TEAM CODE: 114C

BEFORE THE PANEL ESTABLISHED BY WTO DSB

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

LEVISOSA
(COMPLAINANT)

V

WINGARDIUM
(RESPONDENT)
WT/DSXXX

EIGHTH GNLU INTERNATIONAL MOOT COURT COMPETITION

2016

WRITTEN SUBMISSION FOR THE COMPLAINANT

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LIST OF ABBREVIATIONS

¶	PARAGRAPH
APM	AIR PARTICULATE MATTER
ART.	ARTICLE
CLI	CONSORTIUM OF LEVIOSIAN INVESTORS
CSCs	CRYSTALLINE SILICON CELLS
DCR	DOMESTIC CONTENT REQUIREMENTS
DOH	DEPARTMENT OF HEALTH
DSB	DISPUTE SETTLEMENT BOARD
DSU	DISPUTE SETTLEMENT UNDERSTANDING
INDC	INTENDED NATIONALLY DETERMINED COMMITMENT
FIT	FEED-IN-TARIFF
KWH	KILO WATT
LCR	LOCAL CONTENT REQUIREMENT
PV	PHOTO VOLTAIC
RFID	RADIO FREQUENCY IDENTIFICATION TAG
SCM	SUBSIDIES AND COUNTERVAILING MEASURES
TBT	TECHNICAL BARRIERS TO TRADE
TRIMS	TRADE RELATED INVESTMENT MESURES
TRIPS	TRADE RELATED ASPECTS OF INTELLECTTUAL PROPERTY RIGHTS
TMA	TRADEMARK ACT
WDOH	WINGARDIUM DEPARTMENT OF HEALTH
WG/SM/P-1	WINGARDIUM SOLAR MISSION PHASE-I
WHO	WORLD HEALTH ORGANISATION
WLECA	WINO LEVIOSIAN ENERGY OOPERATION AGREEMENT
WTO	WORLD TRADE ORGANISATION

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4. Joel P. Trachtman *et al.*, *Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 737 (2003).

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2. General Agreement on Trade and Tariffs, Apr. 15, 1994, 186.

STATEMENT OF FACTS

THE PARTIES

Wingardium is a developing country with a population of 500 million. It decided to join the WTO in the year 2005 and through liberalization it has achieved its constitutional goal of building a *"socialistic pattern of society*". Wingardium ranks fourth in the world with respect to its high utilization of fossil fuels and carbon emissions. Leviosa is a developed country with a population of 250 million. It is the founding member of both **GATT** and **WTO** and has been champion of free trade and capitalism across the world. It has a robust manufacturing industry and technological innovation platform which has given leviosa an edge over its competitors in the global market. It has also made significant strides to develop cleaner sources of energy to diminish its carbon footprint.

THE SOLAR PANEL DEVELOPMENT

In 2006, a scientist named Einburke in Leviosa developed Solar Panels, a unique technology that uses solar power to generate electricity. Solar Panels have the ability to provide decentralized OTG technology in order to facilitate uninterrupted electricity for large number of households in remote areas. This technology has helped leviosa to reduce its carbon emissions in order to meet the INDC it made at the UNFCCC conference on climate change in 2012. Moreover, Levisoa is the largest exporter of Crystalline Silicon Solar Cells in the world due to which many countries have executed successful solar missions on account of the technology transferred by the CLI.

WINGARDIUM NATIONAL SOLAR MISSION

In 2013, WNSM was initiated by the government of Wingardium, aimed at developing 40,000 MW off grid connected solar power by the year 2030. This program was proposed to be conducted into two phases i.e. phase I for 10 years & phase II for 5 years. In accordance with this mission, project developers mandatorily had to ensure 30% of local content sourcing in all plants and installations which use crystalline silicon technology excluding land. In order to promote the usage of Renewable energy, a Feed-In-Tariff scheme similar to the Ontario

Feed-In-Tariff scheme would be initiated by the Government.

WINO-LEVIOSIAN ENERGY COOPERATION AGREEMENT

In January 2013, President of Leviosa visited Wingardium to develop a strategic partnership through deep economic integration. In pursuance of the cordial diplomatic relationship between both the countries, Leviosa believed that an economically empowered Wingardium would act as a balancer in the region while, Wingardium on the other hand believed that a super power like Leviosa could help it in halting the strategic growth of Redondo, its competitor and neighbor who reaped benefits of economic reforms to the chargin of both the countries and having a tumultuous relationship with Wingardium due to war over land claims.

Both the presidents entered into 27 agreements an executed the WLECA in which the CLI won tenders for 60% of Phase I by meeting all the criteria and technical regulation in accordance with the WSO**.** The domestic content requirement under WG/SM/P-1 resulted in significant loss of $5 billion for the CLI within the time span of 2 years, which lead to the intervention of president of leviosa w.r.t the domestic content law under WG/SM/P-1.

NEGOTIATIONS

On 30th June, 2015, the president of Leviosa in pursuance of the request made by 34 investors, wrote a letter to the president of Wingardium to reconsider the domestic content requirement since the CLI had transferred substantial know how for the development of Wingardium's domestic industry.

On 1st July, 2015, the president of Wingardium acknowledged the fact that CLI had transferred the know-How of PV Modules which had helped Wingardium to meet its target and also that their products met the quality and safety standards as prescribed. On 2nd July, 2015, the president of wigardium through an executive order honored the commitment made to Leviosa by suspending the requirements contained under Article 4 & 4.1 of WG/SM/P-1 pertaining to Crystalline Silicon Technology and immediate suspension of FIT scheme till further notice.

On 4th January, 2016, the president of Wingardium through an executive order called for the reinstatement of WG/SM/P-1 by increasing the domestic content requirement to 50% and reinstating the FIT scheme with immediate effect. This was an outcome of the rising

unemployment and burgeoning fiscal deficit on account of loss of tax revenue, giving the opposition party in Wingardium enough grounds to launch an offensive against the present government. The previous order resulted in policy paralysis and with election in 2017 and president's intention to secure a second term in office the only option left was to revert to the original scheme.

On 12th January, 2016, the president of Leviosa wrote a strongly worded letter to the president of Wingardium that his decision was in violation to its country's commitment under WTO and international law including the ECA. The transfer of know-how had resulted in the establishment of 25 domestic companies for production of solar PV crystalline Silicon technology Module.

THIN FILM CELLS TECHNOLOGY

The president of Wingardium secured an energy cooperation deal with Redondo for supply of thin film cells technology on similar terms as stipulated under the Energy Cooperation agreement with Leviosa. At the same time, the DOH in a preliminary study revealed the health hazards of crystalline silicon solar cells. Henceforth, DOH issued a directive on 1st February, 2016 for plain packaging of solar cells in the interest of public health.

The CLI called this measure trade restrictive and a violation of wingardium's commitment under the TRIPs agreement. On 10th march, 2016, Leviosian trade representative wrote a letter to the commerce minister of Wingardium stating that the issued health directive infringed upon the trademark rights of CLI and are based on inconclusive scientific evidence as Leviosian based NGO has confirmed that Crystalline Technology Solar Cells are completely safe and pass every quality, safe and health standard under the technical regulation of WG/SM/P-1. The trade representative of Leviosa regarded the health directive as a technical barrier to trade and the reason for the depletion of the market share in the wingardium solar industry which dipped to 10% in march 2016 from 75% in December 2013.

REQUEST FOR ESTABLISHMENT OF PANEL

On 10th 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 AT ISSUE

I. **WHETHER WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE SCM AGREEMENT AND THE GATT, 1994?**

II. **WHETHER WLECA IS INCONSISTENT WITH WINGARDIUM'S OBLIGATION UNDER THE PROVISIONS OF THE TRIPS AGREEMENT?**

III. **WHETHER WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE TBT AGREEMENT AND THE GATT, 1994?**

SUMMARY OF PLEADINGS

I. WHETHER WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE SCM AGREEMENT AND THE GATT, 1994

A measure is said to be inconsistent with the SCM and the GATT provision, when the question of "subsidy" arises. The FIT scheme could be treated as a subsidy provided to the domestic manufacturers of Wingardium. As a result of the increase in the domestic content requirement from 30% to 50%, the benefit of this FIT scheme was given to 50% of the domestic manufacturers, thus making it trade restrictive and a biased action towards the complainant. The provisions of GATT were violated as there was a less favorable treatment to the imported products in comparison to the local manufactured product due to the DCR in Wingardium.

II. WHETHER WLECA IS INCONSISTENT WITH WINGARDIUM'S OBLIGATION UNDER THE PROVISIONS OF THE TRIPS AGREEMENT

A measure is said to be inconsistent with the provisions of the TRIPS Agreement when there are trade related intellectual property right infringements. The respondent infringed the trademarks of Leviosa through an unjustifiable encumbrance of the use of trademarks for the CSCs by imposing special requirements and creating detrimental distinguishing capabilities between the CSCs and Thin Film Technology cells. Furthermore, the trademark of Leviosa was also infringed by preventing the complainant from using the rights conferred upon it under the Wingardium Trademarks Act since, an identical trademark for identical products create confusion amongst the public respectively.

III. WHETHER WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE TBT AGREEMENT AND THE GATT, 1994.

A measure is said to be consistent with Art. 2.2 when it seeks to achieve a legitimate objective and is not more trade-restrictive than necessary to fulfill that objective, taking account of the risks arising from non-fulfillment.

The real objective of WLECA is not protection of domestic manufacturers. It is a disguised restriction on international trade however, It seeks to protect the domestic producer of PV Modules in Wingardium. Thus, WLECA does not pursue a legitimate objective. Assuming but not conceding that it aims to achieve a legitimate objective, WLECA is more trade restrictive than necessary to achieve the objective. It does not make any contribution as the domestic content requirement even after providing the 'know-how' form CLI did not decrease in Wingardium.

The wingardium's DOH called for plain packaging of solar cell products, which altered the competitive opportunities to the detriment of imported Leviosian crystalline silicon cells. These products were denied to use the RFID, which met the labeling requirements under technical requirements under WG/SM/P-1.As a result, the market share of CLI in Wingardium dipped to 10% in March 2016 from 75% in December 2013.

Non-fulfilment of the objective will not lead to any grave consequences as its implementation has also failed to make any contribution to the legitimate objective. Reasonable and less trade-restrictive alternatives are also available.

Hence, WLECA is an unnecessary obstacle to international trade, violating Art. 2.2 of the TBT Agreement.

LEGAL PLEADINGS

I. WHETHER WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE SCM AGREEMENT AND THE GATT, 1994

1.1 WLECA IS INCONSISTENT WITH THE PROVISION OF THE GATT, 1994

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

The objective of Art. III of the GATT is to avoid protectionism and perpetuate an equal competitive relationship between countries. The Appellate Body in Canada — Periodicals,[5] held that 'the fundamental purpose of Art. III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products'. Art. III of the GATT protects the requirement and the expectation of equality of competitive relationship.[6] Regulatory measures according an advantage to

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

[2] Id. at 1.

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

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

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

domestic products over imported products are therefore, inconsistent with the principle of equality of competition enshrined in Art. III.

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

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

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

(a) Physical properties of the products;
(b) the extent to which the products can serve the same end users;

[7] Ibid

[8] Appellate Body Report, Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter AB Korea — Beef].

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

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

(c) extent to which consumers treat the products as alternatives for the satisfaction of a particular demand; and
(d) the international classification of products for tariff purposes.

For products to be considered as like it must be shown that they share similar physical properties. In the given case, the domestic CSCs along with imported CSCs are both solar cells required for the production of PV Solar energy and have similar physical properties. They both are like products since the "know-how" of CSCs was transferred from Leviosa to Wingardium for the establishment of domestic companies. 25 domestic companies were established as a result and domestic manufacturing of CSCs in Wingardium was executed.

For products to be considered as like it must be shown that the products can serve the same end uses. The Appellate Body in US — Clove Cigarettes[11], stated that both the domestic menthol cigarettes and the like imported cigarettes satisfied an addiction to nicotine and created a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke and therefore had the same end use. In this case, both imported CSCs and domestic CSCs are used for producing Renewable Solar Energy through the panels i.e. both have the same end use. It is now an obvious fact that both these products are the same as the domestic CSCs are a result of the 'know-how' transfer of CSCs by the CLI. Despite of this, there is a less favorable treatment given to Leviosa in the form of the domestic content requirement and FIT scheme established in Wingardium.

It is established that according to Art. III: 5 of GATT, 1994, no contracting parties shall maintain internal quantitative regulation relating to the mixture, processing, or use of products in specified proportions with certain specifications. Moreover, no contracting parties shall otherwise apply internal quantitative regulations in a manner contrary to the provision. In the present case, the quantitative regulation relating to the use of the products in specified proportions was with respect to the DCR of Wingardium. The last executive order increased the DCR to 50%, thus violating the WLECA provisions. According to the WLECA, once the 'know-'how' of the CSCs is

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

transferred to the respondent, the DCR should reduce below 30%. This quantitative regulation mentioning a bar on the domestic production of CSCs in Wingardium indirectly limits the quantitative proportions of the CSCs imported from Leviosa, thus causing a loss to the CLI. The internal quantitative regulation was already a part of the WNSM with a bar of 30% which instead of reducing, increased to 50% by Wingardium, hence, violating the said provision.

1.2 WLECA IS INCONSISTENT WITH THE PROVISION OF THE SCM AGREEMENT

It is humbly submitted that the WLECA was in violation of **article 3.1(b) and 3.2 of the SCM Agreement**, where subsidy contingent, whether solely or as one of several other condition, upon the use of the domestic over imported goods takes place. The respondent provides for subsidy namely contingent upon the use of equipment for renewable energy generation facility produced in Wingardium over such equipment imported from Leviosa as a FIT scheme. As part of the WNSM, Wingardium decided to initiate a feed-in-tariff Scheme. According to article 5 of the WG/SM/P-1 the government would initiate a feed in tariff scheme similar to the Ontario feed in tariff scheme in order to promote the usage of renewable energy but with a domestic content requirement of 30% excluding land[12].

The Feed-In Tariff (FIT) Program was developed to encourage and promote greater use of renewable energy sources for electricity generating projects. The fundamental objective of the FIT Program, in conjunction with the *Green Energy and Green Economy Act, 2009 (Ontario)* and Ontario's Long-Term Energy Plan, 2013, is to facilitate the increased development of renewable generating facilities of varying technologies using a standardized, open and fair process[13]. FIT is achieved by offering long term contracts to renewable energy producers which may be fixed, typically based on the cost of generation of each technology i.e., rather than paying equal amount for energy, the price awarded may be lower per kWh[14]. Similarly, Wingardium initiated a FIT scheme in order to promote its solar renewable energy sources.

[12] ¶6, Art.4.1 and Art.5, MOOT PROPOSITION
[13] The WTO Report On Local Content Requirements For Canadian Renewables Programme – MENA Implication, PP.02
[14] http://fit.powerauthority.on.ca/fit-program accessed on 12.01.2016

It is humbly submitted that in response to the leviosian president's request to reconsider the domestic content requirement and FIT scheme under article 4 and 5 of WG/SM/P-1, the president of Wingardium through an executive order suspended the feed inn tariff under WG/SM/P-1 with immediate effect and explicitly mentioned that no income support would be provided to any manufacturer dealing in solar PV modules.[15] Further, this order was reinstated through another executive order where domestic content requirement was increased to 50% and the FIT scheme under WG/SM/P-1 was reinstated with immediate effect.[16] Thus, this appears to be a subsidy in the form of income support ensuing benefit to domestic products over imported goods.

The cause of action against the FIT contracts was that they violate SCM Article 1and 3.1(b), which forbids providing a subsidy contingent on local content. In adjudicating this claim, neither the panel nor the Appellate Body reached this central issue, because neither was able to validate the existence of a subsidy[17]. The SCM Agreement defines a subsidy in Article 1 as generally requiring the two prongs of a financial contribution from the government and a benefit to a recipient. Alternatively, a subsidy can also be shown if, instead of a financial contribution, there is 'any form of income or price support in the sense of' GATT Article XVI (notification of subsidies).[18] If found to be a subsidy, then in view of the embedded LCR, the FIT scheme would automatically be prohibited under the SCM Agreement.

A Ruling by the WTO panel on the legality of the local content requirements for renewable energy schemes could mean that such requirements should be withdrawn from those adopted or currently being developed by WTO Members[19].

In a nutshell, the local content requirements **(**LCR**s)** are scheme that require renewable energy producers to source a certain minimum amount of their project costs from local providers in order to qualify for a feed-in tariff programme, which create a barrier to entry to foreign energy suppliers. LCRs are typically introduced by local

[15] ANNEXURE V, MOOT PRPOSITION
[16] ANNEXURE VI, MOOT PROPOSITION
[17] Charnovitz Steve and Fischer Carolyn paper discussion on " Canada–Renewable Energy: Implications for WTO Law on Green" pp.17-18
[18] The condition 'in the sense of' presumably refers to the language of GATT Article XVI:1 which references a subsidy '…including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'.
[19] Ontario Feed-in-tariff scheme

governments with a view to helping boost growth in domestic manufacturing and the job market. However, these measures are commonly viewed as anti-competitive.

Under a feed-in tariff programme, eligible renewable energy producers, including homeowners and businesses, are paid a premium for their green energy generation, which usually exceeds the market price[20].

Ontario FIT is a blend of a market-based instrument and a government procurement program. It is most humbly submitted that, wingardium's law on its domestic content requirement under WLECA is to be treated as a favorable measure for the Wingardium local manufacturers as the saving of 30% DCR and the FIT scheme act in consonance to each other would be termed as subsidy under Article 1.1(a) 2[21] and would be in violation of Articles 3.1(b) and 3.2 of the SCM Agreement.

Under Article 5 of WNSM, the Government of Wingardium would promote the usage of renewable energy by initiating a FIT scheme similar to Ontario FIT scheme **but** with a DCR of 30%. From the beginning, Wingardium was in favor of providing some sort of income support to its domestic manufacturers in the form of subsidy as the FIT scheme was an investment program that too trade-related with leviosa which would suffice the evaluation measure under the Article 2.1 of the TRIMS Agreement as the FIT was an investment measure not only based on the legislative record, but also considering the evidence that Ontario's scheme had in fact attracted investment in equipment manufacturing. Like the Autos panel, the Renewable Energy panel found that the investment measure was trade-related based on its minimum local content requirement[22].The TRIMS Agreement lacks any substantive disciplines independent of the GATT; therefore, evidencing a violation of GATT Article III or XI is necessary to show a violation of TRIMS Article 2. Ontario's measure was not a quantitative restriction, so if there was a violation of GATT, it had to be a violation of Article III:4 (national treatment).

[20] Retrieved from http://www.ictsd.org/downloads/2011/11/feed-in-tariffs-for-renewable-energy-and-wto-subsidy-rules.pdf on 12th December, 2015.
[21] There is any form of income or price support in the sense of Article XVI of GATT 1994
[22] Retrieved from http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-14-38.pdf on 10th Jan 2016.

The domestic content requirement of Ontario's feed-in tariff is a discriminatory investment-related measure under Article III:4 OF the GATT,1994 and as a prohibited import substitution subsidy violating the GATT and the TRIMS Agreement.

It is humbly submitted that the respondent appeared to be less favorable in terms of the imported CSCs with respect to the domestic CSCs due to its domestic content requirement. WLECA is inconsistent with the provisions of GATT III: 4, III: 5, III: 1 and Article 2.1 of the TRIMS agreement and 3.1(b) and 3.2 provisions of the SCM Agreement. Leviosa had provided the 'Know-how' to Wingardium for the development of the domestic industries with respect to the production of CSCs. According to the provisions of WLECA, 30% of the DCR should've been reduced after this transfer of know-how. However, on the contrary in accordance with the last executive order by the President of Wingardium, the DCR was increased to 50% and FIT Scheme was reinstated with immediate effect. It is humbly submitted that the FIT Scheme for the 50% DCR of CSCs proved to be less favorable as compared to the imported CSCs, in other words, the domestically manufactured CSCs were getting more benefit and favor than the imported CSCs despite the fact that Leviosa was 'know-how' transferor for such CSCs.

II. WLECA IS INCONSISTENT WITH WINGARDIUM'S OBLIGATION UNDER THE PROVISIONS OF THE TRIPS AGREEMENT.

2.1. WLECA IS INCONSISTENT WITH ARTICLE 20 OF THE TRIPS AGREEMENT

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[23] TRIPS establish minimum levels of protection that each government has to give to the intellectual property of fellow WTO members[24]. Protection under TRIPS has been defined as to include inter alia matters affecting the availability, enforcement and use of intellectual property rights[25].

The use of trademark in the course of trade shall not be unjustifiably encumbered by special requirements according to Art. 20 of the TRIPS agreement. The respondent unjustifiably encumbered the use of trademark for CSCs in the course of trade by mandating (i) trademark relating to CSCs be used in a special form, (ii) trademark related to CSCs be used in a manner detrimental to their capability to distinguish CSCs of one undertaking from Crystalline Silicon and Thin Film products of other undertaking.

It is humbly submitted that after WDOH recorded the hazardous health effects of CSCs on individuals who came in close contact with these cells, decided to adopt measures of plain packaging of all the solar cells including Thin Film and Crystalline Technology Solar Cells. Plain packaging removes the ability of the company to

[23] Article 7. The TRIPS Agreement.

[24] Graham Dutfield & Uma Suthersanen, Global Intellectual Property Law 32-33 (E. Elgar Ed. 2008); Understanding The Wto 2008, World Trade Organization 41 (4th Ed. 2008).

[25] Agreement on Trade Related Aspects of Intellectual Property Rights, arts. 3-4, Apr. 15, 1994, Marrakesh, Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299

display their branding on the products which amounts to illegal appropriation of their trademarks, thereby, breaching their trademarks.

"The right to use a trademark is the most basic right of the owner of a registered trademark. Indeed, even more so than the right to exclude others."

The objective of this measure was to reduce the attractiveness and appeal of CSCs to consumers and manufactures by laminating the package transparently, not permitting any trademark or mark anywhere on the laminate or on the solar cell and by insisting the brand, business, company and variant names to be displayed in a uniform typeface, font, size, color and placement. The font should be Times New Roman and must not exceed 24 points. It should be Pantone 448 in color and can only be placed on the side of the package. Such special requirements unjustifiably encumbered the use of trademark in the course of trade as plain packaging itself breaches the trademark, violating Art.20 of the TRIPS agreement.[26]

Special requirements for plain packaging prohibit the use of trademarks by imposing restrictions on the registration and use of trademark based on the nature of the goods for which such marks are registered under the TRIPS agreement. It also constitutes a barrier to the functioning of the internal market of the product and undermines the very basis upon which intellectual property rights, which are of global commercial significance, are created and protected internationally, with implications far beyond that industry.[27]

Plain packaging amounts to expropriation of intellectual property as seen in the case of "Australian tobacco plain packaging where the Federal Government of Australia released the plain packaging design (see the image on the side of this post) that cigarette manufacturers will be forced to adopt when a proposed legislation will come into force, possibly on January 1, 2012. All cigarette packets should then use olive green, a colour supposed to be dull, and reproduce not very attractive photos of smoking-related diseases. Significantly, cigarette manufacturers will be prevented to use their logos, trademarked colors of promotional texts. "The only thing to distinguish one brand from another will be the brand and product name in a standard

[26] http://www.hoganlovells.com/custom/LITGM/plain-packaging_02_24_14.pdf accesed on 12.01.2016
[27] British American Tobacco, Response To The Department Of Health Discussion Document "Consultation On The Future Of Tobacco Control, May 2008".

colour, standard position and standard font size and style".[28] In response to this, the Dominican Republic's stated to the TRIPS Council, "By stripping all design elements from tobacco packaging and standardizing other packaging features, plain packaging measures undermine the basic features of trademarks and geographical indications ("GIs") as protected under the TRIPS Agreement. The importance of the health objectives is not disputed and is, indeed pursued in my country by my Government. However, the real-world empirical data emerging from Australia confirms that – contrary to the optimistic predictions by plain packaging proponents – plain packaging has failed to reduce smoking rates among the population in general and among youth in particular."

"As was confirmed by the same real-world empirical data, plain packaging has undermined the vital differentiating role played by trademarks and GIs in promoting competitive opportunities in the marketplace. We are seeing the detrimental impact of this in Australia, as consumers have increasingly shifted to cheaper low-end licit and illicit tobacco products."[29]

(ii) Trademark related to CSCs be used in a manner detrimental to their capability to distinguish CSCs of one undertaking from Crystalline Silicon and Thin Film products of other undertaking.

It is well established that in accordance with Art.15 (1) of the TRIPS agreement, a trademark constitutes any sign, or any combination of signs, words including personal names, letters, numerals, figurative elements and combinations of colours capable of distinguishing the goods or services of one undertaking from those of another undertaking. The plain packaging measure adopted by the respondent prevents the Leviosan companies to use their own logo, or any trademarked combinations, violating Art.15 (1) of the TRIPS agreement. Moreover, plain packaging in itself creates a risk of confusion between the products imported from other countries or manufactured by domestic manufacturers, thus, reducing the capability to distinguish CSCs of one undertaking from CSCs and Thin Film products of other undertaking.

[28] http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Pages/wto-disputes-tobacco-plain-packaging.aspx

[29] Retrieved from http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Pages/australia-certain-measures-concerning-trademarks-and-other-plain-packaging-requirements-applicable-to-tobacco-products-an-4.aspx

In the present case, the measure of plain packaging involved 90% of the package to bear health warning and instruction for use. The WDOH recorded CSCs to have health effects such as skin cancer and fatal allergies to individuals coming in contact with them. Since the appearance of brand, business, company name and country of origin was a required trademark for retail packaging of the products, it became detrimental to the trademark of CSCs from Leviosa as the country name was mentioned as the trademark along with health warnings on 90% of the package. Leviosa being the inventor country for this product loses its brand recognition with respect to the CSCs. This measure gives no protection against this unfair competition in the market with respect to the products[30], thus, making the CSCs from Leviosa less favourable than the products of the other undertaking i.e. Thin Film Cells from Redonodo and domestic CSCs[31]. Plain packaging measures as a concept itself is infringing the trademarks relating to CSCs in a manner detrimental to their capability to distinguish CSCs of one undertaking from CSCs and Thin Films cells of the other undertaking.

"In 2010, the TMA claimed: "The UK Government decided in 2009, after a preliminary consultation, not to proceed with plain packaging as the evidence is 'speculative' and 'needs to be developed' before regulatory action should be taken."[32]

2.2. WLECA IS INCONSISTENT WITH ARTICLE 16 OF THE TRIPS AGREEMENT

It is established that in violation of Art. 16.1 of the TRIPS Agreement, the respondent prevents owners of registered trademarks from enjoying the rights conferred by a trademark on them under the Wingardium Trademark Act as according to section 29 of Wingardium Trademark Act,

A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark:

[30] Article 10bis, para (1) and (3) of the Paris Convention {Article 2.1 of TRIPS}
[31] GATT III:4 (Less favourable) and 3.1 of TRIPS
[32] Secretary of State for Health, Healthy Lives, Healthy People: Our strategy for public health in England, 30 November 2010, accessed 8 June 2011

(2) A registered trademark is infringed by a person who, not be being a registered proprietor or a person using by way of permitted use, uses in the course of trade a mark which because of --

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark.

is likely to cause confusion on the part of the pubic , or which is likely to have an association with the registered trade mark.

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that its is likely to cause confusion on the part of the public.

(4) A registered trademark is infringed by a person who not being a registered Proprietor or a person using by way of permitted use, uses in the course of trade, a mark which-

(a) is identical with or similar to the registered trade mark and

(c) the registered trade mark has a reputation in Wingardium and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

In the present case, the registered trademark of Leviosa was infringed by Wingardium due to the identity of the registered trademark was modified and made similar to the identity of other products through plain packaging. This makes it confusing for the public since the trademark for identical solar cells, CSCs and Thin film cells is the same through plain packaging measures. This further makes the registered trademark detrimental to the uniform trademark of all the solar cells.

It is humbly submitted that the measures taken under the health directive[33] of Wingardium infringe upon the Trademark Rights of Leviosan investors. These findings are based on inconclusive scientific evidence since a Leviosan based NGO, Health For All, has confirmed that Crystalline Technology Solar Cells are completely

[33] Annexure VIII, MOOT PROPOSITION

safe and do not have any harmful effects. [34] In addition to this, the products of Leviosan investors have passed every quality, safety and health standards stipulated under the technical regulations under WG/SM/P-1. This health directive acts as a technical barrier to trade and has resulted in depletion of a substantial market share to 10% from 75% in March 2016.

The plain packaging measure infringes the Leviosan trademark as the exclusive right of preventing the share of this trademark with any third party is breached. Plain packaging placed both the cells i.e. CSCs and Thin Film Cells, identical to each other in terms of their use on the same platform through uniform marking measures. Due to the identical nature of use and equivalent packaging measures, there was a prevention of the exclusive right of the owner since it is likely that a confusion would be created between the two. Thus in the present case, the registered owner Leviosa is prevented from enjoying the rights conferred upon it under Art. 16(1) of the TRIPS Agreements due to the trademark infringement in Art. 29 of the Wingardium Trademark Act.

[34] Annexure IX, MOOT PROPOSITION

III. WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE TBT AGREEMENT AND THE GATT, 1994.

3.1. WLECA IS INCONSISTENT WITH ART.2.2 OF THE TBT AGREEMENT

Art. 2.2 of the TBT Agreement states that Members are obligated to ensure that no technical regulation is prepared, adopted or applied with a view to or with the effect of *creating unnecessary obstacles to international trade.* Thus, a technical regulation cannot be *more trade-restrictive than necessary to fulfill a legitimate objective*[35]. For examining the necessity of a measure, *the risks of non-fulfillment of objective* also have to be taken into account.[36]It is well established that for a measure to be consistent with Art 2.2 of the TBT Agreement, it must seek to achieve a legitimate objective **[3.1.1]** and it should not be more trade restrictive than necessary to fulfill that legitimate objective **[3.1.2]**.[37] It is submitted that in the present case, Technical Regulation of WLECA does not fulfill either of the two conditions. Art. 2.2 enumerate a non-exhaustive list of legitimate objectives which its members should have while enacting a technical regulation which is trade-restrictive. It includes national security requirement, the prevention of deceptive practices; and the *protection of human health or safety,* animal or plant life or health, or the environment.[38]

30. The Appellate Body in EC- Asbestos defined the term "technical regulation" as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. 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". [39] Furthermore, the Appellate Body stated that a "technical regulation" has the effect of prescribing or imposing one or more "characteristics" – "features", "qualities", "attributes" or other "distinguishing mark[40]. It further stated that ""product characteristics" may, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may

[35] TBT art.2.2.
[36] *Id.*
[37] Panel Report, *United States – Measures Affecting the Production & Sale of Clove Cigarettes*, ¶ 7.333, WT/DS406/R (Sept. 2, 2011) [hereinafter *US-Clove* Panel Report]; *US-Tuna* Appellate Body Report*, supra* note 3, ¶¶ 314, 318.
[38] TBT art. 2.2.s
[39] Appellate Body, EC Asbestos, para 61.
[40] AB, EC Asbestos, para 68

provide, positively, that products must possess certain "characteristics", or the document may require, negatively, that products must not possess certain "characteristics".”[41]

3.1.1. TECHNICAL REGULATION OF WLECA DOES NOT SEEK TO ACHIEVE A LEGITIMATE OBJECTIVE

The first step in examining the legitimacy of the objective is in identifying it. The objective of a technical regulation can be determined by considering text of the statute, legislative history, and other evidence regarding the structure and operation of the measure.[42]

The respondent member’s characterization of the objective can also be taken into account. However, the Panel is not bound by such characterization. It may independently assess the legitimacy of the objective.[43] A “legitimate objective” refers to ―*an aim or target that is lawful, justifiable, or proper".*

In the present case, the respondent has stated that the objective of WNSM as part of the WLECA is to promote domestic manufacturing. However, protection of domestic manufacturers does not fall within the ambit of legitimate objective as postulated under Art.2.2. of TBT Agreement. It is submitted that according to Art.3 and Art.4 of the WLECA[44], the complainant met the requirements stipulated in technical regulations contained in WG/SM/P-1 and had transferred substantial ‘know-how’ to Wingardium for their domestic industrial development[45]. According to these provisions the domestic content requirement for phase-I of WNSM under WG/SM/P-1 should have reduced, but the same was not executed.

Wingardium’s 30% domestic content requirement is trade-restrictive in nature without fulfilling the legitimate objective. Since, the objective of WLECA is not in compliance with the legitimate objective of the TBT Agreement it is a manifestation of disguised restriction on international trade.

[41] See Id at 69.
[42] *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 314.
[43] *US-COOL* Appellate Body Report, *supra* note 3, ¶ 370.
[44] ANNEXURE II, MOOT PROPOSITION
[45] ¶14, MOOT PROPOSITION

Wingardium DOH's order of plain packaging of all solar cells had reduced the market share of the imported PV Modules to 10% as of March 2016 causing a huge loss to CLI[46]. In the present case, this order was passed in the interest of public health as CSCs caused many allergies and in some cases. Skin cancer for individuals in close contact with these solar panels. Admitly, 'protection of human health' is a legitimate objective under Art. 2.2. of TBT Agreement. However, it is submitted that the real objective of WLECA was not protection of human health. Moreover, due to plain packaging the imported PV Modules became detriment to the domestic manufactured solar cells as well as products of other country thus, according unfavorable treatment to the imported products in violation of Art.2.1. of TBT Agreement.

Hence, operation of the measure indicates that it aims to protect the domestic producer of CSCs. It seeks to modify the domestic products which are detriment to the imported ones. The objective of protection of domestic producer is not legitimate as it unjustifiable. Art. 2.1 of the TBT Agreement and Art. III: 4 of the GATT[47] prohibit favorable treatment to domestic products. Thus, the technical requirement under WLECA does not seek to achieve a legitimate object.

3.1.2. IN ANY CASE, TECHNICAL REGULATION OF WLECA IS MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE OBJECTIVE

In any case, it is submitted that technical regulation of WLECA is more trade restrictive than necessary to fulfill the legitimate objective. The assessment of necessity of a measure requires "weighing and balancing" factors such as the degree of contribution made by the measure at issue to the legitimate objective **[3.1.2.1]**, the trade-restrictiveness of the measure **[3.1.2.2]**, the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment of the objective pursued by the Member through the measure **[3.1.2.3]**.[48] This test is mainly used for assessment under Art. XX of the GATT. However, the jurisprudence of Art. XX of

[46] ¶17, MOOT PROPOSITION
[47] GATT,1994
[48] *Korea-Beef* Appellate Body Report, *supra* note 42, ¶ 164; *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 321; Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US – COOL,* 8 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 1, 11 (March 2013).

the GATT has been analogously applied to Art. 2.2 of TBT Agreement as well.[49]

To begin with, the wording of the second sentence of Article 2.2 of the TBT Agreement is very similar to that found in Article XX(b) of the GATT 1994.[50] In addition, the context of Article 2.2 of the TBT Agreement establishes a direct link to Article XX(b) of the GATT 1994.

Article XX of the GATT 1994 is entitled "General Exceptions". Together with its chapeau, Article XX(b) reads as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

..... (b) necessary to protect human, animal or plant life or health"

Jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the TBT Agreement. Additionally, a comparative analysis of the measure and the alternatives is also used to establish necessity **[3.1.2.4.][51].**

It is submitted that since that the technical regulation of WLECA does not satisfy either the relational analysis or the comparative analysis, it is more trade-restrictive than necessary to fulfill the legitimate objective.

[49] Panel Report]; 3 Ludivine Tamiotti, *Article 2 TBT: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO – TECHNICAL BARRIERS AND SPS MEASURES 219 (2007).

[50] Panel Report, United States - Standards for Reformulated and Conventional Gasoline, ¶ 6.20, WT/DS2/R, (Jan. 29, 1996); Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, ¶ 7.40, WT/DS332/R (June 12, 2007)

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

3.1.2.1 TECHNICAL REQUIREMENTS OF WLECA HAS NOT MADE ANY CONTRIBUTION TO THE LEGITIMATE OBJECTIVE

A measure is said to contribute to the achievement of the legitimate objective when there is *a "genuine relationship of ends and means between the objective pursued and the measure at issue*". The degree of contribution can be determined from the *design, structure,* and *operation of the measure*.[52] A measure may be termed as necessary only when it makes a material contribution to the objective.

In the present case, the end objective as stated by the respondent is protection of health of the public from CSC side effects as recorded by DOH.
The means is the measure; the technical requirements under WLECA required the manufacturers to label the CSCs with RFID[53]. However, with the Wingardium DOH's order calling for plain packaging of all solar cell products in the interest of public heath, they have failed to achieve the ultimate end of protecting the public from CSCs. Plain packaging does not put a blanket ban on sales of the CSCs and furthermore, does not curb the public from buying and coming in contact with it. In the present case,[54] *US — Clove Cigarettes*, Indonesia argued that a US ban on clove cigarettes was more trade-restrictive than necessary to fulfil a legitimate objective. *The Panel rejected Indonesia's claim. Among other things, the Panel found that the ban on clove cigarettes pursued a legitimate objective (reducing youth smoking), made a material contribution to that objective, and that Indonesia had failed to demonstrate that there are less trade-restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States.*

The legitimate objective being protection of public health[55] cannot be achieved and therefore, there is no relationship between the ends and means. Therefore, it is submitted that the measure did not make any contribution to the legitimate objective.

[52] *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 317.
[53] ANNEXURE-I (d), MOOT PROPOSITION
[54] Panel Report, *US — Clove Cigarettes*, paras. 7.325–7.432.
[55] ART.2.2. TBT AGREEMENT

3.1.2.2. *TECHNICAL REQUIREMENTS OF WLECA IS MORE TRADE-RESTRICTIVE THAN NECESSARY*

The term "trade-restrictive" refers to a measure "*having a limiting effect on trade.*[56] In order to show that a measure is trade-restrictive, *actual impact on trade* need not be proved. A measure that causes restrictions on the competitive opportunities available to imported products is also said to be trade-restrictive.[57]

In the present case, the complainant had met all the technical requirements stipulated in the technical regulations of WNSM under WG/SM/P-1 and met all the international safety standards as given by the WSO. The complainant had also transferred the substantial 'know-how' to Wingardium for their domestic manufacturers to achieve the objectives of WNSM in phase-II. In accordance with Art.4.2 of WLECA[58], there should have been a reduction in the 30% domestic content requirement for phase-I of WNSM under WG/SM/P-1 after the Know-how transfer. However, instead of reducing it the president of Wingardium through an executive order increased the domestic content requirement to 50%. It is mostly submitted that the WLECA is more trade-restrictive than necessary because even when the domestic content requirement was 30% the CLI suffered a loss of 5 Billion Dollars[59] and also had to share a significant amount of revenue with domestic manufacturers. Also, after the transfer of know-how which resulted in the establishment of 25 domestic companies for the production of Crystalline Silicon PV Modules, instead of reducing the domestic content requirement it was raised to 50% thus, causing a heavy loss to CLI.

3.1.2.3..*NO GRAVE CONSEQUENCES ARISE FROM NON-FULFILLMENT OF THE OBJECTIVE*

The third factor in relational analysis is that of the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s)

[56] Panel Report, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.129, WT/DS90/R (Apr. 6, 1999); *US-COOL* Appellate Body Report, *supra* note 3, ¶ 375; *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 214.
[57] *US-COOL* Panel Report, *supra* note 80, ¶ 7.572.
[58] ANNEXURE II, MOOT PRPOSITION
[59] ¶10, MOOT PRPOSITION

pursued by the Member through the measure.[60]

In the present case, the objective of WNSM as part of WLECA being 'promoting domestic manufacturers in Wingardium for producing CSC PV Modules' is not a legitimate objective under Art 2.2 of the TBT Agreement, and no grave consequences would arise from the non-fulfillment of this objective. Despite of raising the domestic content requirement bar to 50% from 30%, Wingardium should've reduced it below 30% in accordance with the provisions of WLECA. Moreover, the reduction would have not given rise to any grave consequences due this non-fulfillment of their objective of promoting domestic products as the complainant had already given them the Know How for the solar cells and that according to the agreement the respondent would have accomplish the Phase-II of the mission solely with the domestic products. Nonetheless, 25 companies had already been established in the country for domestic production of the cells[61] due to which Wingardium would have not suffered any loss in the long run with respect to its economy. On the contrary it was the CLIs who were suffering the loss. Hence, it is argued that even if the technical requirement with respect to domestic content requirement in WLECA is not implemented, it will not have any adverse consequences. The measure, in its present form, is not necessary to achieve the objective.

3.1.2.4. REASONABLE AND LESS TRADE-RESTRICTIVE ALTERNATIVES ARE AVAILABLE

The assessment of necessity requires a comparison of the measure at issue with a possible alternative measure on the basis of elements such as whether the alternatives are *less trade restrictive* than the challenged technical regulation, whether the alternatives would make an *equivalent contribution* to the legitimate objective, taking account of the risks non-fulfillment would create and whether the alternative is *reasonably available*.[62]

It is submitted that the less trade-restrictive alternatives suggested above in Section [3.1.2.2] will contribute to the achievement of the objective to a greater extent. The domestic content requirement of Wingardium should've reduced below 30% after the

[60] *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 320; *US-COOL* Appellate Body Report, *supra* note 3, ¶ 377.
[61] ¶14, MOOT PROPOSITION
[62] *US-Tuna* Appellate Body Report*, supra* note 3, ¶ 321.

transfer of the know-how and establishment of 25 domestic manufacturing companies. Moreover, the alternatives are reasonably available with respect to the plain-packaging of cells. The respondents could've launched advertisements and awareness campaigns with respect to the effects of CSCs as recorded by the WDOH in its report[63]. This alternative would not have been in violation with the technical regulations of WLECA with respect to RFID which was violated through plain packaging. Hence, they are not likely to hesitate in complying with alternative less trade-restrictive measures.

Therefore, the measure at issue is more trade restrictive than necessary and it violates the obligation of Wingardium under Art. 2.2 of the TBT Agreement.

3.2. WLECA IS INCONSISTENT WITH THE PROVISIONS OF THE GATT, 1994

It is well established that the laws and the regulations of the contracting parties relating to the marking of the imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

3.2.1. *Article IX: 4 OF The GATT,1994*

The respondent in violation of **Article IX: 4 of the GATT 1994** impose requirements relating to the marking of imported CSCs which materially reduced their value and/or unreasonably increased their cost of production.

"By effectively banning the lawful use of intellectual property, plain packaging undermines the liberal principle of private property ownership. This sets a disturbing precedent for other personal, real and intellectual property to be restricted by governments."[64]

In the present case, the WDOH issued a directive calling for plain packaging of all solar cell products in the interest of public health. It revealed in a study that CSCs were causing many allergies and skin cancers to some individuals who came in close contact with these cells. Ironically while executing WLECA Leviosa had met all international safety standards and safety concerns established by WSO with respect to

[63] ANNEXURE VIII, MOOT PROPOSITION
[64] [64] Jeffery Lara "Report on Plain Packaging: A Threat to the Intellectual Property Rights System" pp. 03

its CSCs and PV Modules. The objective of plain packaging of solar cells was to reduce the attractiveness of CSCs and increase the noticiability and effectiveness of mandated health warnings[65]. Plain packaging reduces the value to consumers of brand identification. In accordance with the measures adopted for plain packaging of solar cells, other than as permitted by the Directive and Technical Regulation under WG/SM/P-1, the laminate for the package must be transparent and not colored, marked, textured or embellished in any way, no trade mark or mark may appear anywhere on the Laminate, no trade mark or mark may appear anywhere on a Solar Cell or Solar Module product, 90% of the package must contain health warnings and instructions for handling such equipment. Moreover, certain trademarks that may appear on the retail packaging of solar cell and solar PV modules products includes the brand, business or company name for the Solar cell and Solar Panel products, country of origin information, alphanumeric code and any variant name for such products[66].

"The Commonwealth contested in its submissions to the court[67] that holders of intellectual property have "no positive right to use and are, in any event, subject to statutory modification or extinguishment without compensation, for the purpose of preventing or reducing harm to the public or public health."

It is submitted that the respondent on one hand is permitting the country of origin mark on the imported product, however, on the other hand is insisting on marking the health warnings on 90% of the package of the product[68]. Since the WDOH recorded that CSCs have hazardous health effects on the public, it would materially decrease the value of CSCs imported from Leviosa if 90% of the package contained health warnings[69]. Thin film cells as recorded by the WDOH have no health effects due to which 90% of package would only contain instructions for handling such equipment instead of any health warnings. The country of origin Redondo would get positive brand recognition due its mark of origin on the product without any health side effects on. However, the brand, business and company name as marked on the CSCs

[65] ¶5, ANNEXURE VIII, MOOT PROPOSITION
[66] ¶6, ANNEXURE VIII,MOOT PROPOSITION
[67] http://www.hcourt.gov.au/assets/cases/s389-2012/BAT_Def.pdf accessed on 12.01.2016
[68] Ibid.2
[69] ¶1, ANNEXURE VIII, MOOT PROPOSITION

imported from Leviosa would get damaged and its material value would reduce due to the health hazards mentioned on 90% of package.

"*The Australian experience with plain packaging should be a warning to all industries and governments of the dangers in pursuing continued attacks on intellectual property. It is clear that plain packaging has failed to achieve its intended outcomes, Plain packaging grossly misunderstands the role of branding: while it relevant to differentiating between competing brands, it has minimal impact on the uptake. The Australian Tobacco Plain Packaging Act 2011 (TPPA) is discriminatory, unjustifiably infringes upon trademark and intellectual property rights, and is more trade restrictive than evidence suggests is necessary for achieving public health goals."*[70]

It is submitted that this marking requirement with respect to the health warnings on the CSCs is in violation of **Article 2.2 of the TBT Agreement**, acting as an unnecessary obstacle in their technical regulations. This marking scheme is more trade restrictive than necessary in order to fulfill the legitimate objective which is protection of public health, as 90% of the package of CSCs contains health warnings along with the country of origin marked on it. Because of this the brand value of the product from the said country decreases and becomes less favorable than the thin film cells imported from Redondo since they don't have any health effects, this further violates **Article 2.1 of TBT Agreement**.

It is submitted that the technical requirements of WG/SM/P-1 for WLECA did not contain any specifications such as font, size, color and placement for the 'identification and traceability'[71] for the solar cells and the PV Modules. However, the measures for plain packaging require "the brand, business, company and variant names to be displayed on the packaging of the solar cell and PV Modules in a uniform typeface, font, size, color and placement. The font should be Times new Roman and must not exceed 24 points, and it should be Pantone 448 in color and can only be placed at the side of the package."[72] It is submitted that Wingardium has not provided sufficient scientific evidence linking CSCs plain packaging to a reduction in their sales and thus, their efficiency of the measure to achieve the stated objective is

[70] Jeffery Lara "Report on Plain Packaging: A Threat to the Intellectual Property Rights System"
[71] ANNEXURE I (d), MOOT PROPOSITION
[72] ANNEXURE VIII, ¶6(5), MOOT PROPOSITION

questioned. These technical regulations required for marking the product are unnecessary obstacles to trade and are more trade restrictive than necessary to fulfill the legitimate objective, since such markings would in no way contribute to the protection of the public health as part of the plain packaging measure. This is in violation of Art. 2.2 of the TBT Agreement. Moreover, these requirements for marking the imported CSCs would also unreasonably increase the cost of production of these products which have already lost their and thus are in violation of **Art. IX: 4 of the GATT, 1994**.

REQUEST FOR FINDINGS

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

a) Find that the Domestic Content Requirement and FIT scheme under the WLECA is inconsistent with the provisions of the TRIMS, SCM and GATT Agreements.

b) Find that the health directive was not conclusive and the plain packaging of the solar cells is inconsistent with the provisions of the TRIPS, TBT and GATT Agreements.

All of which is respectfully affirmed and submitted,
Counsel for the Complainant,
114C.