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8TH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2016

BEFORE THE

DISPUTE SETTLEMENT BODY

WT/DS/xxx

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

LEVIOSA

(COMPLAINANT)

V.

WINGARDIUM

(RESPONDENT)

SUBMISSIONS ON BEHALF OF THE COMPLAINANT

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LIST OF ABBREVIATIONS

Abbreviation	Full Reference
AB	Appellate Body
Art./Arts.	Article/Articles
CLI	Consortium of Leviosian Investors
DCRs	Domestic Content Requirements
DOHA Declaration	The WTO's Declaration on the TRIPS Agreement and Public Health
DSB	Dispute Settlement Body
EC	European Communities
e.g.	*exempli gratia,* for example
FIT	Feed-in tariff
GA	Global Adjustment
GATT 1994	General Agreement on Tariffs and Trade 1994
GPA	Agreement on Government Procurement
LCR	Local Content Requirement
NSEFI	National Solar Energy Federation of India
OPA	Ontario Power Authority
p./pp.	Page/Pages
¶/para./¶¶/paras.	Paragraph/Paragraphs
Paris Convention	Paris Convention for the Protection of Industrial Property
PV	Photovoltaic
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMs	Trade-related investment measures
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights

U.S.	United States
VCLT	Vienna Convention on Law of Treaties
Vol.	Volume
WNSM	Wingardium National Solar Mission
WSO	Wingardium Standards Organisation
WTO	World Trade Organisation

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STATEMENT OF FACTS

THE PARTIES

Leviosa, a founding member of both GATT and the WTO, is a developed country with a population of 250 million. It has a robust manufacturing industry and developed IT sector.

Wingardium, a developing country with a population of 500 million and has recorded immense economic growth in the past 10 years. It decided to join the WTO in 2005 and liberalize its economy.

SOLAR INDUSTRY IN LEVIOSA

In 2006, Leviosa developed a unique technology that uses solar power to generate energy. The technology allowed Leviosa to significantly reduce its carbon emissions. meet its Intended Nationally Determined Commitment, and become the largest exporter of the Crystalline Silicon Solar Cells in the world.

SOLAR INDUSTRY IN WINGARDIUM

Wingardium is an energy stressed state, with almost 95% of its energy needs being met by fossil fuels. In 2013, the Government of Wingardium decided to initiate the Wingardian National Solar Mission (WNSM), aimed at developing a robust domestic solar industry in Wingardium.

STRATEGIC PARTNERSHIP

In January 2013, the President of Leviosa visited Wingardium to develop a strategic partnership, with respect to the execution of WNSM. The economic gain from such a deal was estimated at $ 1 trillion over a 10 year period. The trip resulted in the inking of the Wino-Leviosian Energy Cooperation Agreement with the Consortium of Leviosian Investors (CLI) winning tenders for 60% of Phase-I of WNSM. This was subject to the meeting of criteria stipulated in technical regulation WG/SM/P-1.

TRADE RESTRICTIVE MEASURES

The WNSM Program introduced domestic content requirement measures vide the mission's enabling document WG/SM/P-1.

Article 4 laid down requirements for project developers of Phase-I of the Mission. This entails projects based on Crystalline Silicon Technology using modules manufactured in Wingardium.
Article 4.1 sets the DCR for plants/installations using CST at 30%. This requirement is strengthened in Phase-II.
Article 5 introduces a FIT scheme coupled with a DCR of 30%.

Over the course of two years Leviosian investors suffered a loss of $ 5 billion and had to share a significant amount of revenue with domestic manufacturers. Keeping in mind the diplomatic relations between Wingardium and Leviosa. the President of Wingardium, through an Executive Order dated 2nd July 2015, slashed back the domestic content requirements. Ensuing backlash due to the rising unemployment and burgeoning fiscal deficit in Wingardium resulted in the reinstatement of the measures with a new requirement of 50%. This was despite the fact that Leviosa had transferred Know-How to establish 25 domestic companies dealing with production of Crystalline Silicon Solar PV Module.

PLAIN PACKAGING OF SOLAR CELLS

A study by the Department of Health of Wingardium revealed that Crystalline Silicon solar cells were causing allergies and in some cases resulting in skin cancer for individuals in close contact. The Wingardian DoH issued a directive on 1st February, 2016 calling for plain packaging of all solar cell products with the aim of reducing brand recognition of Crystalline Silicon cells and promotion of the use of locally manufactured Thin Film technology solar cells.

ESTABLISHMENT OF PANEL

In late March 2016, Leviosa requested consultations with Wingardium under WTO Dispute Settlement Understanding. The failure of consultation resulted in Leviosa requesting the establishment of a WTO Panel. The DSB established a panel in June 2016 The WTO Director General composed the Panel in July 2016.

MEASURES AT ISSUE

The measures claimed by the Republic of Leviosa to be at issue in the present dispute are:

1. The Domestic Content Requirement and the FIT Scheme incorporated in WG/SM/P-1 as well as Executive Order WG/SMEO/119 as inconsistent with:
   a. Article 2.1 of the TRIMS Agreement.
   b. Article III:4 of the GATT 1994.
   c. Article III:5 and Article III:1 of the GATT 1994.
   d. Article 3.1(b) and 3.2 of the SCM Agreement.

2. The Health Directive 141/PP/CST issued by the Department of Health of the Republic of Wingardium requiring plain packaging of Solar Cells and Solar Modules as inconsistent with:
   a. Article 20 of the TRIPS Agreement.
   b. Article 16.1 of the TRIPS Agreement.
   c. Article IX:4 of the GATT 1994.
   d. Article 2.2 of the TBT Agreement

SUMMARY

The Republic Of Leviosa Makes The Following Submissions:

I. THAT WG/SM/P-1, FIT SCHEME AND EXECUTIVE ORDERS ARE INCONSISTENT WITH WTO LAW.

A. Wingardium has acted inconsistently with Article 3.1(b) and 3.2 of the SCM 1994.

- The FIT Scheme is a "*subsidy*" within the meaning of Article 1.1 of the SCM 1994.
- The FIT Scheme is "*contingent*" on the use of domestic equipment over like imported equipment.
- Wingardium is in violation of its obligations under Article 3.2 of the SCM Agreement.

B. Domestic content requirement mandated by the WNSM Program is inconsistent with Article III of the GATT 1994.

- Challenged measures are inconsistent with "*national treatment*" obligation under Article III:4 of the GATT 1994.
- Challenged measures are inconsistent with obligation under Article III:5 of the GATT 1994.

C. Wingardium has acted inconsistently with Article 2.1 of the TRIMs Agreement.

- Challenged measures are "*trade related investment measures"*.
- Challenged measures are inconsistent with Article III of the GATT 1994.
- Challenged measures are inconsistent with Article 2.2 of the TRIMs Agreement.

D. Challenged measures fall outside the scope of Article III:8(a) of the GATT 1994.

- Procured product is not in a "*directly competitive relationship*" with product discriminated against.
- Procurement is undertaken with a "*view to commercial resale*".

E. Challenged measures are not exempted under Article XX sub-paragraph (b),(g) and (j) of the GATT 1994.

- Measures do not fall within the "*scope*" of policy grounds and do not pass "*trade tests*".
- Measures do not satisfy the application of the "*chapeaux*" test.

II. THAT HEALTH DIRECTIVE 141/PP/CST VIOLATES INTERNATIONAL LAW.

A. Challenged measure is inconsistent with the State's obligation under Article 20 of the TRIPS Agreement.

- "*Plain packaging*" falls within the scope of Article 20 of the TRIPS Agreement.
- Article 20 of the TRIPS Agreement expressly prohibits "*plain packaging*".
- Challenged measure is an "*unjustifiable special encumbrance*".

B. Wingardium has acted inconsistently with Article 2.2 of TBT 1994.

- Challenged measure amounts to a "*technical regulation*".
- Objective of the technical regulations is not "*legitimate*".
- Challenged measure is more "*trade-restrictive*" than "*necessary*".
- "*Less trade-restrictive alternatives*" are available.

C. The Directive violates Article 16.1 of the TRIPS Agreement.

- Challenged measure creates a "*likelihood of confusion*".
- Challenged measure violates the "*right to use*" granted under the Wingardium Trademark Act.

D. Challenged measure is inconsistent with Article IX:4 of the GATT 1994.

- Adopted measure falls within the "*scope*" of the Article IX:4 of the GATT 1994.
- Adopted measure "*materially reduces value*" or "*unreasonably increases cost*" of the products.

LEGAL PLEADINGS

I. THAT WG/SM/P-1, FIT SCHEME AND EXECUTIVE ORDERS ARE INCONSISTENT WITH WTO LAW.

The Government of Wingardium has launched the Wingardium National Solar Mission[1] *vide* enabling document WG/SM/P-1.[2] Participation in the Solar Mission is conditioned on compliance with technical regulations and domestic content requirements[3].[4] A separate Feed-In Tariff[5] Scheme coupled with a DCR has been introduced to incentivise the use of domestic solar cells and modules over imported solar cells and modules.[6] Leviosa submits that the above measures are inconsistent with WTO law as they violate A) Article 3.1(a) and Article 3.2 of the SCM Agreement, B) Article III of the GATT 1994, and C) Article 2.1 of the TRIMs Agreement. Additionally, the measures are not saved by exemption under D) Article III:8(a) of the GATT 1994, and E) Article XX of the GATT 1994.

A. WINGARDIUM IS IN VIOLATION OF ARTICLE 3.1(B), AND ARTICLE 3.2 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

The Government of Wingardium launched the WNSM to encourage renewable energy development. The solar mission's enabling document, WG/SM/P-1, prescribes the modalities of the mission. Article 5 of the WG/SM/P-1 introduces a FIT Scheme coupled with a DCR of 30%.[7]

It is contended that the FIT Scheme as implemented by the WNSM Program is inconsistent with 1) Article 3.1(b), and 2) Article 3.2 of the Agreement on Subsidies and Countervailing Measures.[8]

1. INCONSISTENT WITH ARTICLE 3.1(B) OF THE SCM AGREEMENT.

Article 3.1(b) of the SCM 1994 prohibits subsidies within the meaning of Article 1 that are contingent, that is, "*conditional*", on the use of domestic over imported goods.[9] In the present

[1] Hereinafter 'WNSM'.
[2] Factsheet, ¶ 5.
[3] Hereinafter 'DCR'.
[4] Factsheet, ¶ 6.
[5] Hereinafter 'FIT'.
[6] Factsheet, ¶ 6.
[7] *Ibid*.
[8] Agreement on Subsidies and Countervailing Measures, 15 April 1994, 1867 U.N.T.S 14 (entered into force 1 January 1995) [hereinafter SCM Agreement].

matter, the FIT Scheme constitutes a) a "*subsidy*" within the meaning of Article 1.1 of the SCM 1994, and is b) "*contingent*" on the use of domestic equipment over imported equipment.

a) *FIT Scheme amounts to a "subsidy".*

The term "*subsidy*" captures situations in which something of economic value is transferred by a government to the advantage of a recipient. A subsidy is deemed to exist where two distinct elements are present:[10] i) there must be a "*financial contribution*", or "*income or price support*" and ii) the financial contribution, or income or price support must "*confer a benefit*".[11]

i) FIT Scheme is an "*income or price support*" measure in terms of Article 1.1(a)(2) of the SCM Agreement.

It is submitted that the term "*or*" between Articles 1.1(a) and 1.1(a)(2) of the SCM 1994 is used implying that the first element of the definition of subsidy can be met by either alternative.[12] In the present matter, the FIT Scheme is challenged under Article 1.1(a)(2) of the SCM 1994.

In terms of Article XVI of the General Agreement on Tariffs and Trade[13] "*income or price support*", means that the income or price support measure introduced by the government must operate to increase exports of the subsidized product or to decrease imports of similar products. They may also be defined as measures introduced by governments in order to sustain the income of a certain category of industries or maintain the price of a commodity.

In the present case, the FIT Scheme contributes to the income of electricity generators availing the scheme thereby operating to reduce import of solar cells based on CST into Wingardium.

Moreover, the FIT Scheme amounts to "*income or price support*" as it requires project developers to ensure 30% of local content in all plants/installations under solar thermal

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[9] Appellate Body Report, *US-Subsidies on Upland Cotton*, ¶ 544, WT/DS26/AB/R (Mar. 3, 2005).
[10] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, ¶ 157, WT/DS46/AB/R (Aug. 2, 1999).
[11] LUCA RUBINI, THE DEFINITION OF SUBSIDY AND STATE AID: WTO AND EC LAW IN COMPARATIVE PERSPECTIVE 108 (Oxford University Press, 2009).
[12] Panel Report, *US - Subsidies On Upland Cotton*, ¶ 7.1494, WT/DS26/R (Sept. 8, 2004).
[13] General Agreement on Tariffs and Trade (1994), 15 April 1994, 1867 U.N.T.S 187, 33 I.L.M. 1153 (entered into force 15 January 1995) [hereinafter GATT 1994].

technology, hence, incentivizing the use of Wingardian origin equipment. Therefore, it is a form of "*income or price support*" under Article XVI of the GATT 1994.

Additionally, the panel in *China – GOES*[14]established that government measures designed to sustain a certain price level, would be considered "*price support*". The FIT Scheme does this by guaranteeing that all electricity produced will be bought regardless of demand. Thus, the program can be considered a form of "*price support*".

ii) FIT Scheme confers a "*benefit*"

In *Canada — Aircraft*, the Panel found that the ordinary meaning of "benefit", "*clearly encompasses some form of advantage*."[15] The existence of the advantage was determined by examining whether the recipient was in a more advantageous position than they would have been but for the financial contribution.[16]

An FIT is an instrument for promoting investment in Renewable Energy and sets a fixed price for purchases. Thus providing electricity producers with a premium above the market price for electricity.[17] The Government of Wingardium has enacted a FIT Scheme similar to Ontario's FIT Scheme.[18] The scheme covers (i) the production costs, and (ii) reasonable profits for a period of 20-years for solar electricity generators.[19] Generally, no producer participating in the market would have such certainty in recovering production cost coupled reasonable profit over such a long period of time. That is, *but for* the FIT Scheme, these are payments which generators would not be able to obtain in the market. Therefore, electricity generators obtain "*advantages*" and are hence, "*conferred a benefit*".

b) *The subsidies are "contingent upon the use of domestic over imported goods".*

In the present matter, subsidies provided to renewable energy generators under the FIT Program are subsidies "*contingent … upon the use of domestic over imported goods*" and hence, prohibited under Article 3.1(b) of the SCM 1994.

[14] Panel Report, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/R (June 15, 2012).
[15] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶ 9.112, WT/DS70/R, (August 20, 1999).
[16] *Ibid*.
[17] MENDONÇA, M., JACOBS, D. & B. SOVACOOL ET AL, POWERING THE GREEN ECONOMY: THE FEED-IN TARIFF HANDBOOK, xxi (Earthscan, 2010).
[18] Factsheet, ¶ 6.
[19] Panel Report, *Canada – Certain Measures Affecting The Renewable Energy Generation Sector and Canada – Measures Relating To The Feed-In Tariff Program*, ¶ 9.23, WT/DS412/R, WT/DS426/R (Dec. 19, 2012) [hereinafter *Canada-Renewable Energy/ Feed in Tariff Program* Panel Report].

The Appellate Body has found "*contingent*" to mean "*conditional*" or "*dependent for its existence on something else*".[20] The Wingardium FIT Scheme requires that for "*all"* project types, "*at least some*" goods manufactured, formed, or assembled in Wingardium "*must*" be utilized in order to achieve the DCR for that project. Such subsidies create incentives for use of Wingardian goods over of other origins in electricity generation facilities. Further, compliance with the DCR is mandatory. If electricity generators do not meet DCRs the contract will be in default.[21] Therefore, it is humbly contended that such incentives, in and of themselves, render the FIT Scheme subsidies contingent upon the use of domestic over imported goods, and hence, is inconsistent with Article 3.1(b).

c) *The subsidy is "specific" under Article 2.3 of the SCM Agreement.*

Article 1.2 of the SCM Agreement states that: "*a subsidy as defined in Paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2*".[22] The subsidy is specific as Article 2.3 of SCM Agreement states that any subsidy falling under the provisions of Article 3 shall be deemed to be specific.[23] The subsidies provided by the FIT Program and related contracts are prohibited subsidies under Article 3.1(b) of the SCM Agreement and, therefore, are deemed to be specific pursuant to Article 2.3 of the SCM Agreement.

2. THAT WINGARDIUM VIOLATES ARTICLE 3.2 OF THE SCM AGREEMENT.

Article 3.2 of the SCM Agreement prescribes that a member shall neither grant nor maintain subsidies referred to in Article 3.1 of the SCM Agreement.[24] Thus, in granting and maintaining prohibited subsidies inconsistent with Article 3.1 of the SCM 1994, Wingardium is in violation of its obligations under Article 3.2 of the SCM Agreement.

[20] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶¶ 139, 166,WT/DS70/AB/R (August 20, 1999); Appellate Body Report, *United States – Tax Treatment For Foreign Sales Corporations* (Article 21.5 – EC), ¶ 111, WT/DS108/AB/RW (Jan. 14, 2002).
[21] The Green Energy and Green Economy Act of 2009, the Minister's 2009 FIT Direction, and every version of the FIT and microFIT Rules and FIT and microFIT Contracts.
[22] SCM Agreement, Article 1.2.
[23] SCM Agreement, Article 2.3.
[24] SCM Agreement, Article 3.2.

B. DOMESTIC CONTENT REQUIREMENT MANDATED BY THE WNSM PROGRAMME IS INCONSISTENT WITH ARTICLE III OF THE GATT 1994.

The Government of Wingardium launched the WNSM Program to encourage renewable energy development. The solar mission's enabling document, WG/SM/P-1, prescribes the modalities of the mission.

- Article 4 lays down requirements for project developers of Phase-I of the Mission. One of the requirements is that projects based on CST have to use modules manufactured in Wingardium.[25]
- Article 4.1. sets the DCR for plants/installations using CST at 30%. This requirement is strengthened in Phase-II where all eligible solar projects must use only locally developed technology.[26]
- Article 5 introduces a FIT scheme coupled with a DCR of 30%.[27]

It is humbly contended that the (i) DCR imposed on solar project developers; and (ii) DCR of FIT scheme are inconsistent with Wingardium's obligations under 1) Article III:4 and, 2) Article III:5 of the GATT 1994[28].

1. MEASURE IS INCONSISTENT WITH NATIONAL TREATMENT OBLIGATION UNDER ARTICLE III:4 OF THE GATT 1994.

A violation of Article III:4 of the GATT 1994 is found when a measure a) concerns imported and domestic products that are "*like products*"; b) is a "*law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use*"; and c) accords "*less favourable*" treatment to imported product than that accorded to like domestic products.[29]

[25] Factsheet, ¶ 6.
[26] *Ibid*.
[27] *Ibid*.
[28] GATT 1994, Article III:5.
[29] Appellate Body Report, *Korea – Measures Affecting Import Of Fresh, Chilled And Frozen Beef*, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea-Beef* Appellate Body Report].

a) *Imported Solar PV modules and cells and domestic Solar PV modules and cells are "like products".*

In *Argentina – Import Measures*[30], the Panel noted that where (i) the DCR focused on the origin of the product; and (ii) the only distinguishing feature between products in terms of the application of requirement was origin, the products would be "*like*" for the purposes of Article III:4 of the GATT.[31] That is, where origin is the sole distinguishing criterion, there is no need to establish the likeness between imported and domestic products in terms of traditional criteria.[32]

In the instant case, the only distinguishing criterion is between those cells and modules "*Manufactured in Wingardium*"[33] versus cells and modules "*Sourced from any Country*"[34].

Additionally, the WNSM Programme sets forth technical requirements for solar modules to be used in solar power projects. Solar modules that meet these technical requirements, imported or domestic, are suitable, in terms of function and quality, for use in solar power projects under the WNSM Programme. The "*likeness"* is further confirmed by the fact that several foreign developers were asked to supply solar cells to local solar power developers for use in projects under Phase I of the WNSM Programme.[35] Therefore, it is submitted that the solar cells and modules manufactured domestically in Wingardium and those imported from the Leviosa are *"like products*".

b) *The challenged measure is a "requirement", "affecting" the internal sale, offering for sale, purchase, transportation, distribution or use of imported product.*

For a measure to satisfy the term requirement it may be an (i) obligation which an enterprise is "*legally bound to carry out*"; or (ii) those which an enterprise "*voluntarily accepts*" in order to "*obtain an advantage*" from the government.[36]

Firstly, domestic content provisions are "*requirements*" because solar power developers have full knowledge that participation in the WNSM is conditioned on compliance with the domestic content provisions. (i) By submitting a bid application, they signal *voluntary*

[30] Panel Reports, *Argentina – Measures Affecting The Importation Of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R (Aug. 22, 2014) [hereinafter *Argentina-Import Measures* Panel Report].
[31] *Id*, at ¶ 6.274.
[32] Panel Report, *India-Measures Affecting the Automotive Sector*, ¶ 7.174, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) [hereinafter *India-Autos* Panel Report]; Panel Report, *Turkey – Measures Affecting The Importation Of Rice*, ¶.7.214-7.216, WT/DS334/R (Sept. 21, 2007) [hereinafter *Turkey-Rice* Panel Report].
[33] Factsheet, ¶ 6(iv).
[34] *Ibid*.
[35] *Ibid*.
[36] *India-Autos* Panel Report, *supra* 32, ¶ 7.184.

acceptance of the *obligation* to use domestic content in order to obtain an *advantage from the government* in the form of a power purchase agreement. (ii) Once the agreement is executed, the solar power developer is *legally obligated*, to carry out the DCRs.

Secondly, it is contended that DCRs coupled with FIT are a regulation as it (i) determines a certain amount of local content to be fulfilled and, (ii) imposes an indirect penalty on non-compliance. In this context, the Panel in *US-DMA*[37], held the measure to be a regulation as it (i) set a minimum specified proportion of 75%, and (ii) made any producer that failed to source the required amount of local content subject to penalties.[38] On FITS with DCR, the scheme involves an indirect penalty as energy producers not fulfilling the demanded quota do not receive equal support and are thereby at a competitive disadvantage against producers that fulfill the quota.

Therefore, WNSM's domestic content provisions are "*requirements*" in respect of the obligations of the solar developers and the FIT Scheme.

c) *The DCR modifies the "conditions of competition" between solar cells and modules manufactured in Wingardium and those imported.*

The term "*affecting*" means having "*an effect on*", encompasses measures that modify the conditions of competition between domestic and imported goods in the market.[39]

In the present matter, a concrete link exists between the DCR and the internal sale, purchase, or use of solar cells and modules in Wingardium. Specifically, per the terms of WNSM, a developer satisfies the applicable DCRs by purchasing and using solar cells and modules made in Wingardium.

With regard to the FIT Scheme, the Panel in *EC – Bananas III*[40] clarified that the word "*affecting*" covers measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product.[41] Therefore, the FIT Scheme creates incentive for the sale and use of domestic solar cells and modules.

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[37] Panel Report, *United States - Measures Affecting the Importation, Internal Sale And Use Of Tobacco*, WT/DS44/R (Oct. 4, 1994) [hereinafter, *US-DMA* Panel Report].
[38] *Id*, at ¶ 68.
[39] *Turkey-Rice* Panel Report, *supra* 32, ¶ 7.221-7.222; Appellate Body Report, *Canada – Certain Measures Affecting The Automotive Industry*, ¶ 158, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000).
[40] Appellate Body Report, *European Communities - Regime For The Importation, Sale And Distribution Of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).
[41] *Id*, at ¶ 7.175.

The sale, purchase, or use of the equipment should be considered "*internal*" because the requirements apply with respect to the sale, purchase, or use for a project approved only inside the customs territory[42] of Wingardium and not at the border.

Hence, these measures "*affect*" the "*internal sale….purchase… or use*" of solar cells and modules within the meaning of Article III:4 of the GATT 1994.

d) *The technical regulation accords" less favorable treatment" to imported products.*

A regulation accords less favorable treatment if it modifies conditions of competition in the relevant market to the detriment of imported products or denies effective equality of opportunities for imported products.[43] In *India – Autos*[44], the Panel found that indigenization requirements create a disincentive to use like imported products, and that it was "*more than likely to have effect on manufacturers' choices…"*[45]

In the present matter, WNSM requires that a developer use solar cells and modules of Wingardian origin in order to enter into a power purchase agreement. This creates incentive for the purchase of domestic solar cells and modules. By creating such incentive, WNSM accords less favorable "*conditions of competition,*" and therefore "*less favorable treatmen*t," to imported solar cells and modules.

Similarly, FIT Schemes with DCRs incentivize the use of domestic products, placing the imported product at a competitive disadvantage. In the present matter, imported solar cells and modules are accorded less favourable "*conditions of competition*" and therefore "*less favourable treatment*" than Wingardium cells and modules.

Further, it can be shows that there exists a "*genuine relationship between the measure at issue and the unfavourable impact on competitive opportunities for imported products*."[46] In the present matter, the unfavourable impact is evidence by the 65% drop in Leviosan investor market share within a month of the Directive imposing a 50% DCR measure into force.[47]

Hence, the DCRs imposed by the WNSM Programme are inconsistent with Article III:4 of the GATT 1994.

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[42] First Written Submission Of The United States, *India — Certain Measures Relating To Solar Cells And Solar Modules*, ¶ 68, DS456 (Oct. 24, 2014) [hereinafter *India – Solar Cells]*.
[43] *Korea-Beef* Appellate Body Report, *supra* 29, ¶ 137.
[44] *India-Autos* Panel Report, *supra* 32, ¶ 7.174.
[45] *Id*, at ¶ 7.174.
[46] Appellate Body Report, *Thailand–Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 134, WT/DS371/AB/R (Jul. 15, 2011); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 202, WT/DS381/AB/R (May 16, 2012) [hereinafter *US-Tuna* Appellate Body Report]; *Korea-Beef* Appellate Body Report, *supra* 29, ¶ 137.
[47] Factsheet, ¶ 17.

2. MEASURES INCONSISTENT WITH OBLIGATION UNDER ARTICLE III:5 OF THE GATT 1994.

Wingardium has acted inconsistently with Article III:5 of the GATT 1994 by a) establishing and maintaining internal quantitative regulations requiring specified proportions of domestic content, and b) has applied internal quantitative regulations in a manner contrary to the principles set forth in Paragraph 1 of Article III:1.

a) *Finding of inconsistency with Article III:5, first sentence.*

In order to find a violation of the first sentence of Article III:5, the measure must be i) an *internal quantitative regulation*; ii) *relating* to the mixture, processing or use of products in specified amounts; and iii) *requiring*, directly or indirectly, the use of those products from domestic sources.[48]

[48] *US-DMA* Panel Report, *supra* 37, ¶ 67-69.

i) It is submitted that in *US-DMA* the *internal quantitative regulation* was: (i) A measure established by an Act of the government, (ii) The opening sentence of the provision made specific reference to "*domestic manufacturers*", and (iii) The regulation set a minimum specified proportion of 75 per cent for the use of U.S. tobacco. [49] In the present case, the enabling document was passed by the Ministry of Renewable Energy and makes specific reference to use of domestic content by manufacturers in specified proportions[50]. Therefore, it is an internal quantitative regulation.

ii) The internal quantitative regulation in question "*relate*" to the mixture, processing or use of products in specified amounts or proportions because they are concerned with the amounts and proportions of domestic or imported products in solar projects.[51]

iii) When measures provide advantages conditioned on the purchase of a specified quantity of domestic goods, then those measures "*require*" such a purchase. In *India-Autos*[52] it was found that if vehicle manufacturers did not use sufficient domestic parts they were "*charged according to the duty rate for complete vehicles as penalty*".[53] In the present case, (i) solar project developers would not be awarded tenders, and (ii) solar power generators would not be eligible for the FIT scheme if they did not comply with the domestic content requirements of the WNSM Programme.

In summary, the measures violate Article III:5, first sentence, because they are internal quantitative regulations relating to the use of domestic products in specified quantities and impose disadvantage on parties if the specified quantities of domestic parts are not met.

b) *Finding of inconsistency with Article III:5, second sentence.*

The measures are inconsistent with Article III:5, second sentence because they are applied "*so as to afford protection to domestic production*". The second sentence doesn't permit quantitative regulations to be contrary to the general principles of Article III:1. Therefore, in order to find a violation of Article III:5, consistency of the impugned regulation with the provisions of Article III:1, particularly as to whether it affords protection to domestic production must be examined.[54]

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[49] *Ibid*, at ¶ 67.
[50] Factsheet, ¶ 6.
[51] *India – Solar Cells*, *supra* 42, ¶ 89.
[52] *India-Autos* Panel Report, *supra* 32, ¶ 7.32.
[53] *Ibid*.
[54] Panel Report, *EEC Measures on Animal Feed Proteins*, ¶ 4.8, BISD 25S/49 (March 14, 1978); *US-DMA* Panel Report, *supra* 37.

The Panel has held that "*measures ... with a view to ensuring the sale of a given quantity of* [domestic product] *protected this product in a manner contrary to Article III:1 and to the provisions of Article III:5, second sentence*".[55] Similarly, in *USA-DMA* minimum DCRs violated this principle because they *reserved a portion* of the domestic market for domestically grown tobacco.[56]

In the present matter, the DCR under the WNSM Programme violates Article III:1 by (i) ensuring the sale of a given quantity of domestic product, (ii) providing domestic manufacturers a protected outlet for their production, and (iii) incentivizing the use of domestic products by way of an FIT Scheme.

C. WINGARDIUM ACTED INCONSISTENTLY WITH ARTICLE 2.1 OF THE TRIMS AGREEMENT.

The WNSM Programme comprises trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and is therefore in violation of Article 2.1 of the Trade-Related Investment Measures[57] Agreement. Article 2.1 of the TRIMs Agreement is breached by establishing, a) the existence of an investment measure related to trade in goods; and b) inconsistency of that measure with Article III the GATT 1994.

1. THE DCR MEASURES ARE INCONSISTENT WITH ARTICLE 2.1 OF THE TRIMS.

a) *DCR measures are "investment measures".*

The Panel in *Canada – Renewable Energy / Feed-In Tariff Program*[58], found that measures constituted "*investment measures*," if they had the objective of encouraging the production of renewable energy generation equipment. The Panel noted that the FIT Schemes encouraged investment in renewable energy generation.[59] Similarly, Article 4[60] states that an important objective of the WNSM is to promote domestic manufacturing.[61] Therefore, the measures are "*investment measures*".

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[55] *Ibid*.
[56] *US-DMA* Panel Report, *supra* 37, ¶ 4.8.
[57] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].
[58] *Canada-Renewable Energy/ Feed in Tariff Program* Panel Report, *supra 19*.
[59] *Id*, at ¶ VII.2.
[60] Factsheet, ¶ 6(iv).
[61] *Ibid*.

b) *DCR measures are "trade related".*

The Panel in *Indonesia – Autos*[62], reasoned that domestic content requirements are "*necessarily 'trade-related' because such requirements, always favour the use of domestic products over imported products, and therefore affect trade*".[63] In the present matter, the WNSM Programme measures impose DCRs hence incentivizing the use of domestic goods over imported goods. Therefore, the measures are "*related to trade in goods*."

c) *DCR measures are inconsistent with Article III of the GATT 1994.*

It is submitted that the DCRs have already been demonstrated to be inconsistent with Article III of the GATT 1994. Therefore, the WNSM measures are inconsistent with Article 2.1 of the TRIMs Agreement. This conclusion is further confirmed by the Illustrative List contained in the Annex to the TRIMs Agreement.

Annex 1(a) provides that TRIMs inconsistent with the obligation of national treatment include those with whom compliance is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production… The Panel in *Canada – Renewable Energy / Feed-In Tariff Program* has held that where a measure has the characteristics described in Paragraph 1(a) it will be in violation of Article III:4, and thereby also Article 2.1 of the TRIMs Agreement.[64]

The WNSM measures have characteristics as described in Paragraph 1(a). Under the Programme's DCRs, developers are required to purchase or use products of Wingardian origin in order to enter into and maintain power purchase agreements. It therefore follows that the requirements are inconsistent with Article 2.1 of the TRIMs Agreement and the terms under Annex 1(a) of the same.

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[62] Panel Report, *Indonesia - Certain Measures Affecting The Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) [hereinafter *Indonesia-Autos* Panel Report].
[63] *Indonesia-Autos* Panel Report, ¶ 14.82-14.83.
[64] *Canada-Renewable Energy/ FIT Program* Panel Report, *supra 19*, ¶ 7.120; Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 5.24,WT/DS412/AB/R / WT/DS426/AB/R, (May 24, 2013) [hereinafter *Canada-Renewable Energy/ Feed in Tariff Program* Appellate Body Report]

2. THE FIT SCHEME IS INCONSISTENT WITH THE PROVISIONS OF ARTICLE III OF THE GATT 1994, AND IS THEREFORE VIOLATE ARTICLE 2.1. OF THE TRIMS AGREEMENT.

It is humbly submitted that the DCR of the FIT Scheme is a *trade related investment* measure for reasons discussed in **B(1)(a) and (b**). That is, the FIT imposes a "*minimum required domestic content level*" on solar electricity generators compelling them to purchase and use renewable energy generation equipment produced in Wingardium. To this extent, the domestic requirement for FIT Scheme is not unlike the one challenged in *Canada-Renewable Energy/FIT Program* and hence a "*trade related investment measure*".

It is submitted that the FIT Scheme has already been demonstrated to be inconsistent with Article III of the GATT 1994. Hence, the scheme is inconsistent with Article 2.1 of the TRIMs Agreement. Further, the FIT Scheme falls within the scope of Article 2.1. of TRIMs and Para 1(a) of the Illustrative List as explained in Section 1.1.3. Therefore, the measures are inconsistent with Article 2.1. of TRIMs.

D. CHALLENGED MEASURES FALL OUTSIDE THE SCOPE OF ARTICLE III:8(A) OF THE GATT 1994.

It is submitted that to fall within the Article III:8(a) exception, a challenged measure must: 1) "*govern the procurement by governmental agencies of products purchased for governmental purposes*"; and 2) "*not* [be undertaken] *with a view to commercial resale or with a view to use in the production of goods for commercial sale*".[65] Further, the Appellate Body has clarified that the product of foreign origin being discriminated against must be in a competitive relationship with the domestic product being purchased by the government.[66] It is humbly contended that the DCR imposed on solar electricity generators, and DCR with FIT Scheme fall outside the scope of Article III:8(a) of the GATT 1994.

1. PROCURED PRODUCT NOT IN A COMPETITIVE RELATIONSHIP.

In *Canada-Renewable Energy*[67] the product being procured was electricity whereas the product discriminated against was generation equipment. Accordingly, the challenged measures were not saved by Article III:8(a) of GATT 1994. Under WNSM the government acquires electricity whereas the products subject to requirements are solar cells and modules.

[65] *Canada-Renewable Energy/ Feed in Tariff Program* Panel Report, *supra 19*;
[66] *Canada-Renewable Energy/ Feed in Tariff Program* Appellate Body Report, *supra* 64, ¶ 5.74.
[67] *Ibid*.

Therefore, the DCR cannot be characterized as "*procurement by governmental agencie*s". Hence, Article III:8(a) does not exempt requirements that discriminate against imported solar cells or modules.

2. PROCUREMENT WITH A VIEW TO COMMERCIAL RESALE.

Alternatively, the "*procurement*" undertaken is a) not for governmental purposes, and b) with a view to commercial resale.

a) A purchase of goods for "*governmental purposes*" cannot at the same time amount to a government purchase of goods "*with a view to commercial resale*" under the terms of Article III:8(a).[68]Thus, if the procurement of electricity is undertaken "*with a view to commercial resale*" it will not be covered by Article III:8(a).

b) The Panel in Canada-FIT held that "*with a view to commercial resale*" means with a view to being sold or introduced into the stream of commerce, trade or market, regardless of any profit.[69] Similar to the present case, the Panel observed that electricity purchased was resold to retail consumers through channels in competition with private-sector retailers and hence, introduced into commerce. Therefore, just as with the above DCRs the DCRs of the WNSM fall outside the scope of Article III:8(a) of the GATT 1994.

E. THE CHALLENGED MEASURES ARE NOT EXEMPTED UNDER ARTICLE XX SUB-PARAGRAPH (B),(G) AND (J) OF THE GATT 1994.

Article XX of the GATT 1994 lists policy grounds available to members wishing to deviate from GATT obligations. The Appellate Body in *US – Shrimp*[70] prescribed that in order to extend the protection of Article XX to a challenged measure, it must 1) fall within the scope of one of the sub paragraphs of Article XX, 2) pass trade tests specific to the sub paragraph, and 3) satisfy the chapeaux requirement of the introductory clause.[71]

[68] *Canada-Renewable Energy/ Feed in Tariff Program* Panel Report, *supra* 19.
[69] *Canada-Renewable Energy/ Feed in Tariff Program* Appellate Body Report, *supra* 64.
[70] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 119-120, WT/DS58/AB/R, (Nov. 6, 1998)[hereinafter *US – Shrimp* Appellate Body Report].
[71] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (May 20, 1996) at pp.20-21[hereinafter *US – Gasoline* Appellate Body Report].

1. MEASURES DO NOT FALL WITHIN THE SCOPE OF POLICY GROUNDS AND DO NOT PASS TRADE TESTS.

a) It is submitted that sub paragraph (b) applies when a member can demonstrate that i) the measure protects or aims to protect "*human, animal or plant life or health*" and, if so, the ii) measure is "*necessary*" to achieve that objective.[72] . This includes determining, that there are no other '*reasonably available*' '*less trade restrictive measures*' to achieve the desired object.[73] In the present case, Wingardium may avail less restrictive trade measures

b) Article XX(j) of the GATT 1994 contains an exception for measures "*essential to the acquisition or distribution of products in general or local short supply*", subject to certain conditions. The words "*general or local short supply,*" refers to a situation where a product is "*available only in limited quantity*" or "*scarce*."[74] Moreover, a product can be in short supply domestically, without being in short supply in other countries.[75] Wingardium must demonstrate that solar cells and modules are in short supply either internationally or locally. In this regard it is submitted that Leviosa has helped establish 25 domestic companies involved in the production of PV modules.[76] Alternatively, Wingardium must explain why it is unable to avail itself of this supply through importation.

c) It is submitted that for the application of sub paragraph (g) the measure must be '*related to the conservation of exhaustible natural resources*'. These measures must be '*made effective in conjunction with restrictions on domestic production or consumption*'.[77] Further, the restrictions must be imposed upon both domestic and foreign production.[78] There have been no recorded restrictions on the use of fossil fuels in the instant case.

2. CHALLENGED MEASURES DO NOT SATISFY THE APPLICATION OF THE '*CHAPEAU*' TEST.

The chapeau requires measures to be applied in a manner not arbitrary or unjustifiably discriminatory between countries where the same conditions prevail, or a disguised restriction

[72] FREYA BAETENS, JOSÉ GUILHERME MORENO CAIADO(EDS), FRONTIERS OF INTERNATIONAL ECONOMIC LAW: LEGAL TOOLS TO CONFRONT INTERDISCIPLINARY CHALLENGES (Leiden: Brill Nijhoff, 2014).
[73] *US – Shrimp* Appellate Body Report, *supra* 70, ¶119-120.
[74] Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 326, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, (Feb. 22, 2012).
[75] *Ibid, at* ¶ 326.
[76] Factsheet, ¶ 14.
[77] *US – Shrimp* Appellate Body Report, *supra* 70, ¶¶ 127, 135, 143-145.
[78] *US – Gasoline* Appellate Body Report, *supra* 71, pp.20-21.

on international trade.[79] An arbitrary or unjustifiable discrimination exists when a member seeks to justify a measure by a rationale that bears no relationship to the accomplishment of the objective.[80] It is humbly contended that discrimination against imported renewable energy products does not benefit the achievement of the prevention of health effects or conservation of clean air. Therefore, DCRs fall outside the purview of Article XX(b) and Article XX(g) of the GATT 1994.

II. THAT HEALTH DIRECTIVE 141/PP/CST VIOLATES INTERNATIONAL LAW.

The measure at issue is the directive issued by the Department of Health of the Republic of Wingardium mandating standardized packaging for all solar cell products.[81] It requires that the laminate contain only the necessary information, all trademarks and marks be removed, text be solely in the prescribed format as well as 90% of the package must contain health warnings.[82] Such directions constitute plain packaging of the product.[83] Leviosa claims that the state is in violation of international law as the measure is inconsistent with A) Article 20 of TRIPS, B) Article 2.2 of TBT, C) Article 16.1 of TRIPS and D) Article IX:4 of GATT 1994.

A. THE MEASURE IS INCONSISTENT WITH THE STATE'S OBLIGATIONS UNDER ARTICLE 20 OF THE TRIPS AGREEMENT.

Article 20 provides that '*the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements…*'[84] The plain packaging requirement imposed by the Ministry of Health of Wingardium constitutes such an encumbrance as 1) it falls within the scope of Article 20, 2) it is expressly prohibited by the provision, and 3) alternatively, it constitutes an unjustifiable special encumbrance.

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[79] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 339, WT/DS285/AB/R, (April 20, 2005); *US – Gasoline* Appellate Body Report , *supra* 71, pp.20-21.

[80] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 246, WT/DS332/AB/R, (Dec. 17, 2007) [hereinafter *Brazil – Retreaded Tyres* Appellate Body Report].

[81] Factsheet, ¶ 16; Annexure VIII.

[82] Annexure VIII, ¶ 6.

[83] Becky Freeman et al., *The Case for Plain Packaging of Tobacco Products*, 103 ADDICTION 581 (2008).

[84] Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 20, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994), [hereinafter TRIPS].

1. PLAIN PACKAGING FALLS WITHIN THE SCOPE OF ARTICLE 20 OF THE TRIPS AGREEMENT.

It is submitted that a ban on the use of trademarks and restrictions on the word marks constitute possible encumbrance under Article 20. Many scholars have opined that plain packaging does not fall within the scope of the provision as to encumber means to hamper, impede, or burden,[85] and therefore, complete prohibition would not constitute an encumbrance.[86] However, Article 20 of TRIPS does not make a distinction between total and partial encumbrances and prohibits altogether any measure that impedes the use of a trademark, including a complete ban, an ultimate encumbrance[87]. The measure also entails special requirements on the use of word trademarks, thus, creating an encumbrance.[88]
Additionally, as held in *Indonesia – Autos*,[89] the Article is applicable in the present case as there is an imposition of a mandatory "special requirement" by the Directive. Therefore, plain packaging falls within the scope of Article 20.

2. ARTICLE 20 EXPRESSLY PROHIBITS PALIN PACKAGING.

It is submitted that the provision explicitly provides for 3 examples of unjustified encumbrances.[90] '*Use in a special form*' means specification of a generic format for the use of the trademark.[91] '*Use in manner detrimental to the capacity to distinguish*' refers to a mandatory requirement that hampers either the ability of the consumer in identifying it or the mark's influence on him.[92]

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[85] OXFORD DICTIONARY OF ENGLISH 577 (3rd ed. 2010).
[86] Benn McGrady, *TRIPs and Trademarks: The Case of Tobacco*, 3 W. T. R. 1, 61-64 (2004); Submission from British American Tobacco Australasia, to S. Cmty. Affairs Comm., *Inquiry into Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill 2009* (May 6, 2010); Mark Davison, *The Legitimacy of Plain Packaging under International Intellectual Property Law: Why there is no Right to Use a Trademark under either the Paris Convention or the TRIPS Agreement*, in A. Mitchell, *et al*. (eds), PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES 12, 19 (Edward Elgar, 2012).
[87] NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF TRADEMARKS AND DESIGNS 323 (Kluwer Law International, 3rd ed., 2006) [hereinafter CARVALHO].
[88] Report by Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (30 November 2010), ¶ 42.
[89] Panel Report, *Indonesia- Certain Measures Affecting the Automobile Industry*, ¶ 14.278,WT/DS54/R (July 2, 1998).
[90] Memorandum from LALIVE to Philip Morris Int'l Mgmt. SA, *Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris Convention* (July 23, 2009), at 11.
[91] PETER-TOBIAS STOLL, *ET AL*., WTO: TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 345 (BRILL, 2009) [hereinafter WTO:TRIPS]; UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 246 (Cambridge University Press, 2005) [hereinafter UNCTAD].
[92] *Id*, at 346.

The Directive requires trademarks to be used in the specific form as provided.[93] Also, the stipulations regarding absence of trademarks and other marks from laminates as well as the products and the uniformity in the format of the text on the packaging is detrimental to the core function of distinctiveness of a trademark. Therefore, the plain packaging requirement imposed by the Directive fit into the examples of unjustified encumbrances and is violative of Article 20.

3. IN *ARGUENDO*, IT IS AN UNJUSTIFIABLE SPECIAL ENCUMBRANCE.

The plain packaging requirement under the Directive was allegedly introduced in the interest of public health,[94] based upon inconclusive reports in preliminary studies that the product causes fatal allergies and may lead to skin cancer.[95] Even if the measure is not expressly prohibited, it violates Article 20 as it is a special requirement which unjustifiably encumbers the use of trademarks.

A measure is justifiable when there exist special reasons that demand it[96] and it materially contributes to the achievement of its stated objectives.[97] Public health may be a valid exception to Article 20 as laid down in a) Article 8 of TRIPS, and b) the Doha Declaration[98]. However, neither is applicable as a valid justification in the present case.

a) *Article 8 is inapplicable.*

Article 8 of TRIPS provides that Member countries are permitted to adopt necessary measures to protect public health.[99] Such measures must also be consistent with the provisions of TRIPS.[100] Necessity, in terms of Article XX GATT, was interpreted to mean that no alternative measure, consistent with the Agreement, was available which could reasonably be employed.[101] It must also be for a legitimate objective.[102] A balance must be

[93] Annexure VIII, ¶ 6(v).
[94] Annexure VIII; Factsheet ¶ 16.
[95] *Ibid*.
[96] GERVAIS D., TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 2.180 (London, Sweet and Maxwell, 3rd ed. 2008).
[97] *Ibid*; *Brazil – Retreaded Tyres* Appellate Body Report, *supra* 80.
[98] WTO Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, Adopted on 14 November 2001, WT/MIN(01)/DEC/2 (20 November 2001) [hereinafter Doha Declaration].
[99] TRIPS, Article 8.
[100] *Ibid*.
[101] Panel Report, *United States - Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Nov.7, 1989); Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200, (Nov. 7, 1990).
[102] *US – Shrimp* Appellate Body Report, *supra* 70, ¶ 121.

maintained between the right of a Member to adopt such a measure and its treaty obligations.[103]

The Cells and the Modules underwent all necessary tests and obtained relevant certificates issued by the Wingardian authorities as required by the Technical Requirements. It also qualified the IEC 43070 for health hazards which specifically tests modules for allergens and radiation. Thus, the products were safe and not a risk to public health.

Moreover, even if the products were unsafe, Wingardium could have adopted certain other TRIPS-consistent measures like issuing a public notice creating public awareness before issuing the Directive violating TRIPS. The public notice would have been a measure validly protected under Article 8.

Therefore, the requirement of the necessity test is not fulfilled and the measure cannot be justified under Article 8.

b) *Doha Declaration may not be applicable.*

The Doha Declaration recognizes the right of the members to take measures protecting public health.[104] An international instrument, however, is interpreted through its text in light of its relevant text and subsequent practice.[105] The commitment under the Doha Declaration has been made with a view to promote the interpretation of TRIPS in favor of the pharmaceutical needs of the Members.[106] An unnecessary broad interpretation is not permissible.[107]

In any case, the Doha Declaration does not qualify as a binding interpretation of TRIPS under Article IX:2 of WTO Agreement.[108] Therefore, the justification of the measure on grounds of protection of public health fails.

Thus, the Directive is inconsistent with Article 20 as it imposes an unjustifiable special encumbrance upon the use of trademarks.

[103] *Ibid*, ¶¶ 156-159.
[104] Doha Declaration, ¶ 4.
[105] Vienna Convention on the Law of Treaties, Article 31(3)(b), 32, 23 May 1969 1155 U.N.T.S. 331; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 192-193, WT/DS285/AB/R, (April 20, 2005).
[106] Doha WTO Ministerial Declaration, ¶ 17, WT/MIN(01)/DEC/1; 41 ILM 746 (2002); Doha Declaration, ¶ 4.
[107] International Law Commission, *Report on the Work of its Sixty-Third Session*, at 238, UN Doc A/66/10.
[108] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 255, WT/DS406/AB/R (April 24, 2012).

B. THAT THE MEASURES AMOUNTS TO VIOLATION OF ARTICLE 2.2 OF TBT AGREEMENT.

Article 2.2 of TBT provides that Member's shall not adopt any technical regulations which create unnecessary obstacles to international trade.[109] The Health Directive issued by Wingardium is inconsistent with this provision as 1) it amounts to a technical regulation, 2) it does not pursue a legitimate objective, and 3) the regulation is more trade restrictive than necessary to fulfill the legitimate objective.

1. THAT THE MEASURE AMOUNTS TO A TECHNICAL REGULATION.

In order to qualify as a technical regulation, a document must lay down compliance with one or more characteristics for an identifiable product or group of products as a mandatory requirement.[110] In *EC – Sardines,* the Appellate Body emphasized that product characteristics, whether positive or negative, include not only "*features and qualities intrinsic to the product*", but also those that are related to it, such as means of identification.[111] Therefore, a technical regulation regulates or imposes certain binding features or attributes on specific products. [112]

It submitted that the Health Directive identifies Crystalline Silicon Cells and Modules as the relevant products. It also prescribes the characteristics of the packaging by regulating the text, trademarks, marks and health warning on the laminate.[113]

Thus, it can be reasonably concluded that the Health Directive is a technical regulation within the definition provided in Annex 1.1 of TBT.

2. THAT THE OBJECTIVE OF THE TECHNICAL REGULATIONS IS NOT LEGITIMATE.

A legitimate objective refers to an aim or target that is either lawful, justifiable or proper.[114] The objective of a technical regulation can be determined by considering the text of the

[109] TBT Agreement, Article 2.2.
[110] TBT Agreement, Annex 1.1.
[111] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 69, WT/DS135/AB/R (April 5, 2001) [hereinafter *EC – Asbestos* Appellate Body Report]; Panel Report, *European Communities – Trade Description of Sardines*, ¶ 7.44, WT/DS231/R (Oct. 23, 2002).
[112] *EC – Asbestos* Appellate Body Report, *supra* 111, ¶ 68.
[113] Annexure VIII, ¶ 6.
[114] Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 370, WT/DS384/AB/R / WT/DS386/AB/R (July 23, 2012) [hereinafter *US – COOL* Appellate Body Report].

statute, legislative history, and other evidence regarding the structure and operation of the measure.[115]

In the present case, the respondent has stated that the objective of technical regulation is to safeguard the health of workers and consumers from fatal allergies and cancer.[116] Protection of human health is a legitimate objective under Article 2.2 of TBT Agreement. [117]

However, it is submitted that the ulterior objective of the regulation is to promote the use locally manufactured Thin Film technology solar cells by reducing the import from Leviosa.[118] Since there are no known health warnings related to Thin Films,[119] plain packaging would only affect the Crystalline Silicon Technology Products which would ultimately lead to reduction in use of the products and resultantly affecting imports. Thus, the regulation is not legitimate and amounts to an unjustifiable discrimination or disguised restriction on international trade.

3. THAT THE MEASURES ARE MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFILL A LEGITIMATE OBJECTIVE.

The assessment of necessity of a measure under the Article is based on the test developed under Article XX of GATT 1994.[120] It requires weighing and balancing of factors such as a) the degree of contribution made by the measure at issue to the legitimate objective, b) the trade-restrictiveness of the measure and c) the gravity of the consequences that would arise from non-fulfillment of the objective pursued by the Member through the measure.[121]

a) *The technical regulation does not make any material contribution to the objective.*

It is submitted that contribution exists when a genuine relationship of ends and means exists between the objective pursued and the measure at issue, assessed in quantitative or in

[115] *US-Tuna* Appellate Body Report, *supra* 46, ¶ 314.
[116] Factsheet, ¶ 16.
[117] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WT/DS2/R, (May, 20, 1996).
[118] Factsheet, ¶ 8.
[119] Annexure VIII, ¶ 6(iv).
[120] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.368, WT/DS406/R (April 24, 2012); Panel Reports, United *States – Certain Country of Origin Labelling (COOL) Requirements*, ¶7.667, WT/DS384/R / WT/DS386/R (July 23, 2012).
[121] *Korea-Beef* Appellate Body Report, *supra* 29, ¶ 164; Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US –COOL*, 8 ASIAN J. WTO & INT'L HEALTH L & POL'Y, 1, 11 (March 2013).

qualitative terms.[122] Such contribution must not be marginal or insignificant; rather, the measure must be sufficient to make a material contribution to the achievement of its objective.[123]

Evidence suggests that the measure has been successful in reducing the use of Crystalline Silicon Cell technology.[124] But no such data refers to the achievement of the public health objective by the measure elsewhere. Therefore, the technical regulations imposed by Wingardium do not make any material contribution to the objective as there is no genuine relationship between the objective pursued and the measure undertaken.

b) *The measure is "trade-restrictive".*

A measure is termed as trade-restrictive when it has "*limiting effects on trade*".[125] Within a month of the Directive coming into force, the Leviosian investors' already depleting market share in the Wingardian solar industry dipped to 10% in March 2016 from 75% in December 2013,[126] evidencing a limiting effect on trade. This is in addition to the loss of profits due to increase in domestic content requirement.[127] This evidences the trade-restrictive effects of the measure.

c) *No grave consequences occur from non-fulfillment of the objective.*

Consideration of risks created by non-fulfillment involves a comparison of the challenged measure with possible alternative measures in light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment of the legitimate objective.[128]

The manufacture of both Thin Film and Silicon based PV materials typically involves depositing ångström-thick layers of highly pressurized noxious gases onto a substrate, which pose the main occupational hazard.[129] In the present scenario, the only objective being fulfilled by the Directive is the restrictions on imports of the products into the country. This

[122] *Brazil – Retreaded Tyres* Appellate Body Report, *supra* 80, ¶¶ 145-146; PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 820 (Cambridge University Press, 2008).
[123] *Brazil – Retreaded Tyres* Appellate Body Report, *supra* 80, ¶ 150.
[124] Annexure VIII, ¶ 4.
[125] *US – COOL* Appellate Body Report, *supra* 114, ¶ 375.
[126] Factsheet, ¶ 17.
[127] Factsheet, ¶ 15.
[128] *US-Tuna* Appellate Body Report, *supra* 46, ¶ 321.
[129] David Tylor, *On the Job with Solar PV*, Environ Health Perspective 118:A19-A19 (2010), available at <http://ehp.niehs.nih.gov/wp-content/uploads/118/1/ehp.118-a19.pdf>.

does not guarantee the reduction or cessation of manufacture of the products. Non-fulfillment already exists in the measure at issue. Thus, it can be argued that no grave consequence arises from non-fulfillment of the objective.

Therefore, the measure is more trade-restrictive than necessary to fulfill its legitimate objective.

4. LESS TRADE-RESTRICTIVE ALTERNATIVES ARE AVAILABLE.

Possible alternatives must be compared to determine whether a less trade restrictive measure exist which provides an equivalent contribution, if not greater, to the achievement of the objective pursued.[130]

It is submitted that there are less restrictive reasonable alternatives available for reducing or eliminating exposure, or for protecting citizens from the risk of such exposure. For instance, Wingardium could educate workers as to sources of exposure of Crystalline Silicon cells and how to avoid them; prescribe safety standards to be necessarily adopted by producers of solar modules; require details of standards used by manufacturer; and deal only with manufacturers that follow the strictest environmental and occupational safety guidelines. Further, warnings could be issued to consumers of the resultant effects of close contact with solar panels. Therefore, these alternative measures are reasonably available and make equivalent contribution to the objective of protecting health.

Thus, it can be concluded that the measure is more trade restrictive than necessary and it violates the obligation of Wingardium under Article 2.2 of the TBT Agreement.

C. THE DIRECTIVE VIOLATES ARTICLE 16.1 OF THE TRIPS AGREEMENT.

Article 16.1 guarantees minimum standards of protection for trademark owners.[131] The plain packaging mandated by the Directive violates this provision as 1) it is inconsistent with the right to protect trademarks against likelihood of confusion, and 2) it violates the rights conferred upon registered owners of trademark by national legislations.

[130] *Brazil – Retreaded Tyres* Appellate Body Report, *supra* 80, ¶ 156.
[131] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Feb. 1, 2002).

1. THE MEASURE CREATES A LIKELIHOOD OF CONFUSION.

Trademarks are intended to conserve and protect the goodwill associated with a product and its manufacturer.[132] Its basic purpose is to enable the distinction of goods or services of its owner from others.[133] Article 16.1 protects the spirit of trademarks and grants the owner of a registered trademark an exclusive right to protect the identity of the trademark as well as protect it against confusion in course of trade.[134] Thus, the Article grants an exclusive right to prevent a likelihood of confusion resulting from the acts of a third party.

Likelihood of confusion connotes to the significant probability of confusion arising in the consumers regarding the origin of the product.[135] The likelihood of such confusion is more probable if the visibility of the mark that distinguishes products is absent. The Directive requires absence of trademarks and uniformity in the packaging. This would impair the ability of the consumer to effectively differentiate between the products. In fact, the aim of the plan packaging directive is to reduce the brand recognition creating confusion among consumers.[136]

Therefore, it creates a likelihood of confusion and violates Article 16.1 of TRIPS.

2. THE MEASURE VIOLATES THE RIGHT TO USE GRANTED UNDER THE WINGARDIUM TRADEMARK ACT.

Article 1.1 allows Member countries to implement further protection of trademarks to the extent compatible with TRIPS.[137] The rights thereby granted under a member's legislation are to be guaranteed irrespective of the country of origin.[138] Article 16.1 recognises the possibility of certain extra rights being granted by the Members and upholds them. Therefore, a positive right granted under a Member's national legislation shall have to be protected along with the negative right granted by the Article.

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[132] CARVALHO, *supra* 87.
[133] TRIPS, Article 15.1; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, ¶ 7.664,WT/DS174/R (April 20, 2005).
[134] TRIPS, Article 16.1; WTO:TRIPS, *supra* 91, at 318.
[135] UNCTAD, *supra* 91, at 237; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, ¶ 7.544, WT/DS290/R (April 20, 2005); Caon Kabushiki Kaisha v. Metro-Goldwyn Meyer [1998] ECR I-05507.
[136] Factsheet, ¶ 16.
[137] TRIPS, Article 16.1.
[138] TRIPS, Article 3.

Wingardium has legislated the Wingardian Trademark Act which under Section 28 grants every registered owner of a trademark the exclusive right to use the trademark.[139] The Directive, in violation of Section 28, prohibits the registered owners from using the trademark on the products in relation to which it was registered.
Thus, the Directive violates Article 16.1 of TRIPS.

D. THE MEASURE IS IN VIOLATION OF THE OBLIGATIONS IMPOSED BY ARTICLE IX:4 OF GATT 1994.

Article IX:4 of GATT provides that the laws and regulations of a Member country relating to marking of imported products shall not materially reduce value or unreasonably increase costs of the products.[140] The Directive is inconsistent with the provision as 1) it falls within the scope of the Article and 2) it materially reduces value or unreasonably increases cost of the products.

1. THE MEASURE FALLS WITHIN THE SCOPE OF THE ARTICLE IX:4.

Article IX:4 concerns with marking of imported products.[141] The Directive under paragraph 6 provides that no mark shall appear on the Laminate or the product. Therefore, it relates to marking of goods imported from Leviosa.
Alternatively, trademarks often are helpful in indicating the manufacturer of the product, including the product's geographical origin.[142] Therefore, any regulations relating to trademarks of imported products would fall within the scope of Article IX:4.

2. THE MEASURE MATERIALLY REDUCES VALUE OR UNREASONABLY INCREASES COST OF THE PRODUCTS.

The requirements mandated by the Directive impose an onerous condition upon the manufacturers of the Solar Cells and Modules to conform to the regulations.[143] In order to comply with them, the manufacturers would have to alter the packaging of all their products, thereby leading to increased costs of manufacture. More importantly, since the packaging would be uniform, the manufacturers would be compelled to lower the retail prices of the

[139] Wingardium Trademark Act, § 28.
[140] GATT 1994, Article IX:4.
[141] Panel Report, *United States - Restrictions on Imports of Tuna*, ¶ 5.41, 203, DS21/R, 39S/155 (Sep. 3, 1991).
[142] ALAN V DEARDORFF, TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS (2001).
[143] Annexure VIII, ¶ 6.

products in order to attract consumers. This would lead to an unreasonable increase in the cost of production for the manufacturers.

Alternatively, plain packaging would materially reduce the value of the Solar cells and Modules manufactured by the Claimants. Leviosa had developed the technology of solar cells and exported it to various countries.[144] It is the forerunner of the technology and has effectively transferred the same to other countries, including Wingardium.[145] The products manufactured by Leviosians would therefore be of a superior quality. However, the plain packaging requirement prevents consumers from recognizing brands of the products, impairing their ability to distinguish between the imported products from the domestic manufactures. This would result in a significant reduction in the value of the Leviosian products in the Wingardium markets.

Therefore, the Directive is in violation of Article IX:4 of GATT.

Thus, it can be sufficiently concluded that the Health Directive is in violation of the international framework established by WTO.

[144] Factsheet, ¶¶ 3-4.
[145] Factsheet, ¶¶ 3-4, 14.

REQUEST FOR FINDINGS

Wherefore for the foregoing reasons, the Republic of Leviosa respectfully requests the panel to adjudge and declare that:

1. The Domestic Content Requirement is inconsistent with the WTO Agreements as it is violative of –
    a. Article III of the GATT 1944 since it denies an equality of competitive conditions between imported solar cells and modules and like goods of Wingardian origin;
    b. Article 2.1 of the TRIMS Agreement since it constitutes a trade-related investment measures inconsistent with Article III of the GATT 1994;
    c. Article 3.1(b) and 3.2 of the SCM Agreement since coupled with the FIT Scheme it acts as a subsidy contingent upon the use of domestic over like imported goods;

2. The Health Directive mandating plain packaging is inconsistent with the WTO Agreements as it is violative of –
    a. Article 20 of the TRIPS Agreement since it constitutes an unjustifiable encumbrance on the use of trademarks;
    b. Article 2.2 of the TBT Agreement since it imposes an unnecessary technical barrier to international trade;
    c. Article 16.1 of the TRIPS Agreement since it prevents owners of registered trademarks from enjoying the rights conferred by a trademark;
    d. Article IX:4 of the GATT 1994 since it imposes requirements of marking that materially reduce the value and/or unreasonably increase the costs of the products.

All of which is most respectfully submitted.

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(Complainant)