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EIGHTH GNLU INTERNATIONAL LAW MOOT COURT COMPETITION 2016

IN THE WORLD TRADE ORGANIZATION PANEL

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

WT/DSxxx

LEVIOSA

(COMPLAINANT)

v.

WINGARDIUM

(RESPONDENT)

MEMORANDUM ON BEHALF OF THE RESPONDENT

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LIST OF ABBREVIATIONS

¶	Paragraph
Art.	Article
Annex	Annexure
AB/R	Appellate Body Report
AIR	All India Reporter
APM	Air Particulate Matters
CLI	Consortium of Leviosian Investors
DSU	Dispute Settlement Understanding
DCR	Domestic Content Requirement
EC	European Communities
ECA	Energy Cooperation Agreement
ECT	Energy Charter Treaty
FIT	Feed in Tariff
GATT	General Agreement on Tariffs and Trade

Ibid	Ibidem
ICJ	International Court of Justice
JIEL	Journal of International Economic Law
NGO	Non-Governmental Organization
Pg.	Page
PPA	Product Purchase Agreement
PV	Photovoltaic
SC	Supreme Court
SCM	Subsidies and Countervailing Measures
SPD	Solar Power Developers
TBT	Technical Barriers to Trade
TRIM	Trade Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNTS	United Nations Treaty Series

WTO	World Trade Organization
WT/DS	World Trade/Dispute Settlement
WSO	Wingardium Standards Organization
WHO	World Health Organisation

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STATEMENT OF FACTS

The Parties: Leviosa is a developed country with a population of 250 million and has been a founding member of both GATT and the WTO. It has a robust manufacturing industry and an equally enviable technological innovation platform. Wingardium is a developing country with a population of 500 million and much of its population resides in the rural sector (almost 65%) and has little or no access to electricity. Wingardium ranks fourth in terms of carbon emissions in the world. Wingardium has achieved considerable success in meeting its constitutional goal of building a "socialistic pattern of society" through liberalization.

Solar power sector in Leviosa: In 2006, Leviosa developed a unique technology that uses solar power to generate energy. A scientist named Einburke developed Solar Panels. This technology has allowed Leviosa to significantly reduce its carbon emissions. Leviosa has become the largest exporter of the Crystalline Silicon Solar Cells in the world and many countries have initiated and executed successful solar missions, aimed at providing solar powered electricity to households and commercial enterprises, on account of the technology transferred by Leviosian investors.

Wingardium National Solar Mission (WNSM): In 2013, the Government of Wingardium decided to initiate a similar program, titled Wingardian National Solar Mission (WNSM), aimed at developing 40,000 MW of grid connected solar power by the year 2030, through its enabling document WG/SM/P-1.In order to develop a robust domestic production industry the document highlighted the importance of domestic content sourcing for the production of solar panels. Further to promote use of renewable energy a feed-in-tariff scheme was also initiated. In January 2013, the President of Leviosa visited Wingardium at the behest of the solar industry lobby to develop a strategic partnership. The Wingardian President had acknowledged that energy security is key for economic development and overall growth of the country and Leviosa will be a key partner in assisting Wingardium to achieve optimal energy efficiency and meeting its development and environmental goals. The Leviosian President's trip to Wingardium resulted in the inking of agreement pertained to collaboration on executing the WNSM successfully. Upon execution of the Wino-Leviosian Energy Cooperation Agreement, Leviosian companies through the Consortium of Leviosian Investors (CLI) won tenders for 60% of Phase-I of the project having met all the criteria stipulated in the technical regulation.

Domestic Content Requirement under WG/SM/P-1: The President of Leviosa in a letter dated 30th June, 2015 requested the Wingardian President to reconsider the DCR for the benefit of Leviosian investors and offered a commitment to support the growth of domestic industry. The President of Wingardium, in a letter dated 1st July 2015 offered to cut back on the DCR. Through an Executive Order dated 2nd July 2015, the President of Wingardium honoured the commitment made to Leviosa with a requirement that nothing shall affect the livelihood of Wingardian citizens. However this attempt resulted in a backlash in Wingardium. The domestic Crystalline Silicon cells and solar panels industry had employed a workforce of 10 million people and due to this decision they were compelled to lay off more than half of their workforce. For a whole session, the debate on the President's "ill-conceived" measure stonewalled any concrete development on other aspects of governance and law making. The policy paralysis at the centre resulted in a hostile investor sentiment and compelled credit rating agencies to downgrade Wingardium's credit status to negative. There was no other option left but to revert to the original scheme as laid down in WG/SM/P-1.On 4th January, 2016, the President of Wingardium through an executive order called for the reinstatement of WG/SM/P-1 in its totality with a domestic content requirement of 50% on account of not receiving sufficient technical knowhow from Leviosa.

Plain packaging requirements under Directive 141/PP/CST: It was revealed in a preliminary study by the Department of Health of Wingardium, that Crystalline Silicon solar cells are causing many allergies and in some cases resulting in skin cancer for individuals in close contact with such panels containing these cells. The reliance on Crystalline Silicon cells had to be reduced and the only way to reduce this was through plain packaging of all solar cells, which would reduce the brand recognition and promote of the use of locally manufactured Thin Film technology solar cells. The Wingardian Department of Health issued a directive on 1st February, 2016 calling for plain packaging of all solar cell products in the interest of public health.

Panel Establishment: In late March 2016, Leviosa requested consultations with Wingardium under WTO Dispute Settlement Understanding (DSU). The consultations were unsuccessful. Leviosa requested the establishment of a WTO Panel. Wingardium did not object to this request. The DSB established a panel in June 2016 The WTO Director General composed the Panel in July 2016.

MEASURES AT ISSUE

I.

WHETHER DOMESTIC CONTENT REQUIREMENT UNDER WG/SM/P-1 AND EXECUTIVE ORDERS IS CONSISTENT WITH ARTICLE 2.1 OF TRIMS AGREEMENT?

II.

WHETHER DOMESTIC CONTENT REQUIREMENT UNDER WG/SM/P-1 AND EXECUTIVE ORDERS IS CONSISTENT WITH ARTICLE III: 4, III: 5 AND III: 1 OF GATT?

III.

WHETHER FIT POLICY IS CONSISTENT WITH PARAGRABH B OF ARTICLE 3.1 AND 3.2 OF SCM AGREEMENT?

IV.

WHETHER HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE 16.1 AND 20 OF TRIPS AGREEMENT?

V.

WHETHER HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE IX 4 OF GATT?

VI.

WHETHER HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE 2.2 OF TBT AGREEMENT?

SUMMARY OF PLEADINGS

I. DOMESTIC CONTENT REQUIREMENT UNDER WG/SM/P-1 AND EXECUTIVE ORDERS IS CONSISTENT WITH ARTICLE IIIOF GATT.

DCR measures does not violate Article III: 1, III: 4, III; 5 as such measures are justified under Article III: 8(a) and General Exceptions under Article XX.

- **The DCR measures are justified under GATT 1994 Article III: 8(a):** To fall within the exception of Article III: 8(a), a challenged measure must be: first, that the products are purchased for governmental purposes; and second, "it is not undertaken with a view to commercial resale".In our case, the aim of procuring solar energy is to distribute solar power equally to the citizens of Wingardium. Hence, procurement of solar power by the Wingardian government is for governmental purposes within the meaning of Article III.8 (a). The aim of the program is to provide solar power in form of clean renewable energy and not to gain any profit out of the whole Program.
- **The DCR measures are justified under general exception of Article XX (b) and (j) GATT:** There are two necessary conditions under the chapeau of Article XX. First, whether the measure in question satisfies the requirements of the chapeau of Article XX. Second, a measure should fall under one of the exceptions listed in the various sub-paragraphs of Article XX.
- **DCR satisfies the requirement of the chapeau:** In our case the requirement of DCR was not only on developers of Leviosa but on all the developers using Crystalline Silicon technology to manufacture solar cells in order to produce solar energy. Moreover, a transparent procedure was followed in allotting tenders. Therefore, there is no unjustifiable discrimination and disguised restriction in International trade.
- **DCR falls within the exceptions mentioned under sub-paragraphs (b) and (j) of Article XX of GATT:** The policy in respect of the measures for which the provision was invoked is designed to protect human, animal or plant life or health and therefore is justified under Article XX (b). Further, there is a local short supply of products necessary to procure renewable and clean energy in Wingardium. DCR was implemented, to solve the problem of

local short supply and introduce changing trends of technical know-how of production of solar cells. Therefore, it is justified under Article XX (j).

II. DOMESTIC CONTENT REQUIREMENT UNDER WG/SM/P-1 AND EXECUTIVE ORDERS IS CONSISTENT WITH ARTICLE 2.1 OF TRIMS AGREEMENT.

DCR has not violated Article 2.1 of TRIMS Agreement as the violation of principle of national treatment is justified under Article III: 8(a) of GATT.

III. FIT POLICY IS CONSISTENT WITH PARAGRABH B OF ARTICLE 3.1 AND 3.2 OF SCM AGREEMENT.

The FIT Scheme is not a subsidy within the meaning of Article 1 of the SCM Agreement as it a financial contribution by way of government purchases of goods but does not confer a benefit to the recipients. Further, the claim of violation of SCM Articles 3.1(b) and 3.2 forbid subsidies contingent on the use of domestic over imported goods. However, this claim is premised on the fact that the FIT Scheme is a subsidy under the SCM Agreement. The FIT Scheme does not by itself constitute a subsidy and therefore does not violate the SCM Agreement.

IV. DIRECTIVE 141/PP/CST IS CONSISTENT WITH ARTICLE 16.1 AND 20 OF TRIPS AGREEMENT.

- **Wingardium is not in violation of Article 16.1 of TRIPS Agreement:** The distinctive character of SPDs trademarks remains untouched by the Directive. SPD's are still able to use their trade marks in limited ways. Under the Directive, use of trademark in certain is provided as the trademark owners can use their brand, business or company name on the Solar cells in a manner provided under the Directive. Hence, the requirement of plain packaging does not violate Article 16.1 of the TRIPS Agreement.
- **Requirement qualifies as a 'limited exception' under Article 17 of TRIPS Agreement:** Since, brand and a business name is allowed to be highlighted in package, there can be no form of confusion in the minds of the consumers as to which particular brand a product belongs. Under the Directive a fair use of descriptive terms of the trademark owners

is allowed and also adequate protection is provided to the owners of the trademark to preserve the distinctiveness of their products. Therefore, it qualifies as a limited exception.

- **Health directive under 141/ PP/CST is consistent with article 20 of TRIPS Agreement:** It was revealed in a preliminary study by the Department of Health of Wingardium, that Crystalline Silicon solar cells are causing many allergies and in some cases resulting in skin cancer for individuals in close contact with such panels containing these cells. Therefore, there is a reasonable nexus behind the measure taken in order to prevent the harm and qualifies as a justifiable measure within the meaning of Article 20 of TRIPS Agreement and is justified under Article 20.

V. HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE 2.2 OF TBT AGREEMENT.

The framework of the TBT Agreement allows for countries to pursue legitimate objectives as long as such pursuit does not create unnecessary obstacles to international trade. A technical regulation under Article 2.2 must pursue a 'legitimate objective and not be more trade-restrictive than 'necessary' to fulfil that legitimate objective. Therefore, the objectives of the Directive are legitimate objectives.

VI. DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE IX 4 OF GATT.

To prove a violation under Article IX: 4, a two tier test must be satisfied. First, there should be laws and regulations relating to marking of imported products. Second, the impugned laws and regulations impose damage to imported products in the manner put forward in the provision. Directive does not materially damage the value/cost of the product such health requirements will let the consumers choose the products according to their requirements as the requirements are applicable on every solar cell weather crystalline silicon or thin film cells the demand per se will not shift directly on the domestically produced goods. Hence, there will not be any material reduction of cost.

I. DOMESTIC CONTENT REQUIREMENT UNDER WG/SM/P-1 AND EXECUTIVE ORDERS IS CONSISTENT WITH ARTICLE III OF GATT.

The violation under Article III: 4, III: 5 and III: 1 of GATT is justified under Article III: 8(a) and Article XX.

A. The DCR is justified under GATT Article III: 8(a).

In *Canada Renewable Energy case*, the Appellate body observed that Article III: 8(a) establishes that a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III: 8(a) are not subject to the national treatment obligations set out in other paragraphs of Article III.[1]

To fall within the GATT[2] Article III: 8(a) exception, a challenged measure must:

i. *"be laws, regulations and requirements governing the procurement by governmental agencies of products purchased for governmental purposes"; and*
ii. *"not [be undertaken] with a view to commercial resale or with a view to use in the production of goods for commercial sale".*

Test 1: The WNSM Program's DCR are laws, regulations, or rules governing procurement of products purchased for governmental purposes within the meaning of Article III: 8(a).

The term 'procurement' may refer generally to *"the action or process of obtaining equipment and supplies".*[3] In order to promote the usage of renewable energy, the government shall initiate a FIT Scheme similar to the Ontario FIT Scheme but with a domestic content

[1] Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 5.56, WT/DS412/AB/ ,WT/DS426/AB/R,, (06 May 2013) [hereinafter Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*].
[2] General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.
[3] The Oxford Thesaurus: An A-Z Dictionary of Synonyms (Oxford University Press, 1991), Pg. 353.

requirement of 30% excluding land (which was later amended to 50%).[4] The Wingardian government through its agencies procures solar power under WNSM Program. The panel in the *Canada Renewable Energy case* observed that "*procurement of electricity has a close relationship between the generation equipment, that is, solar cells and the final product, that is, electricity."*[5]

It is contented that the product (that is, electricity) 'characteristics', does not necessarily refer to physically detectable characteristics, but to elements that define the nature of the product more broadly. The environmental profile or attributes that a particular product may incorporate, even if they do not materialize into any particular physical characteristic, could legitimately form part of the requirements of the product purchased that are closely related to the subject matter of the contract. The whole Wino-Leviosian Energy Cooperation Agreement's aim was to generate solar power by installing plants in Wingardium.[6] The solar cells form the essence of the final product and when we consider the final product for the purposes of government procurement, the generation equipment qualifies as products purchased for 'government procurement' within the meaning of Article III: 8(a).

In *US Sonar mapping case*, the Panel concluded that, "*in the light of the government's payment for, ownership and use of the sonar mapping system and given the extent of its control over the obtaining of the system, the acquisition of the sonar mapping system was government procurement within the meaning of Article III: 8(a)."*[7]

Similarly, according to WNSM Program, the Wingardian government will have the final title of the solar energy generated from solar cells. Additionally, the allotments of tenders for generation of solar powers is completely monitored and controlled by the Wingardian government. Therefore, the acquisition of solar power qualifies as the 'product procured by government'.

[4] Fact on Record, ¶ 6.
[5] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1, ¶5.76.
[6] Fact on Record, Annexure II.
[7] GATT Panel Report on *United States - Procurement of a Sonar Mapping System*, ¶ 4.13,GPR.DS1/R (23 April 1992)[hereinafter Panel Report,*US-Sonar*].

The Appellate Body in *Canada Renewable Energy case* stated that *"the phrase 'products purchased for governmental purposes' refers to:*

i. what is consumed or used by the government; or

ii. what is provided by government to recipients in the discharge of its public functions."[8]

Article 1.1 of WNSM stated goals of the Mission as:

(ii) Achieving 90% rural electrification through off-grid solar power.

(iii) Creating a robust Research and Development platform for diffusion of clean and innovative technology across Wingardium.[9]

Wingardium has become an energy stressed state. High usage of fossil fuels has deteriorated the standard of living in the country. Despite economic growth, much of Wingardium's population resides in the rural sector and has little or no access to electricity.[10] Wingardian government following a socialist pattern of economy has a public function of providing clean energy and reducing pollution. Therefore, the aim of procuring solar energy is to distribute solar power equally to the citizens of Wingardium. Hence, procurement of solar power by the Wingardian government is for governmental purposes within the meaning of Article III: 8(a).

Test 2: The Wingardian government's procurement of solar power is not with a view to commercial resale.

The Appellate Body has explained that an inquiry into whether a transaction is with a view to 'commercial resale' for purposes of Article III:8(a) 'must be assessed having regard to the entire transaction'. It also explained that a profit motive on part of the seller is a strong indication that a 'resale' is 'commercial' in nature. However, it also clarified that the lack of an immediate profit motive does not necessarily rule out the possibility of a 'commercial resale' as the seller could have 'self-interested' motives for selling at a loss or not gaining an

[8] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1, ¶ 5.68.
[9] Fact on Record, ¶ 5.
[10] Fact on Record, ¶ 2.

immediate profit. With respect to a buyer, it stated that 'commercial resale' is evident where "the buyer seeks to maximize his or her own interest."[11]

The aim of the program is to provide solar power in form of clean renewable energy both for commercial and residential purposes and there is no profit motive behind the whole program. It seeks to achieve 90% rural electrification and promote the use of clean and renewable energy. Therefore, Wingardian government is not to earning any profit but merely discharging its public function of providing clean and renewable energy to its citizens.

Conclusion: The DCR is justified under Article III: 8(a) of GATT.

B. The DCR is justified under general exception of Article XX (b) and (j) GATT.

The defences under the general exceptions of Article XX will be applicable in our case.

Test to be satisfied to fit into general exceptions under Article XX

In *Brazil — Retreaded Tyres*, the Appellate Body for the examination of a measure under Article XX laid down a two-tiered test:

i. *Whether the measure in question satisfies the requirements of the chapeau of Article XX.*
ii. *Whether a measure falls under one of the exceptions listed in the various sub-paragraphs of Article XX.*[12]

Test 1: The measure in question satisfies the requirements of the chapeau of Article XX.

The Appellate Body in *US — Gasoline* held that the chapeau has been worded so as to prevent the abuse of the exceptions under Article XX.[13] To prove that there is no abuse of the exceptions the language of Article XX provides for assessing whether:

[11] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1,¶ 5.71.
[12] Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶ 139, WT/DS267/AB/R (21 March 2005) [hereinafter Appellate Body Report, *US-Upland Cotton*].
[13] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, Pg. 23,WT/DS2/AB/R (20 May 1996) [hereinafter Appellate Body Report, *US Gasoline*]

i. there is any arbitrary or unjustifiable discrimination between countries where the same conditions prevail.
ii. the measures are disguised restrictions in International Trade.

i. <u>There is no arbitrary or unjustifiable discrimination between countries where the same conditions prevail.</u>

The Panel in *EC — Tariff Preferences* looked at the inclusion of Pakistan, as of 2002, as a beneficiary of the Drug Arrangements preference scheme and the exclusion of Iran, and found that no objective criteria could be discerned in the selection process. The Panel was not satisfied that conditions in the 12 beneficiary countries were the same or similar and that they were not the same with those prevailing in other countries.[14]

In the case of Solar PV Projects selected, it is mandatory for Projects based on Crystalline Silicon technology to use 30% (which was later amended to 50%) of cells and modules manufactured in Wingardium as per Article 4.1.[15] The requirement of DCR was not only on developers of Leviosa but on all the developers using Crystalline Silicon technology to manufacture solar cells in order to produce solar energy. Therefore, the WNSM measures being the same for all developers are in a manner consistent with the chapeau of Article XX of GATT.

The Appellate Body in *US — Shrimp* laid down the concept of 'due process' to determine the arbitrariness of a measure. It found that the procedures under which United States authorities were granting the certification which foreign countries were required to obtain in order for their nationals to import shrimps into the United States were 'informal' and 'casual' and not 'transparent' and 'predictable'[16]

Upon execution of the Wino-Leviosian ECA, Leviosian companies through the CLI won tenders for 60% of Phase-I of the project having met all the criteria stipulated in the technical regulation including the Quality, Health and Safety Standards established by Wingardium

[14] First written submission of the European Communities, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, ¶ 136 (20 April 2004).
[15] Fact on Record, ¶ 6.
[16] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 180-181, WT/DS58/AB/R (6 November 1998)[hereinafter Appellate Body Report, *US-Shrimp*]

Standards Organization (WSO).[17] Therefore, a transparent due process was followed in allotment of contracts to the investors and developers from Leviosa as there was a requirement for filing of the tenders and on after reviewing the same they were allotted.

The objective of putting a requirement of domestic content was to promote domestic production of critical raw materials, components and products, as a result to achieve grid tariff parity by the year 2030,[18] to meet the Socialistic and Environmental goals of the Government.

ii. The measures are disguised restrictions in International Trade.

In *US — Gasoline*, the Appellate Body held that the concepts of 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade' were related concepts which 'imparted meaning to one another'.[19] So, it is clear to us that 'disguised restriction' includes disguised discrimination in international trade.

As stated earlier DCR of 50% was not only on developers of Leviosa but on all the developers using Crystalline Silicon technology to manufacture solar cells in order to produce solar energy. Therefore, there was no disguised discrimination or restriction by Wingardian government through its WNSM Program and therefore satisfies the requirements of the chapeau of Article XX.

Test 2: DCR falls within the exceptions (b) and (j) of Article XX of GATT.

1. DCR is justified Article XX (b) of GATT

The Panel in *US — Gasoline* stated a three-tier test in respect of Article XX (b):

i. that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health,

ii. that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective;

[17] Fact on Record, ¶11.
[18] Fact on Record, ¶ 4.
[19] Appellate Body Report, *United States –Gasoline*, *Supra* Note 13, Pg. 25.

iii. that the measures were applied in conformity with the requirements of the introductory clause of Article XX.[20]

Test 1: That the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health.

In *EC — Asbestos*, the Panel stated that *"first it should be established whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health."*[21]

High usage of fossil fuels (almost 95% of energy needs) has deteriorated the standard of living in the country. The prevalence of APM in Wingardium's capital, Tesori, is well beyond the prescribed limit established by WHO. Due to its high utilization of fossil fuels, Wingardium ranks fourth in terms of carbon emissions in the world and qualifies as a major contributor to the deleterious effects of climate change.[22]

The objective of the WNSM Program to protect human life and health was outlined in WG/SM/P-1:

"Article 1.1:

(v) Promote the use of clean solar energy across households and commercial enterprises in Wingardium through a Feed-in-Tariff Scheme."[23]

It is clear from the facts that in Wingardium the contents of carbon emissions were increasing day by day, thereby, damaging the health of both humans and animals. An alternative form of energy was required to reduce the usage of fossil fuels and decrease the carbon emissions by using a clean renewable energy.

Therefore, the policy in respect of the measures for which the provision was invoked is designed to protect human, animal or plant life or health.

[20] *Ibid*. ¶ 620.
[21] Appellate Body Report, *EC - Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.184, WT/DS135/AB/R (5 April 2001) [hereinafter Appellate Body Report, *EC-Asbestos*].
[22] Fact on Record, ¶ 2.
[23] Fact on Record, ¶ 5.

Test 2: That the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective

The Appellate Body in *Brazil — Retreaded Tyres* explained that a panel must evaluate whether a measure at issue is necessary based on whether it is apt to produce a material contribution to the achievement of its objective and observed:

"We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions — for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time — can only be evaluated with the benefit of time."[24]

It is established that the air quality of Wingardium is degrading and therefore, it is required to find an alternative source of clean energy to protect human life and health of people of Wingardium. It was necessary for the government under its public policy to establish a renewable energy industry in Wingardium to achieve its socialistic goals with environmental goals. The DCR is justified as it is necessary to ensure growth of solar cells industry in Wingardium for introduction of changing trends of technical know-how of production of solar cells, as technology in renewable energy sector keep on changing day by day. This will ensure that they have efficient source of solar energy available with them at their disposal whenever required.

Therefore, the DCR will have a material contribution in the achievement of its objectives of providing the people of Wingardium with clean and renewable energy in the long-run.

Test 3: The measures were applied in conformity with the requirements of the introductory clause of Article XX.

[24] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WT/DS332/AB/R, (17 December 2007)[hereinafter Appellate Body Report, *Brazil – Retreaded Tyres*].

As proved above, the measures of DCRs are applied in conformity with the requirements of introductory clause of article XX as there is no arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

Conclusion: The DCR is justified Article XX (b) of GATT

2. DCR is justified under Article XX (j) of GATT.

Article XX (j) requires two conditions for its application:

i. the enacted measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products.
ii. these measures shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

Test 1: The enacted measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products.

To prove the first test we will establish:

a. Wingardium is experiencing a short supply of solar cells and modules.
b. The DCRs at issue are 'essential' within the meaning of Article XX (j).

a. Wingardium is experiencing a short supply of solar cells and modules.

In *China – Raw Materials*, the Appellate Body observed that:

"In the context of Article XX (j), the words 'general or local short supply', refers to a situation where a product is 'available only in limited quantity' or 'scarce'. Consistent with this interpretation, the terms 'general or local' reflect that a product can be in short supply in the international market, without necessarily being in short supply in any particular country. The converse is also true: a product that is generally available on the international market, could possibly be in short supply in a particular country or locality."[25]

[25] Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*,¶ 325 WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R (22 February 2012)[hereinafter Appellate Body Reports, *China – Raw Materials*].

It became necessary for Wingardium to use the renewable sources of energy and to promote the use of clean energy due to high utilization of fossil fuels causing deleterious effects on climate change.

It is contended that there is a local short supply of products necessary to procure renewable and clean energy in Wingardium. Crystalline silicon cell technology or for that matter any other technology required for the manufacturing purposes of solar cell is not present in Wingardium, hence, there is no production of solar cells, that is, generation equipment of production of solar energy.

Therefore, the factual requirement under article XX (j) of products, that is, solar cells and modules being in local short supply is met as there is a scarcity of the solar cells and modules in Wingardium.

b. The DCRs at issue are 'essential' within the meaning of Article XX (j).

It is important to consider that, given the element of necessity embodied in the ordinary meaning of 'essential', legal tests developed to evaluate whether measures were 'necessary' within the meaning of other paragraphs of Article XX might inform the analysis under Article XX(j). The Appellate Body in *EC- Seal case* found that "*in that regard that such an analysis 'involves a process' of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure."*[26]

The DCRs suggest that they are 'essential' by establishing the following balance of factors test:

- The objective: The 'objective' being a necessity analysis under Article XX, the objective in our case would be the acquisition and distribution of solar cells and modules as they are in short supply.
- The importance of the objective: The importance of the objective is to become self-sufficient with the production of solar cells as there is an urgent requirement for the

[26] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*,¶ 5.214, WT/DS400/AB/R / WT/DS401/AB/R (18 June 2014) [hereinafter Appellate Body Report, *EC – Seal Products*].

government to do so. Also, it is essential to ensure that the levels of carbon emissions are reduced to protect the health of people of Wingardium.

- Contribution of the measure to the objective: The DCR a measure to increase the local manufacturing of renewable energy system so that it is independent of foreign imports. Also, the measure introduces the technical know-how and its changing trends in manufacturing solar cells in Wingardium.

Wingardium has for curbing local short supply and introduction of changing trends of technical know-how of production of solar cells have implemented DCR. Therefore, the DCRs are 'essential' to achieve the objectives of Article XX (j).

Conclusion: The measures taken by Wingardium are justified under Article XX (b) and (j) of GATT. In conclusion, the DCR under WG/SM/P-1 and Executive Orders is consistent with Article III of GATT.

II. DCR IS CONSISTENT WITH ARTICLE 2.1 OF TRIMS AGREEMENT.

The DCR measures violating Article 2.1 of TRIMS are justified under Article III: (8)(a) of GATT.

The Appellate body in the *Canada Renewable Energy case* observed that, *"a measure that is inconsistent with Article III: 4 of GATT would also be a TRIM that is incompatible with Article 2.1 of the TRIMs Agreement. Importantly, the cross-reference to Article III also includes paragraph 8(a) of that provision. A measure that falls within the scope of paragraph 8(a) cannot violate Article III of the GATT. This, in turn, means that a Member applying such a measure would not violate Article 2.1 of the TRIMs Agreement."*[27]

Conclusion: We have earlier established that the violation of principle of national treatment is justified under Article III: 8(a) of GATT. Therefore, the violation is also justified under the TRIMS[28] Agreement. In conclusion, the DCR is consistent with Article 2.1 of TRIMS Agreement.

[27] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1, ¶5.20.

[28] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

III. FIT SCHEME IS CONSISTENT WITH PARAGRABH B OF ARTICLE 3.1 AND 3.2 OF SCM AGREEMENT.

A. That the measures under the FIT Scheme do not qualify as a subsidy under Article 1 of SCM Agreement.

In *Brazil — Aircraft case*, the Panel noted that the object and purpose of the SCM Agreement[29] is to impose multilateral disciplines on subsidies that distort international trade.[30]

Article 1.1 of the Agreement defines a Subsidy. In *Brazil — Aircraft case*, the Appellate Body indicated that *"a 'financial contribution' and a 'benefit' as two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists."*[31]

Wingardium was becoming an energy stressed state. Due to high utilization of fossil fuels, Wingardium qualified as a major contributor to the deleterious effects of climate change. Moreover, much of Wingardium's population resides in the rural sector and has little or no access to electricity.[32] Considering this situation, Wingardian government launched WNSM Program. Certain goals of the Program were laid down in Article 1.1[33] under WG/SM/P1. Further, to promote the use of renewable energy in Wingardium, Article 5 provided for a FIT Scheme with 30% (which was later amended to 50%) of DCR.[34]

For any government measure to qualify as subsidy two tests need to be satisfied:

i. That FIT Scheme under WG/SM/P1 is a 'financial contribution' or 'income or price support' and
ii. That it confers a benefit.

Test 1: FIT Scheme under WG/SM/P-1is a 'Financial contribution'.

[29] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14.
[30] Panel Report, *Brazil – Export Financing Programme for Aircraft*, ¶ 7.26, WT/DS46/R9 (20 August 1999)[hereinafter Panel Report, *Brazil – Aircraft*] .
[31] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶ 5.18, WT/DS70/R (20 August 1999) [hereinafter Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*].
[32] Fact on Record, ¶1.
[33] Fact on Record, ¶ 5.
[34] Fact on Record, ¶ 6.

In *US — Softwood Lumber IV*, the Appellate Body stated that:

"An evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government. A wide range of transactions falls within the meaning of "financial contribution under Article 1.1(a)(1)."[35]

However, the Panel in *US — Export Restraints* stated that:

"Not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a). If that were the case, there would be no need for Article 1.1(a), because all government measures conferring benefits, per se, would be subsidies."[36]

To promote use of renewable energy a FIT Scheme was initiated as part of WG/SM/P-1 and was enforced through Article 5.[37] The FIT Scheme launched by the government of Wingardium was similar to the Ontario FIT Scheme. The conditions laid under the FIT Scheme were that:

i. FIT generators must build a generation facility while satisfying a requirement to use Wingardium-made solar PV generation equipment in constructing the plant.
ii. In return, the Wingardian government promises to pay a price which is alleged to be above a market price that guarantees the recovery of costs plus a reasonable return on investment over a long term period.
iii. The Wingardian government pays that price to the generator upon the generator delivering electricity to the grid.[38]

The Panel in *Canada renewable energy case* concluded that:

[35]Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 52, WT/DS257/AB/R,(17 February 2004)[hereinafter Appellate Body Report, *US – Softwood Lumber IV*].
[36] Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, fn. 35, WT/DS257/R (17 February 2004)[hereinafter Panel Report, *US – Softwood Lumber IV*].
[37] Fact on Record, ¶ 6.
[38] Second Written Submission by Japan, *Canada – Certain Measures Affecting The Renewable Energy Generation Sector*, ¶ 36, WT/DS412/R (19 December 2012).

"The appropriate legal characterization to be given to the FIT Programme, and the FIT and microFIT Contracts, is as 'government purchases of goods' under Article 1.1(a)(1)(iii) of the SCM Agreement."[39]

Wingardium argues that the FIT Scheme can be legally characterized as financial contributions in the form of government purchases of goods within the meaning of Article 1.1(a)(iii) of the SCM Agreement because it involves payment of money by the Wingardian government to SPDs for the supply of electricity into the grid.

In *US – Large Civil Aircraft*, the Appellate Body observed that a purchase of goods *"is usually understood to mean that the person or entity providing the goods will receive some consideration in return."*[40]

The 'government purchases of goods' will arise under the terms of Article 1.1(a) (1) (iii) of the SCM Agreement when a 'government' or 'public body' obtains possession (including in the form of an entitlement) over a good by making a payment of some kind (monetary or otherwise). This is exactly what happens through the FIT Scheme under WSNM and hence it falls within the meaning of financial contribution by way of purchase of goods (that is, the electricity) by the government.

Test 2: The FIT Scheme confers a benefit to the recipient.

The question of whether a benefit is conferred is determined by establishing whether the terms of the transaction reveal that the government has paid more than an 'adequate' price, for that specific form of electricity, with its specific inherent qualities.

The word 'benefit' as it is found in Article 1.1(b) of the SCM Agreement has two components: a benefit is conferred when a financial contribution by a government:

i. imposes a cost on the government, and

[39] Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 7.222, WT/DS412/R (19 December 2012) [hereinafter Panel Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*].

[40] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 619, WT/DS353/AB/R (23 March 2012)[hereinafter Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*].

ii. results in an advantage above and beyond what the market could provide.

Proper approach to assessing whether a benefit is conferred should reflect the ordinary meaning of Article 1.1(b) of the SCM Agreement, in the relevant context of Article 14 and the related jurisprudence.

With regard to the existence of a benefit in *US — Softwood Lumber III*, the Panel opined that "*the prevailing market conditions to be used as a benchmark are those in the country of provision of the goods."*[41]

The Appellate Body in *EC and certain member States – Large Civil Aircraft*, stated that:

Article 14(d) "*highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods … at issue would under market conditions, be exchanged."*[42]

A benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment.[43] In a case of a government 'purchase of goods', a benefit is conferred only when a government purchases goods from a recipient and makes more than sufficient payment or compensation for those goods.

Article 14(d) demonstrates that whether a benefit is being conferred depends on the price paid by the government and that this provision deals with the existence of a benefit in the context of a government 'purchase of goods' and not merely how to calculate the amount of benefit. Further, the Appellate Body found that a benefit is an 'advantage' conferred on a recipient and is determined by a comparison based on whether the recipient is 'better off' than it would be absent the contribution.[44]

However, the actual comparison required in a specific benefit analysis is to be conducted by comparing the terms of a government's 'financial contribution' to terms available in the

[41] Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*,¶4.21 , WT/DS236/R (1 November 2002) [hereinafter Panel Report, *US – Softwood Lumber III*].
[42] Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, ¶ 975, WT/DS316/AB/R(1 June 2011) [hereinafter Appellate Body Report, *EC and certain member States – Large Civil Aircraft*].
[43] Appellate Body Report, *US – Softwood Lumber IV*, *Supra* Note 35,¶ 84
[44] *Ibid*, ¶ 93.

market for a comparable transaction, a proper benefit analysis assumes a counterfactual market purchase and the central question is whether the terms of a financial contribution are more beneficial than a similar transaction between two arm's-length private entities on the market.

The appropriate electricity price benchmark for benefit analysis in our case must be found on the 'market' for electricity produced from solar energy produces, reflecting the fact that it is the Wingardian government (not the end-consumer) that is the purchaser of the electricity supplied under the FIT Scheme.

In *US – Upland Cotton*, the Appellate Body defined a 'market' as *"the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices."*[45]

The Appellate Body in *Canada Renewable Energy case* noted that *"there are additional factors that may be used to differentiate on the demand-side. Factors such as the type of contract, the size of the customer, and the type of electricity generated (base-load versus peak-load) may differentiate the market."*[46]

The Appellate Body in *EC and certain member States – Large Civil Aircraft*, in addressing market definition found that "*both demand-side and supply-side considerations should be taken into account in the definition of the relevant market."*[47]

In our case, supply-side factors suggest that SPDs of electricity cannot compete with other electricity producers because of differences in cost structures and operating costs and characteristics. Solar PV technologies have very high capital costs (as compared to other generation technologies), very low operating costs, and fewer, if any, economies of scale. Solar PV technologies produce electricity intermittently (depending on the availability of sun) and cannot be relied on for base load (characterized by high fixed and low marginal costs, e.g. nuclear power) and peak-load (characterized low fixed costs and high marginal

[45] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, *Supra* Note 42, ¶1122.
[46] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1, ¶5.170.
[47] *Ibid*, ¶ 1121.

costs, e.g. single cycle gas combustion turbines) electricity. Differences in cost structures and operating costs and characteristics between solar PV technologies, on the one hand, and other technologies, on the other hand, make it very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity. They have larger economies of scale and exercise price constraints on solar PV generators.

In circumstances where the supply of electricity from different sources is blended and, for as long as the differences in costs for conventional and renewable electricity are so significant, markets for solar PV-generated electricity can only come into existence as a matter of government regulation. It is often the government's choice of supply-mix of electricity generation technologies that creates markets for solar PV-generated electricity. A government may choose the supply-mix by setting administered prices (based on the principles of cost recovery and Reasonable margin) for technologies that would not otherwise be able to recover their costs on the spot market. Alternatively, a government may require that private distributors or the government itself buy part of their requirements of electricity from certain specified generation technologies.in both instances, the definition of a certain supply-mix by the government cannot in and of itself be considered as conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[48]

In our case, the FIT Scheme by itself cannot be construed as a benefit by analysing the market. The market is of solar energy and the price paid in exchange of the electricity procured from SPDs cannot by itself be said as a benefit because there is a significant difference and the cost paid is just a Quid-Pro-Quo and not a benefit.

Conclusion: The FIT Scheme cannot be considered as a subsidy because of the absence of the outlined conditions which are necessary to be proven for considering any measure as a subsidy.

[48] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, *Supra* Note 1,¶5.179.

B. That the FIT Scheme does not violates Article 3.1 (b) and Article 3.2 of SCM Agreement.

Claim of violation of SCM Articles 3.1(b) and 3.2 forbid subsidies contingent on the use of domestic over imported goods. Importantly, this claim is premised on being able to prove that the FIT incentives were subsidies under the SCM Agreement.

In *Canada — Aircraft Credits and Guarantees*, the Panel found that:

"To prove the existence of an export subsidy within the meaning of this provision, a Member must establish

(i) the existence of a subsidy within the meaning of Article 1 of the SCM Agreement;
(ii) Contingency of that subsidy upon export performance."[49]

Both the conditions are synonymous to each other in a way that for satisfying the second condition first one needs to be fulfilled i.e. existence of subsidies under Article 1 needs to be proved.

In our case, the FIT Scheme does not by itself constitute a subsidy the first condition falls. When there is no subsidy measure into existence, the question of contingency also does not arise.

Conclusion: Wingardium is not in violation of article 3(1)(b) and 3(2) of the SCM Agreement.

C. In arguendo, Wingardium has violated the SCM Agreement, the measures undertaken under WSNM fall within the general exceptions provided under Article XX (b) of GATT.

The SCM Agreement does not provide for exceptions in itself nor does it contain an explicit provision on the application of Article XX of the GATT. However, there is no need for an

[49] Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 7.16,WT/DS222/R (19 February 2002) [hereinafter Panel Report, *Canada – Aircraft Credits and Guarantees*].

express reference to give way to the application of a provision, particularly if the provision is of a general nature.[50]

The *travaux préparatoires* of the SCM Agreement equally confirm applicability of Article XX of the GATT to the SCM Agreement. At the very beginning of the Uruguay Round the participants explicitly specified the objective of the talks:

"Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on Subsidies and Countervailing Measures with the objective of improving GATT discipline."[51]

Therefore, the general exceptions under GATT will also apply to measures under the SCM Agreement. In our case, the measures under the FIT Scheme fall as an exception under Article XX (b) of GATT for the same reasons are established earlier.

Conclusion: The FIT Scheme is an exception within the meaning of Article XX (b) of GATT. In conclusion, FIT Scheme is consistent with Article 3.1(b) and Article 3.2 of SCM Agreement.

[50] L. Rubini, *'Ain't Wasting Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform'*, 15:2 JIEL (2012), 33.
[51] WTO/GATT, Ministerial Declaration on the Uruguay Round of 20th September 1986, GATT Document No. MIN.DEC (20 September 1986).

IV. HEALTH DIRECTIVE 141/PP/CST IS CONSISTENT WITH TRIPS AGREEMENT.

A. Health directive is consistent with Article 16.1 of TRIPS Agreement.

The protection afforded by Article 16.1 of TRIPS Agreement[52] was stressed to be a negative right in the WTO Panel Report *EC – Protection of Trademarks*[53], which states that *"the TRIPS Agreement does not generally provide for positive rights. Rather, TRIPS seeks to grant negative rights to prevent certain acts, such as third parties use of a registered trademark."*

The Panel further added*: "This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."*[54]

Leviosa has submitted to the panel that Wingardium's plain packaging renders ineffective the exclusive right of trademark owners to use signs and to prevent third parties from using similar ones, thus diluting their distinctive character. The requirement of likelihood of confusion test is there to protect any third party using a trademark of a registered owner. Therefore, this likelihood of confusion test will not come into play as the first requirement of Article 16.1 to grant or let a third party use the trademark of a registered owner is not fulfilled as long as such marks are protected under Wingardian trademark law. In any event, plain packaging does not affect the SPD's right to prevent third parties from using their trademarks. The distinctive character of their trademarks remains untouched by the Directive. SPD's are still able to use their trade marks in limited ways. Under the Directive, use of trademark in certain is provided as the trademark owners can use their brand, business or company name on the Solar cells in a manner provided under the Directive.

[52] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299.
[53] Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶7.246, WT/DS174/R (20 April 2005) [hereinafter Panel Report, *EC – Trademarks and Geographical Indications (US)*].
[54] *Ibid*, ¶ 7.246.

Conclusion: The requirement of plain packaging does not violate Article 16.1 of the TRIPS Agreement.

B. Requirements qualifies as a 'limited exception' under Article 17 of TRIPS Agreement.

In order to analyse whether the Directive is in compliance with Article 17, the following two requirements should be complied with:

i. The exception should be limited.

ii. It should consider the legitimate interest of the trademark owner.

In *EC — Trademarks and Geographical Indications* the Panel interpreted the phrase 'limited exceptions' to refer to a narrow exception to the rights conferred by a trademark.[55] Further the Panel extrapolated from the example of 'fair use of descriptive terms' in interpreting the term 'limited exception' for the purposes of Article 17:

"Fair use of descriptive terms is inherently limited in terms of the sign which may be used and the degree of likelihood of confusion which may result from its use, as a purely descriptive term on its own is not distinctive and is not protectable as a trademark."[56]

'Limited exceptions must satisfy the proviso that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties' in order to benefit from Article 17.[57] The Panel in *EC — Trademarks and Geographical Indications* held that, *"The legitimacy of some interest of the trademark owner is assumed because the owner of the trademark is specifically identified in Article 17. The TRIPS Agreement itself sets out a statement of what all WTO Members consider adequate standards and principles concerning trademark protection. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that*

[55] *Ibid*, ¶¶ 7.650 -7.651.
[56] *Ibid*, ¶ 7.654.
[57] *Ibid*, ¶7.662.

function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings."[58]

The SPD's are allowed to use their brand, business or company name for the Solar cells and solar panel products, country of origin information, alphanumerical code and any variant name for such products.[59] When a brand and a business name is allowed to be highlighted in package, there can be no form of confusion in the minds of the consumers as to which particular brand a product belongs. Therefore, under the Directive a fair use of descriptive terms of the trademark owners is allowed and also adequate protection is provided to the owners of the trademark to preserve the distinctiveness of their products.

Conclusion: The Directive qualifies as a limited exception within the meaning of Article 17 of TRIPS Agreement.

C. Health directive is consistent with Article 20 of TRIPS Agreement.

Article 20 confers special protection upon well-known trademarks. In order to assess whether a plain packaging measure mandated under Directive would not be compatible with Article 20, it must be considered whether the measure under Directive:

i. is a special requirement;
ii. encumbers the use of a trademark in the course of trade; or
iii. is justified, as that term is understood in the TRIPS Agreement.

Wingardium contends that the requirements provided under the Directive are not special one. As the question of whether plain packaging encumbers the use of a trademark by special requirements is uncertain, but assuming it does the key issue is whether the resulting encumbrance on trademark use is unjustifiable.

The Panel in *Brazil – Retreaded Tyres* held that the word 'unjustifiable' means 'not justifiable, indefensible' and justifiable means 'able to be legally or morally justified' 'able to

[58] *Ibid*, ¶ 7.664.
[59] Fact on Record, Annexure VIII.

be shown to be just, reasonable, or correct; defensible'.[60] Further the Appellate Body held *"that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence."*[61]

It was revealed in a preliminary study by the Department of Health of Wingardium, that Crystalline Silicon solar cells are causing many allergies and in some cases resulting in skin cancer for individuals in close contact with such panels containing these cells.[62]

Apart from the department of health's study many independent studies has also confirmed that solar cells might cause skin cancer. For example, study by Good Company (Oregano USA) reveals that use of Solar cells can cause lung cancer [63] and another study reveals that it can cause skin cancer later on.[64]

It is evident from these studies that these cells cause cancer and measures were taken for protecting the public health. Therefore, there is a reasonable nexus behind the measure taken in order to prevent the harm and qualifies as a justifiable measure within the meaning of Article 20 of TRIPS Agreement.

Conclusion: The health Directive 141/PP/CST is consistent with TRIPS Agreement.

[60] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.259 , WT/DS332/R (17 December 2007)[hereinafter Panel Report,*Brazil – Retreaded Tyres*].
[61] Appellate Body Report, *Brazil –Retreaded Tyres, Supra* Note 24, ¶ 226.
[62] Fact on Record, ¶ 16.
[63] Health and Safety Concerns of Photovoltaic Solar Panels, *available at* www.oregon.gov/odot/hwy/oipp/docs/life-cyclehealthandsafetyconcerns.pdf.
[64] The Risks Of Solar Energy, *available at*http://www.energyrescueguide.com/the-risks-of-solar-energy/

V. HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE 2.2 OF TBT AGREEMENT.

The framework of the TBT Agreement allows for countries to pursue legitimate objectives as long as such pursuit does not create unnecessary obstacles to international trade.[65]

In *US — Clove Cigarettes*, the Panel stated that a technical regulation under Article 2.2 must:

i. pursue a 'legitimate objective'; and

ii. not be more trade-restrictive than 'necessary' to fulfill that legitimate objective.[66]

Legitimate objective refers to 'an aim that is lawful, justifiable or proper'.[67] Article 2.2 provides a non-exhaustive list of legitimate objectives under this provision. This includes protection of human health or safety.

Wingardium passed the Directive to achieve following objectives:

- Objective of reducing the attractiveness and appeal of Crystalline Silicon PVs products to consumers and Crystalline Silicon Cells to manufacturers:
  Considering that Manufacturing Silicon based PV materials typically involves depositing ångström-thick layers of gases such as arsine, phosphine, and silane onto a substrate. These gases are considered extremely hazardous, highly toxic, or pyrophoric. The highly pressurized gases used for creating Crystalline Silicon Technology PVs pose the main occupational dangers.
- Increase the noticeability and effectiveness of mandated health warnings and Reduce the ability of the retail packaging of such products to mislead consumers about the harms of using such panels:

[65] Petros C. Mavroidis, *Driftin' Too far from shore-Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead*, 522 World Trade Review (2013).

[66] Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1968 U.N.T.S 120; Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶87, WT/DS406/R (24 April 2012)[hereinafter Panel Report, *US Clove Cigarettes*].

[67] Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶313, WT/DS381/AB/R (16 May 2012). [hereinafter Appellate Body Report ,*US Tuna II (Mexico)*]; Appellate Body Report, *United States - Certain Country of Origin Labelling (Cool) Requirements*, ¶370 , WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012). [hereinafter Appellate Body Report, *US- Cool*]. .

Wingardium has undertaken the impugned measure to provide consumers with information in order that they make an informed decision, taking their health concerns into account.

It is submitted that the scheme of Article 2.2 allows for precautionary action. A view shared in scholarly writings, who state that, the words, *"Taking account of the risks non-fulfilment would create….."* in Article 2.2 is an elaboration of the precautionary principle.[68] Consumer information has also been held to be a legitimate objective in the *US – Cool* case.[69]

Therefore, Wingardium had a legitimate objective in implementing the Directive.

Further we will prove that it was necessary to enforce the above legitimate objective. The Appellate Body in the Korea – Various Measures on Beef case noted that *"the determination of the necessity of a measure involves in every case a process of weighing and balancing a series of factors which prominently include:*

i. Contribution made to the objective,
ii. Importance of the common interests or values, and
iii. Restrictiveness of the measure."[70]

i. The impugned regulation contributes to the legitimate objectives.

It is pertinent to note that members have the right to determine the level of protection that they consider appropriate.[71] Wingardium has undertaken this measure in an emergency situation calling for urgent action. In this respect, the objective need not be completely met[72] nor is there a minimum threshold requirement to be fulfilled for a measure to contribute to an

[68] Committee on Technical Barriers to Trade, European Council Resolution on the Precautionary Principle, G/TBT/W/154 (2 February 2001); J. Hepburn, M. C. CordonierSegger& M. Gehring, *The Principle of the Precautionary Approach to Human Health, Natural Resources and Ecosystems* 11 in *RECENT DEVELOPMENTS IN INTERNATIONAL LAW RELATED TO SUSTAINABLE DEVELOPMENT* (CISDL Series1, Working Paper).
[69]Panel Report, *United States - Certain Country of Origin Labelling (Cool) Requirements*, ¶7.651, WT/DS384/R, WT/DS386/R (18 November 2011) [hereinafter Panel Report, *US Cool*].
[70] Appellate Body Report, *Korea - Measures Affecting Imports Of Fresh, Chilled And Frozen Beef*, ¶164.WT/DS161/AB/R WT/DS169/AB/R (11 December 2000) [hereinafter Appellate Body Report, *Korea-Various Measures on Beef*].
[71] Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (10 November 2004) [hereinafter Panel Report ,*US- Gambling*].
[72] Appellate Body Report, *US- Tuna II (Mexico),Supra* Note 67, ¶315; Appellate Body Report, *US- Cool*, *Supra* Note 67, ¶373.

objective.[73] This requirement, of the contribution to the objective is said to be met, as long as there is a contribution to the fulfilment of the stipulated objective to at least some extent.[74]

ii. Importance of Common Interest or Value.

The more vital or important the common interests or values at stake, the easier it would be to accept a measure as necessary.[75] In the *EC – Asbestos* case, the Appellate Body placed a great deal of weight to a measure intended to preserve human health.[76] In the present case, consumers and manufactures have been exposed to danger of skin cancer and occupational hazards. The greatest of precautions has to be taken to escape the possibility of large scale health effects.

iii. There is no reasonably available alternative.

Given that members are allowed deference in the choice of level of protection, an alternative action will render the impugned action inconsistent only when it contributes to the objective to the level of (if not greater than), the impugned measure. Members are expected to consider reasonably available alternatives in pursuing legitimate objectives.[77]

Given the urgency of the situation, Wingardium submits that any other action would have imposed an undue burden on the state. Further, on account of being a developing country, Wingardium is considerably constrained in its capacities. Additionally, the nature of the risk is such that absent an immediate response, grave consequences would have ensued.

Conclusion: Wingardium has not violated Article 2.2 of TBT Agreement as it is necessary to implement the Directive in order to fulfil the legitimate objectives.

[73] Appellant Submission of the United States of America, *United States - Certain Country of Origin Labelling (Cool) Requirements*, ¶167, AB-2012-3 //DS384/386 (23 March 2012).
[74] Appellate Body Report, *United States – Measures Affecting The Cross-Border Supply of Gambling And Betting Services*, ¶ 301, WT/DS285/AB/R (7 April 2005) [hereinafter Appellate Body Report, *US – Gambling*]
[75] Appellate Body Report, *Korea -Various Measures on Beef*, *Supra* Note 70, ¶162.
[76] Appellate Body Report, *EC Asbestos*, *Supra* Note 21, ¶172.
[77] Appellate Body Report, US -Tuna II (Mexico), *Supra* Note 67, ¶322; Appellate Body Report, US- Cool, *Supra* Note 67, ¶471.

VI. HEALTH DIRECTIVE UNDER 141/ PP/CST IS CONSISTENT WITH ARTICLE IX 4 OF GATT.

To prove a violation under Article IX: 4, a two tier test must be satisfied:

i. There should be laws and regulations relating to marking of imported products;
ii. The impugned laws and regulations impose damage to imported products in the manner put forward in the provision.

Assuming that the Directive is a regulation relating to marking of the products, it does not materially damage the value/cost of the product. The term 'materially' could also be interpreted to express substantial or significant, and the phrase 'reduce in value,' could be interpreted to have a broader meaning relating to the decline in value of imported products resulting from an associated decline in demand. In the case of marks of origin regulations, this decline in demand can be attributed to two factors: i) shifts in retail consumer purchasing patterns away from imports based on the presence of Health warnings, and ii) Wingardian firms (either intermediaries or retailers) shifting away from purchasing imported products in order to reduce the costs associated with maintaining origin information along the supply chain.

It is contented that the reduced material value found in Article IX: 4 is not so broad as to encompass the consumer valuation of a good. Article IX includes provisions which expressly permit nations to establish marks of origin laws with the intent of allowing consumers to differentiate between domestic and imported goods. It is unlikely that the interpretation of this material value comparison was intended to include shifts in consumer demand stemming from indicating the country of origin of products.[78]Such health requirements will let the consumers choose the products according to their requirements as the requirements are applicable on every solar cell weather crystalline silicon or thin film cells the demand per se will not shift directly on the domestically produced goods. Therefore, it will not lead to any material reduction of cost.

Conclusion: Wingardium has not violated Article IX: 4 of GATT.

[78] Wendy A. Johnecheck, *Consumer Information, Marks of Origin and WTO Law: A Case Study of the United States – Certain Country of Origin Labelling Requirements Dispute*, Tufts University Food Policy and Applied Nutrition Program, Discussion Paper No. 43, Pg. 22.

REQUEST FOR FINDINGS

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

1. Domestic Content Requirement under WG/SM/P-1 and executive orders is consistent with Article 2.1 of the TRIMS Agreement.

2. Domestic Content Requirement under WG/SM/P-1 and executive orders is consistent with the provisions under Article III: 4, III: 5 and III: 1 of the GATT.

3. FIT Scheme is consistent with Article 3.1(b) and 3.2 of the SCM Agreement.

4. Health directive 141/PP/CST is consistent with Article 16.1 and 20 of the TRIPS Agreement.

5. Health Directive 141/PP/CST is consistent with Article IX: 4 of the GATT.

6. Health Directive 141/PP/CST is consistent with Article 2.2 of the TBT Agreement.

All of which is respectfully affirmed and submitted