to the dispute resolution process and are entitled to a ruling directing the offending to member to eliminate the subsidy or face the prospect of sanctions.[147]

"Contingent" under SCM Article 3.1(b) means "conditional" or "dependent for its existence on something else".[148] The benefits conferred by Wingardium's FIT Scheme are contingent upon compliance with the domestic content requirement under the WNSM.[149] The requirement mandates the use of 50% of domestic content for production of Solar PV modules using Crystalline Silicon technology.[150] This means that suppliers will receive benefits of the FIT Scheme only if 50% of the equipment used in energy generation facilities is produced in Wingardium, over equipment imported from countries like Leviosa.

The FIT Scheme is a subsidy contingent upon the use of domestic goods over imported ones. Such subsidies are prohibited by Articles 3.1(b) and 3.2.[151] It is submitted that the FIT Scheme is inconsistent with SCM Articles 3.1(b) and 3.2.

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[144] *Id.*, at 3.
[145] *Id.*
[146] Agreement on Subsidies and Counterveiling Measures, Annex 1A, art.3.1(b), Jan 1, 1995, 1869 U.N.T.S. 14.
[147] Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 JOURNAL OF LEGAL ANALYSIS 473, 482 (2010).
[148] Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, ¶ 123 WT/DS139/ABR (May 5, 2000).
[149] Annexure VI, Fact on Record.
[150] *Id.*
[151] Agreement on Subsidies and Counterveiling Measures, Annex 1A, art.3.2, Jan 1, 1995, 1869 U.N.T.S. 14.

REQUEST FOR FINDINGS

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

1. Find that the plain packaging measure issued by the Wingardium Department of Health is in violation of article 2.2. of TBT Agreement.
2. Find that the plain packaging measure amounts to trademark infringement under Article 16.1 of the TRIPS Agreement.
3. Find that the plain packaging directive of solar cells is inconsistent with Wingardium's obligations under Article 20 of the TRIPS Agreement.
4. Find that the FIT scheme is inconsistent with the SCM Agreement.
5. Find that the WNSM programme measures are in violation of Wingardium's obligation under Article III:1 of GATT.
6. Find that the domestic content requirement under the WNSM is inconsistent with article III:4 of GATT.
7. Find that the domestic content requirement under the WNSM is inconsistent with article III:5 of GATT.
8. Find that the domestic content requirement under the WNSM is inconsistent with Wingardium's obligation under article 2.1 of TRIMS Agreement.
9. Find that the directives issued by Wingardium is inconsistent with Article IX:4 of the GATT 1994.

All of which is respectfully affirmed and submitted,

Counsel for the Complainant,

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