

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 RESPONDENT

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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.	<i>exempli gratia</i> , 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 Wingardium makes the following submissions:

I. THAT THE WNSM PROGRAM AND EXECUTIVE ORDERS ARE CONSISTENT WITH WTO LAW.

A. Domestic content requirement mandated by the WNSM Program is consistent with Article III of the GATT.

1. Challenged measures are consistent with “*national treatment*” obligation under Article III:4 of the GATT 1994.
 - Imported solar PV modules and cells and domestic solar PV modules and cells are not “*like*” products.
 - Imported solar PV modules and cells are not accorded “*less favourable*” treatment than “*like*” domestic products.
2. Challenged measures are consistent with obligation under Article III:5 of the GATT 1994.

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

1. Government purchase of goods cannot be characterized as “*direct transfer of funds*”.
2. The Feed-In Tariff Scheme does not provide any “*income or price support*”.
3. The Feed-In Tariff Scheme does not “*confer a benefit*”.

C. Feed-In Tariff Scheme falls within the scope of Article III:8(a) of the GATT 1994.

1. Procurement of electricity is for “*governmental purpose*”.
2. Procurement not with a “*view to commercial resale*” or “*used in producing products for commercial resale*”.
3. True and genuine “*connection*” between Feed-In Tariff Scheme and policy objective.
4. Solar electricity generators are in a “*directly competitive relationship*”.

D. Challenged measures are exempted under Article XX sub-paragraph (b) and (g) of the GATT 1994.

1. Measures fall within the “*scope*” of policy grounds and pass relevant “*trade tests*”.
2. Measures satisfy the application of the “*chapeaux*” test.

E. Wingardium has acted consistently with Article 2.1 of the TRIMs Agreement.

1. Challenged measures are consistent with Article III of the GATT 1994.
2. Challenged measures are saved by the operation of Article XX of the GATT 1994.

-Written Submissions on behalf of the Respondent-

3. FIT Scheme is saved by the operation of Article III:8(a) of the GATT 1994.

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

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

1. "Plain packaging" falls outside the scope of Article 20 of the TRIPS Agreement.
2. "Plain packaging" is not in express violation of Article 20 of the TRIPS Agreement.
 - The measure it to be presumed consistent.
 - The measure is not expressly prohibited.
3. Challenged measure is a "justifiable special encumbrance".
 - Public health is a valid justification.
 - The measure materially contributes to the objective.

B. The Health Directive is consistent with Article 2.2 of the TBT Agreement.

1. Health Directive pursues a "legitimate objective".
2. Health Directive is not more "trade restrictive" than "necessary".
 - Measures makes a material contribution towards achieving objective.
 - Measure is not unnecessarily trade restrictive.
 - Grave consequences arise from non-fulfillment of objective.
3. No less restrictive trade alternatives are "reasonably" available.

C. The Directive is consistent with Article 16.1 of the TRIPS Agreement.

1. There exists no "right to use" a trademark under international law.
2. Wingardium Trademarks Act does not fall within the scope of Article 16.1 of the TRIPS Agreement.

D. Adopted measure is consistent with obligation under Article IX:4 of the GATT 1994.

1. Adopted measure falls outside the "scope" of the Article IX:4 of the GATT 1994.
2. Adopted measure do not "materially reduces value" or "unreasonably increase cost" of the products.

LEGAL PLEADINGS

I. THAT THE DSB MUST DECLINE JURISDICTION OVER THE DISPUTE.

An abusive exercise of treaty right results in breach of treaty rights of other Members, and therefore, in a violation of the treaty obligation of the Member so acting.¹ In this regard, “good faith” guides how Members must interpret,² and control the exercise of their rights³. Wingardium submits that Leviosa’s exercise of their procedural rights under the Dispute Settlement Understanding⁴ lacks good faith and does not meet the “standards”⁵ set by the Body. Accordingly, it is contended that the DSB must decline jurisdiction over the dispute.

II. THAT WG/SM/P-1 AND THE EXECUTIVE ORDERS ARE CONSISTENT WITH WTO LAW.

The Government of Wingardium has launched the Wingardium National Solar Mission⁶ *vide* enabling document WG/SM/P-1.⁷ Participation in the Solar Mission is conditioned on compliance with technical regulations and domestic content requirements^{8,9}. Wingardium submits that the above measures are consistent with A) Article III of the GATT 1994. The Feed-In Tariff¹⁰ Scheme is consistent with B) Article 3.1(b) and 3.2 of the SCM Agreement and falls within the scope of C) Article III:8(a) of the GATT 1994. Alternatively, the measures are exempted under D) Article XX of the GATT 1994 and hence do not violate E) Article 2.1 of the TRIMs Agreement.

¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US – Shrimp* Appellate Body Report].

² Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations*, ¶ 166, WT/DS108/AB/R (Feb. 24, 2000) [hereinafter *US-FSC* Appellate Body Report].

³ *US – Shrimp* Appellate Body Report, *supra* note 1, ¶158.

⁴ Hereinafter, ‘DSU’.

⁵ MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT, 237 (Hart Publishing 1st ed, 2006); ANDREW D. MITCHELL, M SORNARAJAH, TANIA V, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW ¶ 3.4.4., 49 (Oxford University Press, 2015).

⁶ Hereinafter, ‘WNSM’.

⁷ Factsheet, ¶ 5.

⁸ Hereinafter, ‘DCR’.

⁹ Factsheet, ¶ 10.

¹⁰ Hereinafter, ‘FIT’.

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

The WNSM Program introduces DCR measures *vide* the mission's enabling document WG/SM/P-1.¹¹

- Article 4 lays down requirements for project developers of Phase-I of the Mission. One of the requirements is that projects based on Crystalline Silicon Technology¹² have to use modules manufactured in Wingardium.¹³
- 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.¹⁴
- Article 5 introduces a FIT Scheme coupled with a DCR of 30%.¹⁵

It is humbly contended that the DCR imposed on solar project developers, and DCR of FIT scheme is consistent with Wingardium's obligations under 1) Article III:4, and 2) Article III:5 of the GATT 1994.

1. CHALLENGED MEASURES ARE CONSISTENT WITH WINGARDIUM'S NATIONAL TREATMENT OBLIGATION UNDER ARTICLE III:4, OF THE GATT 1994.

A violation of Article III:4 of the GATT 1994 can be found when the challenged 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.¹⁶

¹¹ Factsheet, ¶ 5.

¹² Hereinafter, 'CST'.

¹³ Factsheet, ¶ 6.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ 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 not like products.*

A determination of “likeness” under Article III:4 is a determination of the existence and extent of competitive relationship between products.¹⁷ In order to determine whether products in issue are in a competitive relationship the Appellate Body has held that no list of adopted criteria is exhaustive.¹⁸ In the present matter, the following criteria may be considered: i) price of the products¹⁹, and ii) consumer perception and behavior²⁰.

i) Price of product as a factor.

The price of a product is relevant in assessing whether imported and domestic products stand in a sufficiently direct competitive relationship in a given market.²¹ The Panel has upheld that evidence of major price differentials demonstrates that the imported and domestic products are in completely separate markets.²²

The cost of solar panels varies dramatically depending upon one’s location.²³ Dissimilarities in pricing are further evidenced by the practice of dumping solar panels at prices lower than their normal value.²⁴ Generally, ‘infant’ solar industries in countries such as India exhibit greater manufacturing costs and inefficiencies.²⁵

In the present case, the solar industry in Wingardium is an infant industry and difference in pricing is evidenced by, (i) cheap costs of solar cells and modules for technology enabled Leviosa²⁶ and, (ii) the fact that despite the transfer of Technical Know How to 25 domestic

¹⁷ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 97-100, WT/DS135/AB/R, (April 5, 2001) [hereinafter *EC-Asbestos* Appellate Body Report].

¹⁸ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (Nov. 1, 1996) [hereinafter *Japan- Alcoholic Beverages* Appellate Body Report].

¹⁹ Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (Feb. 17, 1999) [hereinafter *Korea – Beverages* Appellate Body Report].

²⁰ Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, ¶¶ 131-132, WT/DS396/AB/R / WT/DS403/AB/R (Jan. 20, 2012) [hereinafter *Philippines – Distilled Spirits* Appellate Body Report]

²¹ *Ibid.*, at ¶ 215.

²² Matthew J. Slaughter, *Infant Industry Protection and Trade Liberalization in Developing Countries*, USAID RESEARCH REPORT (2004).

²³ *Ibid.*

²⁴ Ankur Paliwal, *China Not Pleased With US Slapping Import Duty On Solar Panels*, available at <<http://www.downtoearth.org.in/news/china-not-pleased-with-us-slapping-import-duty-on-solar-panels--38253>> (last accessed Dec. 23, 2015)

²⁵ Mohammed Sahil Ali, Sharath Chandra Rao & Nagalakshmi Puttaswamy, *Incentivising Domestic Manufacturing for a Sustainable Solar Industry*, CSTEP-Note-2014-01, available at <<http://www.cstep.in/uploads/default/files/publications/stuff/dfce8b559f378493e304ca90398a4599.pdf>>

²⁶ Factsheet, ¶ 3.

companies²⁷, the domestic solar cells were unable to offer competitive rates and saw the laying off over 5 million employees in the sector.²⁸

The existence of major price differentials confirms separate markets for domestic and imported products. Therefore, the two types of products are not in a directly competitive relationship and hence, not “*like*” for the purposes of Article III:4 of the GATT 1994.

ii) Consumer preference and behaviour.

A key element in determining the competitive relationship between products is the extent to which consumers are or “*would be*” willing to use the products to perform required functions.²⁹ In markets that are characterized by regulatory barriers to trade or competition, there may be latent demand for a product.³⁰ The Panel has held that it is relevant to examine latent demand that is suppressed by regulatory barriers. Additionally, evidence from other markets is pertinent when demand on that market has been influenced by regulatory barriers to trade or to competition.³¹

In the present case, the Wingardian market is characterised by regulations on the sale of solar cells and modules.³² Therefore, examination of latent demand is relevant. This may be undertaken by examining other markets that are not influenced by such regulation. It is humbly contended that consumers in countries with infant industries showed strong preference towards the use of imported solar cells and modules. Therefore, imported solar cells and modules exist in a separate relevant market than domestic solar cells and modules.

b) *Imported solar PV modules and cells are not accorded “less favourable” treatment than “like” domestic products.*

The Panel and Appellate Body have interpreted “*treatment no less favourable*” to require “*effective equality of competitive opportunities*”,³³ and protection of “*expectation*” of “*equality of competitive conditions*”.³⁴ Further, Article III:4 cannot compel members to develop contestable markets except to the extent that they are “*relieved*” of their

²⁷ Factsheet, ¶14.

²⁸ Factsheet, ¶ 13.

²⁹ *EC-Asbestos* Appellate Body Report, *supra* note 17, ¶¶ 97-100.

³⁰ *Korea – Beverages* Appellate Body Report, *supra* note 19.

³¹ *EC-Asbestos* Appellate Body Report, *supra* note 17, ¶¶ 97-100.

³² Factsheet, ¶ 5.

³³ *US-FSC* Appellate Body Report, *supra* note 2, ¶ 215.

³⁴ *Korea-Beef* Appellate Body Report, *supra* note 16, ¶.

“disadvantage” relative to like domestic goods.³⁵ This overall obligation as described is that of the “*level playing field*”.³⁶

In the present matter, Wingardium recognizes that it has a matching responsibility to create non-formally identical treatment to ensure no disparate impact upon like imports. The overall design of the WNSM Program is such that it doesn’t disadvantage foreign products. This is evidenced by the estimated \$ 1 trillion economic gain the Wino-Leviosan Energy Cooperation Deal³⁷ and that Leviosan investors received 60% of the power purchase agreements by voluntarily complying with the requirements of the scheme³⁸. It is pertinent to note that bullish expectation was arrived at after taking into consideration the obligations entailed. Therefore, while DCR measures did exist, the WNSM created an equally investor conducive environment to “*level the playing field*”.

c) Additionally, Article III:4 does not make specific reference to the element of “*so as to afford protection to domestic production*” in Article III:1. Therefore, Article III:4 does not require a separate examination of whether the measure at issue is applied “*so as to afford protection to domestic production.*”³⁹

2. CHALLENGED MEASURES ARE CONSISTENT WITH WINGARDIUM’S OBLIGATION UNDER ARTICLE III:5, OF THE GATT 1994.

It is humbly contended that no inconsistency with Article III:5, first sentence can be found as the adopted measures are not (a) internal quantitative regulation (b) that require specified amounts of any product.

Further, Article III:5, second sentence prohibits application of measures in a manner contrary to the principles set forth in Article III:1.⁴⁰ Article III:1 articulates that internal measures should not be applied so as to afford protection to domestic production. It is humbly contended that Wingardium has not acted inconsistently with their obligation.

³⁵ UNCTAD, *WTO Core Principles And Prohibition: Obligations Relating To Private Practices, National Competition Laws And Implications For A Competition Policy Framework*, UNCTAD/DITC/CLP/2003/2, available at < http://unctad.org/en/docs/ditcclp20032_en.pdf >

³⁶ *Ibid.*

³⁷ Factsheet, ¶ 7.

³⁸ Factsheet, ¶ 10.

³⁹ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 216, WT/DS27/AB/R (Sept. 9, 1997) [*EC – Bananas III* Appellate Body Report].

⁴⁰ *Japan–Alcoholic Beverages* Appellate Body Report, *supra* 18, p.16.

B. CHALLENGED MEASURES DO NOT VIOLATE ARTICLES 3.1(B) AND 3.2 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures⁴¹ prohibits subsidies within the meaning of Article 1 that are contingent, that is, “*conditional*”, on the use of domestic over imported goods.⁴²

The Government of Wingardium has initiated a FIT Scheme similar to the Ontario FIT Scheme in order to promote the use of clean solar energy across households and commercial enterprises.⁴³

It is humbly contended that the scheme does not amount to a subsidy contingent upon use of domestic over imported goods because, 1) there is no “*direct transfer of funds*”, 2) the scheme does not provide for ‘*income or price support*’, and 3) the scheme does not “*confer a benefit*”.

1. THE GOVERNMENT PURCHASE OF GOODS CANNOT BE CHARACTERIZED AS A “*DIRECT TRANSFER OF FUNDS*”.

The Panel in *US – Large Civil Aircraft*, held that a transaction properly characterized as a government purchase of goods cannot be characterized as a direct transfer of funds as this would be a) ineffective with the principle of effective treaty interpretation, and b) render the term “*purchases goods*” in Article 1.1(a)(1)(iii) “*redundant and inutile*”.⁴⁴ This holds true even if the purchase involves a “*direct transfer of funds*” or a “*potential direct transfer of funds*”.⁴⁵

⁴¹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (1999), 1869 U.N.T.S. 14. [hereinafter SCM Agreement].

⁴² Appellate Body Report, *US-Subsidies on Upland Cotton*, ¶ 544, WT/DS26/AB/R (Mar. 3, 2005).

⁴³ Factsheet, ¶ 6(v).

⁴⁴ Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶¶ 7.955-956, WT/DS353/R (March 23, 2012).

⁴⁵ Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 7.248, WT/DS412/R / WT/DS426/R, (May 24, 2013) [hereinafter *Canada – Renewable Energy/Feed-in Tariff Program Panel Report*]

It is submitted that a simple monetary contribution is differentiated such as a "*direct transfer of funds*" from a "*purchase of goods*" as that the latter involves a monetary contribution "*in exchange*" for a good.⁴⁶

In the instant case, the transaction with FIT generators involves a monetary contribution (payments) *in exchange* for electricity that Wingardium directs to be supplied into the system once generated. Thus, the scheme is properly characterized as a "purchase of goods" and not a transfer of funds.

2. THE CHALLENGED MEASURES DO NOT PROVIDE "*INCOME OR PRICE*" SUPPORT.

It is submitted that Article 1.1(a)(2) of the SCM Agreement incorporates the term "*income or price support*" as prescribed in Article XVI⁴⁷ by way of reference.⁴⁸ Article XVI:1 requires notification of "*any subsidy, including any form of income or price support, that operates directly or indirectly to increase exports [...] or reduce imports [...]*".⁴⁹ Where, "*any product*" in Article XVI of the GATT is a reference to "*any product*" that is the "*subject of the subsidy*" being notified under the provision.

Following from the above, for the FIT Scheme to be characterized as a form of "*income or price support*", Leviosa needs to show that trade in electricity is affected by the subsidy, not trade in renewable electricity generation equipment.

There is no evidence suggesting that the FIT Scheme has contributed to a decrease in imports of solar electricity into Wingardium or increase of export out of Wingardium. In fact, there is no evidence that solar electricity is traded at all. Thus, the qualification for "*income and price support*" has not been met.

3. THE CHALLENGED MEASURES DO NOT "*CONFER A BENEFIT*".

a) The Panel in Canada-Renewable/FIT determined that Article 14(d) of the SCM Agreement suggests that a challenged measure "*confers a benefit*" if the remuneration is "*more than*

⁴⁶ Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 2.91, WT/DS412/AB/R / WT/DS426/AB/R (May 24, 2013) [hereinafter *Canada – Renewable Energy / Canada – Feed-in Tariff Program Appellate Body Report*]; Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 619, WT/DS353/AB/R (March 23, 2012)..

⁴⁷ GATT, Article XVI.

⁴⁸ SCM Agreement, Article 1.1(a)2.

⁴⁹ GATT, Article XVI.

adequate" compared with to remuneration on would receive on the "*market*".⁵⁰ Further, this benchmark for "*adequate remuneration*" should be found in a competitive wholesale market.⁵¹

In the present case, the wholesale electricity market is not a market where there is effective competition. Rather, Wingardium's electricity market is better characterized as defined in most aspects by the Government's policy decisions and regulations.⁵² This is done in order to ensure that Wingardium has a safe, reliable and long-term sustainable supply of electricity, as well as costs that can be recuperated.

b) Further, the "*but for*" approach cannot be applied because such an approach would not measure what the recipient could obtain in the marketplace for solar PV energy generation.⁵³ Such a test, presupposes that the relevant market is electricity generated from all energy sources, in a situation where the government defines its energy supply-mix as including solar PV-generated electricity, and accordingly creates separate markets for solar PV-generated electricity.⁵⁴

c) Alternatively, "*benefit*" is linked to the concepts of "*financial contribution*" and "*income or price support*", and its existence requires a comparison in the marketplace.⁵⁵ The notion of "*advantage*" within the meaning of the TRIMS agreement cannot be applied to the SCM agreement. In *Canada – Aircraft*, the Appellate Body did not equate the notions of "*benefit*" and "*advantage*". The interpretation of "*benefit*" in Article 1.1(b) of the SCM Agreement clearly suggests that, while benefits involves some form of advantage the former has a more specific meaning under the SCM Agreement.

C. THE FIT SCHEME IS EXEMPTED BY ARTICLE III:8(A) OF THE GATT 1994.

The challenged FIT Scheme satisfies the prerequisites of Article III:8(a) and is therefore not subject to the obligations of Article III:4 of the GATT 1994. In order to fall within this provision, there must be, 1) "*procurement*" of a product by government agency, 2) for

⁵⁰ *Canada – Renewable Energy/Feed-in Tariff Program* Panel Report, *supra* note 46, ¶ 7.272.

⁵¹ *Ibid.*, at ¶ 7.276.

⁵² Factsheet, ¶ 5.

⁵³ *Canada – Renewable Energy / Canada – Feed-in Tariff Program* Appellate Body Report, *supra* note 46, ¶ 5.197.

⁵⁴ *Ibid.*

⁵⁵ Appellate Body Report, *Canada – Aircraft*, ¶ 153, WT/DS70/AB/R, (Aug. 20,1999) [hereinafter *Canada-Aircraft* Appellate Body Report] ; *Canada – Renewable Energy/Feed-in Tariff Program* Appellate Body Report, *supra* note 46, ¶ 5.208.

“governmental purposes”; and 3) not with a “view to commercial resale” or with a “view to being used in the production of goods for commercial sale”.⁵⁶

1. PROCUREMENT FOR “GOVERNMENTAL PURPOSE”.

Determining the definition “governmental purposes” within the context of Article III:8(a) of the GATT requires an assessment of the, a) role of government in a particular country, and b) stated aim of the government.⁵⁷

a) In determining whether a purchase is for governmental purposes due consideration must be given to whether it has a constitutional mandate to do so. In the present case, WNSM has been characterised as a program in furtherance of Wingardium’s socialistic, constitutional and environmental goals.⁵⁸ Where, “socialistic” is defined as a state that advocates that the means of production, distribution, and exchange should be owned or regulated by the community as a whole.⁵⁹

b) A purchase for “governmental purposes” is a purchase for a stated aim of the government.⁶⁰ Therefore, the “aim” behind the purchase of electricity by the Wingardian Government must be looked into. The stated goals of the WNSM include:

- Achievement of 90% rural electrification through off grid solar power.
- Promotion of the use of clean solar energy across households and commercial enterprises in Wingardium through a FIT Scheme.⁶¹

A reading of 1(a) and 1(b) indicate that the purchase of electricity was for the purposes of providing rural electrification and promotion of clean energy in furtherance of Wingardium’s constitutional mandate.

2. PROCUREMENT NOT WITH A VIEW TO “COMMERCIAL RESALE” OR “USED IN THE PRODUCTION OF GOODS FOR COMMERCIAL SALE”.

The interpretation of the word “commercial” in *US – Anti-Dumping and Countervailing Duties*⁶² and the interpretation of the term “commercial considerations” by the panel in

⁵⁶ *Canada – Renewable Energy/Feed-in Tariff Program* Appellate Body Report, *supra* note 46, ¶ 2.8.

⁵⁷ *Ibid.*

⁵⁸ Factsheet, ¶ 5.

⁵⁹ OXFORD DICTIONARY

⁶⁰ *Canada – Renewable Energy/Feed-in Tariff Program* Panel Report, *supra* note 45, ¶ 5.66.

⁶¹ Factsheet, ¶ 5.

*Canada – Wheat Exports and Grain Imports*⁶³, define "commercial resale" as a resale with the underlying intent to profit. This meaning is also consistent with academic commentary, stating that, in the context of Article III:8(a), a resale is commercial if the activity is carried out as a profit-making activity, and not where only a nominal fee is charged.⁶⁴

Additionally, there is no suggestion that the Government purchases electricity with an aim to resell for profit or to make any goods. Rather, it is done to help ensure a sufficient and reliable supply of electricity for Wingardium's citizens,⁶⁵ and promote the use of clean solar energy⁶⁶.

Consequently, the measures are not subject to the obligations of Article III of the GATT 1994 or the TRIMs Agreement.

3. TRUE AND GENUINE "CONNECTION" BETWEEN FIT SCHEME AND GOVERNMENTAL PURPOSE.

A degree of connection or relationship between the measure under appraisal and policy sought to be promoted is evidenced in the enabling document WG/SM/P-1. By incentivizing production of solar electricity, Wingardium is ensuring a stable and robust solar industry to help achieve its energy and environment goals.

4. ELECTRICITY GENERATORS ARE IN "DIRECT COMPETITION" WITH EACH OTHER.

For the application of Article III:8(a), the products being discriminated against must be in a directly competitive relationship.⁶⁷ FIT Scheme makes distinction between electricity generated within facilities that make use of solar cells and modules of Wingardian origin and those which make use of imported cells and modules. It is humbly contended that the electricity produced in either facility are in a directly competitive relationship.

⁶² Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 465-490, WT/DS379/AB/R (25 March 2011) [hereinafter *US-Anti Dumping and Countervailing Duties* Appellate Body Report].

⁶³ Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 6.87-6.89, 6.96, 6.123, and 6.129, WT/DS276/R (Sep. 27, 2004) [hereinafter *Canada – Wheat Exports and Grain Imports* Panel Report].

⁶⁴ A. La Chimia And S. Arrowsmith, "Addressing Tied Aid: Towards a More Development-Oriented WTO?", *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, Vol. 12, No. 3 (2009).

⁶⁵ Factsheet, ¶ 5.

⁶⁶ *Ibid.*

⁶⁷ *Canada – Renewable Energy/Feed-in Tariff Program* Appellate Body Report, *supra* note 46, ¶ 5.62-5.63.

D. CHALLENGED MEASURES ARE SAVED BY EXCEPTION UNDER ARTICLE XX OF THE GATT 1994.

Article XX of the GATT 1994 lists the policy grounds available to WTO Members wishing to deviate from their GATT obligations. In order to extend the protection of Article XX to a challenged measure, it must a) fall within the scope of one of the sub paragraphs of Article XX⁶⁸, b) pass trade tests specific to the sub paragraph, and c) satisfy the chapeaux requirement of the introductory clause.⁶⁹

It is humbly contended that the challenged measures are provisionally justified under, 1) subparagraph (b) and, 2) subparagraph (g) of the GATT 1994.

1. PROTECTION OF HUMAN, ANIMAL AND PLANT LIFE AS A POLICY GROUND JUSTIFYING DEVIATION ARTICLE III OF THE GATT.

a) *Challenged measures fall within the scope policy ground.*

Article XX(b) allows for contracting parties to give priority to human health over trade liberalization.⁷⁰ A number of policies aimed at reducing risks to human, animal and plant life and health arising hazardous environment have been held to fall within Article XX(b).⁷¹ Further, due consideration is given to the i) resolutions as adopted by international agreements, and ii) the views expressed by scientific experts.⁷²

In the present case, the DCR for solar projects and of the FIT Scheme are aimed at raising the standard of living of the citizens by reducing the dependence on fossil fuel energy in Wingardium.⁷³ The dependence on which verifiably poses a risk to human, animal and plant life. This policy objective is also in conformity with the UNFCCC⁷⁴ resolution to promote the use of renewable energy. This is achieved by i) developing a stable and robust domestic solar industry and, ii) incentivizing the use of solar generated electricity.

⁶⁸ *US – Shrimp* Appellate Body Report, ¶¶ 119–120.

⁶⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (May 20, 1996) at pp.22 [hereinafter *US – Gasoline* Appellate Body Report].

⁷⁰ *Ibid*, at pp. 17-18.

⁷¹ *US – Shrimp* Appellate Body Report, *supra* note 1, ¶¶ 119-120.

⁷² *EC-Asbestos* Appellate Body Report, *supra* note 17, ¶ 178.

⁷³ Factsheet, ¶ 5.

⁷⁴ United Nations, Adoption of the Paris Agreement, FCCC/CP/2015/L.9, 12 December 2015.

b) *Challenged measures are necessary within the meaning of Article XX(b).*

The Panel in *United States - Restrictions on Imports of Tuna* determined that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards.⁷⁵ Standard setting in itself involves multiple governmental considerations such as competitive restrictions.⁷⁶

A measure is justified by Article XX(b) if it serves to achieve the policy objective and is “*necessary*” within this context.⁷⁷ This entails a determination of whether a WTO-consistent “*alternative measure*” is reasonably available and “*contributes to the realization of the end pursued*”.⁷⁸

In the present case, the WNSM is a comprehensive policy that interlaces health and conservation of clean air and the objective of increase in reliance on solar energy. This narrows the margin of discretion in looking for alternative measures. Moreover, DCR measures can be used to achieve public policy as well as political economy objectives, such as reduction of fiscal deficits.⁷⁹ If policy makers are uncertain about the true cost of mitigating environment damage, quantity based measures are preferred to price based measures.⁸⁰ Wingardian President’s letter dated 1st July, 2015 evidences the success of the WNSM scheme. Therefore, the measures have been successful in mitigating the sought objective.

Additionally, in *Brazil – Tyres* dispute, the Panel weighed the three factors: human life and health, the impugned measures, and material contribution.⁸¹ An assessment of these factors renders the DCR measures as necessary to increase reliance on solar generated electricity.

⁷⁵ Panel Report, *United States - Restrictions on Imports of Tuna*, ¶ 3.18, WT/DS29/R (Jun. 16, 1994).

⁷⁶ Sean F. Ennis, *Standard Setting*, DAF/COMP(2010) 33, available at <<http://www.oecd.org/daf/competition/47381304.pdf>>

⁷⁷ Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶¶74-75, WT/DS371/R, (July 15, 2011)[hereinafter Thailand – Cigarettes Panel Report]; Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, (May 20, 1996) [hereinafter *US- Gasoline* Panel Report]

⁷⁸ *Korea-Beef* Appellate Body Report, *supra* note 16, ¶¶163, 166.

⁷⁹ World Trade Report 2012, *Trade and public policies: A closer look at non-tariff measures in the 21st century: An Inventory of Non-tariff Measures and Services*, available at <https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2b_e.pdf>

⁸⁰ William J. Moon, Alec Stone Sweet, *Consensus Analysis, State Practice, and Majoritarian Activism in the WTO*, available at <<https://www.asil.org/blogs/consensus-analysis-state-practice-and-majoritarian-activism-wto>> (last accessed Dec. 20, 2015)

⁸¹ Appellate Body Report, *Brazil – Retreaded Tyres*, ¶ 182, WT/DS332/AB/R (Dec. 17, 2007) [*Brazil – Retreaded Tyres* Appellate Body Report]

c) *Application of the “chapeaux”.*

If the discrimination is not arbitrary or unjustifiable, it may be authorized pursuant to the chapeau of Article XX. In *US – Shrimp*, the measure was held unjustifiable as it i) was too rigid, and ii) lacked good faith negotiations. It was accordingly held to be arbitrary in nature. It is humbly contended that the measures were i) flexible as evidenced by their removal vide Executive Order WG/SMEO/118, dated 2nd July, 2015,⁸² and ii) in good faith evidenced by the consultations participated in.⁸³

2. CHALLENGED MEASURES EXEMPTED UNDER ARTICLE XX (G) BECAUSE THEY ARE UNDERTAKEN TO CONSERVE EXHAUSTIBLE NATURAL RESOURCES.

a) *Challenged measures fall within policy ground.*

The Appellate Body in *US – Gasoline* found that clean air was an exhaustible natural resource.⁸⁴ Accordingly, a policy to reduce the depletion of clean air was a policy within the meaning of Article XX(g). At present high fossil fuel usage has deteriorated the standard of living in the Wingardium and the prevalence of Air Particulate Matters in Wingardium’s capital is well beyond the prescribed limit established by WHO.⁸⁵ It follows that the adopted measures aim at the conservation of clean air.

b) *Challenged measures pass specific trade tests.*

It is submitted that Article XX(g) prescribes a “*related to*” test. The term “*related to*” has been defined as a measure “*primarily aimed at*” the policy goal.⁸⁶ Baseline establishment rules are regarded as “*primarily aimed at*” for the purposes of Article XX(g).⁸⁷ Due consideration is to be given to whether there is an observably close and real relationship between the measure and the ends.⁸⁸ Evaluation of the contribution made by the measure confirms whether the mean is justifiable. The objectives of the WNSM are “*primarily aimed at*” increasing reliance on solar generated electricity.⁸⁹ Further, the Wingardian President’s

⁸² Annexure V.

⁸³ Factsheet, ¶18.

⁸⁴ *US – Gasoline* Appellate Body Report, *supra* note 69, ¶¶ 6.36-6.37.

⁸⁵ Factsheet, ¶1.

⁸⁶ Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶¶ 4.4-4.6, BISD 35S/98 (March 22, 1988) [hereinafter *Canada – Herring and Salmon* Panel Report]

⁸⁷ *US- Gasoline* Panel Report, *supra* note 77, ¶ 6.33.

⁸⁸ *Ibid*; *US – Shrimp* Appellate Body Report, *supra* note 1, ¶ 141.

⁸⁹ Factsheet, ¶ 5.

letter dated 1st July, 2015 evidences the success of the WNSM scheme. Therefore, the measures are reasonably related to end objective.

Further, Article XX(g) requires the measures be made effective in conjunction with restrictions on domestic production or consumption. This is a requirement of “*even handedness*”.⁹⁰ It is submitted that while there is no evidence of regulation of fossil fuel, the WNSM DCR measures applied to all solar electricity generators, regardless of nationality.

c) *Application of the “chapeaux”.*

The application of the chapeaux requires determining whether the discrimination was i) arbitrary or unjustifiable, and ii) operating as a disguised restriction on trade.

i) In *US – Shrimp*, the measure was held unjustifiable as it (a) was too rigid, and (b) lacked good faith negotiations. It was accordingly held to be arbitrary in nature. In the present case, (a) Wingardium entered into a co-operative arrangements with the government of Leviosa, (b) the investors were aware of the measures as part of the Wino-Leviosan Agreement⁹¹, (c) DCR measures were lifted in good faith upon the request of Leviosan investors⁹², (d) the stringent measure was not severe in comparison to the burgeoning fiscal deficit and rising unemployment,⁹³ and (e) Leviosa engaged in consultation with Wingardium.

Therefore, the discrimination is justified.

ii) The considerations pertinent in deciding whether a measure amounts to “*arbitrary or unjustifiable discrimination*”, may also determine the presence of a “disguised restriction.”⁹⁴ It follows from the above that the DCR measures are not disguised restrictions on international trade.

E. CHALLENGED MEASURES ARE NOT INCONSISTENT WITH ARTICLE 2.1 OF THE TRIMS AGREEMENT.

The WNSM Programme does not trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and is therefore not in violation of Article 2.1 of

⁹⁰ *US – Gasoline* Appellate Body Report, at pp. 20-22.

⁹¹ Factsheet, ¶ 7.

⁹² Factsheet, ¶ 12; Annexure IV; Annexure V.

⁹³ Factsheet, 13.

⁹⁴ *US – Shrimp* Appellate Body Report, *supra* note 1, ¶¶ 164-165, 177.

the Trade-Related Investment Measures Agreement. A breach of Article 2.1 of the TRIMs is found by establishing: (i) an investment measure related to trade in goods; and (ii) inconsistency of that measure with Article III of the GATT 1994.

1. MEASURES NOT INCONSISTENT WITH ARTICLE III OF THE GATT 1994.

It is humbly contended that the DCR measures imposed on solar project developers, and FIT Scheme coupled with DCR measures are not inconsistent with Article III of the GATT 1994 and therefore, do not amount to TRIMs.

2. FIT SCHEME FALLS WITHIN THE SCOPE OF ARTICLE III:8(A) OF THE GATT 1994.

Alternatively, Article 3 of the TRIMs Agreement, states that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." In this regard, a finding of inconsistency with Article III of the GATT 1994 or Article 2.2 of TRIMs requires determining whether the measure is outside the scope of Article III:8(a) of the GATT 1994. Accordingly, it is submitted that if the FIT Scheme is inconsistent with Article III of the GATT 1994 or Article 2.2. of the TRIMs Agreement, then it is saved by exception under Article III:8(a) of the GATT.

3. DCR MEASURES ARE EXEMPTED UNDER ARTICLE XX OF THE GATT 1994.

Article 3 of the TRIMs prescribes that all exceptions under GATT 1994 shall apply to TRIMs inconsistent with the Agreement. Article XX operates to exempt measures from GATT obligations and consequently TRIMs.⁹⁵ In the present matter, the challenged measures are justified by Article XX(b) and Article XX(G) of the GATT 1994. Therefore, to the extent of the application of DCR measures, Wingardium is exempted of its obligation under the TRIMs Agreement.

III. THAT HEALTH DIRECTIVE 141/PP/CST IS CONSISTENT WITH INTERNATIONAL LAW.

The Department of Health of the Republic of Wingardium issued a directive mandating standardized packaging for all solar cell products in the interest of public health.⁹⁶ It requires that the laminate contain only the necessary information, all trademarks, marks and texts be

⁹⁵ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 23, WT/DS363/AB/R (Dec. 21, 2009).

⁹⁶ Annexure VIII, ¶ 6.

in the prescribed format as well as 90% of the package contain health warnings.⁹⁷ The measure has been taken in light of studies that revealed allergies and possible skin cancer caused due to use of the products.⁹⁸ The state's actions are consistent with international law as the Directive is compatible 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 CONSISTENT 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 may be encumbered by special requirements only to the extent justifiable.⁹⁹ The plain packaging requirement imposed by the Directive does not constitute such an encumbrance as 1) it does not fall within the scope of Article, 2) in *arguendo*, it is not in violation of Article 20, and 3) it is a justifiable encumbrance.

1. PLAIN PACKAGING IS OUTSIDE THE SCOPE OF ARTICLE 20 OF THE TRIPS AGREEMENT.

Article 20 prohibits the imposition of certain special encumbrances upon the use of trademarks. To encumber, in general parlance, means to hamper, impede, or burden.¹⁰⁰ The examples in the Article, however, indicate a positive requirement, not merely a prohibition or restriction.¹⁰¹ The plain packaging measure intends to ban or completely prohibit the use of trademarks and is, therefore, not merely an encumbrance,¹⁰² thereby falling outside the scope of Article 20.

⁹⁷ *Ibid.*

⁹⁸ Factsheet, ¶ 16; Annexure VIII, ¶ 1.

⁹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), Article 20 [hereinafter TRIPS].

¹⁰⁰ OXFORD DICTIONARY OF ENGLISH 577 (3rd ed. 2010).

¹⁰¹ Benn McGrady, *TRIPs and Trademarks: The Case of Tobacco*, 3 W. T. R. 1, 61-64 (2004)

¹⁰² 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), p. 10.

2. IN *ARGUENDO*, IT IS NOT EXPRESSLY IN VIOLATION OF ARTICLE 20 OF THE TRIPS AGREEMENT.

Even if the measure is considered a special encumbrance attracting the provisions of Article 20,¹⁰³ it is not in violation of the Article as a) it is presumed consistent until proven otherwise, and b) it is not expressly prohibited under the Article.

a) *The measure is to be presumed consistent.*

Generally, the burden of proof is on the party who asserts the affirmative in a claim or defence.¹⁰⁴ A law imposed by a Member will be treated as WTO-consistent until it is conclusively proven otherwise.¹⁰⁵ Article 20 imposes an obligation upon Members not to unjustifiably encumber by special requirements the use of a trademark in the course of trade.¹⁰⁶ It raises a presumption that actions undertaken by a Member would be justifiable encumbrances, if any. Therefore, the burden of proving that the measure is unjustifiable is upon the Member claiming the violation of Article 20.

b) *It is not expressly prohibited under the Article.*

As accepted by most writers, Article 20 provides three examples of special requirements, which are not necessarily unjustified.¹⁰⁷ Any interpretation to the contrary would deprive the word ‘unjustifiably’ of any meaning. Such would be contrary to the principle of effectiveness recognized as applicable in WTO disputes.¹⁰⁸ Therefore, the mere fact that the measure requires use of a trademark in a special form or in a manner detrimental to the capability of distinguishing products does not constitute violation of Article 20.

¹⁰³ Panel Report, *Indonesia- Certain Measures Affecting the Automobile Industry*, ¶ 14.278, WT/DS54/R (July 2, 1998) [hereinafter *Indonesia – Autos Panel Report*].

¹⁰⁴ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 1888, WT/DS268/AB/R (Dec. 17, 2004); Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc WT/DS344/AB/R (May 20, 2008).

¹⁰⁵ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 157, WT/DS213/AB/R (Dec. 19, 2002).

¹⁰⁶ TRIPS, Article 20.

¹⁰⁷ 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), ¶ 48 [hereinafter Gervais]; DE CARVALHO NP, *THE TRIPS REGIME OF TRADEMARKS AND DESIGNS* 427 (Kluwer Law International, 2007) [hereinafter CARVALHO].

¹⁰⁸ Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 80-81, WT/DS98/AB/R (Jan. 12, 2000); Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 88, WT/DS121/AB/R (January 12, 2000); Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 271, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 27, 2003); MITCHELL A, *LEGAL PRINCIPLES IN WTO DISPUTES* 53 (Cambridge University Press, 2008).

Therefore, the measure is not expressly prohibited by the Article and claims of violations must sufficiently prove that it is unjustifiable.

3. THE MEASURE IS A JUSTIFIABLE SPECIAL ENCUMBRANCE.

In order to be permissible within the scope of Article 20, a measure which imposes a special encumbrance must be justifiable. Public health as a reason for imposing the Directive is a valid justification as a) public health is a valid justification and b) plain packaging shall materially contribute to the objective.

a) *Public health is a valid justification*

Protection of human health is an eminent priority¹⁰⁹ and implementing policies for the same is a sovereign right¹¹⁰ of a state and takes primacy over trade objectives.¹¹¹ TRIPS must, therefore, be interpreted subject to considerations of public health as provided under i) Articles 7 & 8 of TRIPS, and ii) Doha Declaration.

i) Articles 7 & 8 of the TRIPS Agreement.

Articles 7 and 8 are important tools for the interpretation of the goals and limitations of the provisions of TRIPS.¹¹² Article 7 states that the object of the Agreement and provides that rights granted under TRIPS must be interpreted in order to promote social welfare and establishes a balance of rights and obligations,¹¹³ securing the right to public health.

Article 8 simultaneously lays down guiding principles in the interpretation of the treaty. As has been stated by the Panel in *EC – Trademarks and Geographical Indications*, the principle embodied in Article 8.1 is crucial in ensuring that Members are free to pursue legitimate

¹⁰⁹ *EC-Asbestos* Appellate Body Report, *supra* note 17.

¹¹⁰ WTO Ministerial Conference, Declaration of Punta del Este, Adopted on Sept 20, 1986; VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 50 (Routledge, 2012); S Ganguly, *Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113 (1999).

¹¹¹ *EPHA Position Paper: Striking the balance: Protecting Health, Protecting Investments*, available at <http://epha.org/IMG/pdf/EPHA_Position_Paper_on_Investment_Protection_in_TTIP-3.pdf>.

¹¹² Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, ¶¶ 7.26, 7.92, WT/DS114/R (April 7, 2000).

¹¹³ TRIPS, Article 7.

public policy objectives.¹¹⁴ It provides that Members are permitted to adopt measures necessary to protect public health.¹¹⁵

ii) Doha Declaration

The Declaration on the TRIPS Agreement and Public Health was adopted in a Ministerial Conference and therefore, constitutes an authoritative interpretation of the Agreement.¹¹⁶ Additionally, it amounts to a subsequent agreement between parties regarding the interpretation of the treaty or the application of its provisions.¹¹⁷ The Declaration, under paragraph 4, states that the Agreement must be interpreted and implemented in a manner supportive of the Member's right to protect public health.¹¹⁸ It also states that TRIPS must be read in light of the objectives and principles stated in the Agreement,¹¹⁹ as envisaged in Articles 7 & 8.

Therefore, measures or conditions imposed restricting the use of trademarks would be justifiable on account of public health under Art 20.¹²⁰

b) *Plain packaging shall materially contribute to the objective.*

In order to be justifiable, it is sufficient to prove that a measure shall materially contribute to the achievement of the stated objective.¹²¹ A mere indication, qualitative or quantitative, of the degree of that contribution is adequate and the actual effectiveness of a measure need not be established.¹²²

¹¹⁴ Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, ¶ 7.246, WT/DS290/R, (April 20, 2005) [*EC – Trademarks and Geographical Indications (Australia)* Panel Report].

¹¹⁵ TRIPS, Article 8.

¹¹⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Article IX:2.

¹¹⁷ Vienna Convention on the Law of Treaties, Article 31(3)(a), 23 May 1969 1155 U.N.T.S. 331; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 24, 2012) [hereinafter *US – Clove Cigarettes* Appellate Body Report].

¹¹⁸ World Trade Organization, Ministerial Decision of 14 November 2001, WT/MIN(01)/DEC/1.41 I.L.M. 746 (2002), ¶ 4 [hereinafter *Doha Declaration*].

¹¹⁹ *Doha Declaration*, ¶ 5(a).

¹²⁰ Andrew Mitchell, *Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging*, 22(3) PUBLIC LAW REVIEW (2011) [hereinafter *Face Off*].

¹²¹ *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 81, ¶ 150.

¹²² *Ibid.*

Justifiability under Article 20 is also not constrained by legitimate interests of trademark owners.¹²³ Moreover, any measure which can be proved to be necessary shall be considered justifiable.¹²⁴ Necessity has been discussed in the case of *EC – Asbestos* in context of Article XX of GATT to mean that no alternative measure, consistent with the Agreement, was available which could reasonably be employed.¹²⁵ It must also be for a legitimate objective.¹²⁶

The Directive was issued with the objective of reducing brand recognition in order to protect public health, a legitimate objective.¹²⁷ Due to the nature of the product, plain packaging of all Cells and Modules with absence of trademark and uniform packaging is a measure which could reasonably undertaken to inform the concerned market without any damage to the reputation of the manufacturers.

Therefore, plain packaging, adopted to implement the policy objective of protection of health of the public while balancing the rights of the manufacturers, is justifiable and thus does not violate Article 20.

B. THE HEALTH DIRECTIVE IS IN CONSONANCE WITH WINGARDIUM’S OBLIGATION UNDER ARTICLE 2.2 OF THE TBT AGREEMENT.

The terms of Article 2.2 of the TBT Agreement provide that that Members shall not adopt any technical regulations which create unnecessary obstacles to international trade.¹²⁸ It is submitted that the Directive is consistent with Wingardium’s obligations under Article 2.2 of TBT as the technical regulation 1) pursues a legitimate objective and 2) is not more trade-restrictive than necessary to fulfill that legitimate objective.

1. THE HEALTH DIRECTIVE PURSUES A LEGITIMATE OBJECTIVE.

It is submitted that the Health Directive mandates plain packaging of solar cells to protect human health. A legitimate objective refers to an aim or target that is lawful, justifiable, or

¹²³ CARVALHO, *supra* note 107, at p 441.

¹²⁴ BENN MCGRADY, *supra* 101.

¹²⁵ 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).

¹²⁶ *US – Shrimp* Appellate Body Report, *supra* note 1, ¶ 121.

¹²⁷ CARVALHO, *supra* note at 107, pp 424, 427.

¹²⁸ TBT Agreement, Article 2.2.

proper.¹²⁹ The objective of a measure can be determined by considering the text of the statute, legislative history, and other evidence regarding the structure and operation of the measure.¹³⁰ Article 2.2 also explicitly provides for protection of human health or safety, *inter alia*, as a legitimate objective.¹³¹

It is submitted that the preliminary study by the Department of Health of Wingardium shows that Crystalline Silicon solar cells cause allergies and in some cases, skin cancer to individuals in close contact with panels containing these cells.¹³² This is further corroborated by the study conducted by the Wingardian Health Initiative that Crystalline Silicon technology solar cells are a health hazard and should be avoided despite their ability to significantly reduce carbon emissions.¹³³

Therefore, the objective of the Health Directive is to protect the health of individuals from fatal allergies and skin cancer through reduction in usage of Crystalline Silicon technology products by introducing plain packaging of the solar cells. Thus, it pursues a legitimate objective.

2. IT IS NOT MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE.

The assessment of necessity of a measure under the Article is based on the test developed under Article XX of GATT 1994.¹³⁴ It requires weighing and balancing of certain factors.¹³⁵ It is submitted that the Health Directive is not more trade restrictive than necessary to fulfill the legitimate policy objective as 1) it makes a material contribution to the legitimate objective, 2) it is not unnecessarily trade restrictive, 3) grave consequences arise from non-fulfillment of the objective and 4) no possible alternatives are reasonably available.

¹²⁹ 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].

¹³⁰ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 314, WT/DS381/AB/R (June 13, 2012) [hereinafter *US-Tuna* Appellate Body Report].

¹³¹ TBT Agreement, Article 2.2

¹³² Factsheet, ¶ 16.

¹³³ Annexure VIII, ¶ 1.

¹³⁴ Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.368, WT/DS406/R (April 24, 2012) [hereinafter *US-Clove* Panel Report]; Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶7.667, WT/DS384/R / WT/DS386/R (July 23, 2012) [hereinafter *US – COOL* Panel Report].

¹³⁵ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R, (Jan. 10, 2001) ; Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US – Tuna II, and US –COOL*, 8 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 1, 11 (March 2013).

a) *The measure makes a material contribution to the legitimate objective.*

It is submitted that the degree of achievement of a particular objective may be discerned from the ‘design, structure, and operation of the technical regulation, as well as from evidence relating to its application – to what degree, if at all, the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member’.¹³⁶

It is submitted that the main aim of initiating plain packaging is to reduce the brand recognition of Crystalline Silicon products, supported by the evidence from other countries.¹³⁷ This will allow the public and manufacturers a better opportunity to select other viable sources, such as thin film technology.¹³⁸ Thereby, the measure shall contribute in alleviating the health hazards related to it. Thus, the measure makes a material contribution in achieving the objective of protecting human health and safety.

b) *The measure is not unnecessarily trade restrictive.*

The term trade-restrictive refers to a measure having a limiting effect on trade.¹³⁹ Measures that are trade-restrictive include those that impose any form of “*limitation of imports, discriminate against imports or deny competitive opportunities to imports*”.¹⁴⁰

It is submitted that the Appellate Body, in *US – Tuna II*, found that “some” trade-restrictiveness is allowed. Excessive restrictions than necessary to achieve the required degree of contribution on international trade are, however, prohibited.¹⁴¹

It is submitted that plain packaging applies to both domestic and foreign products and thus does not discriminate against imports. Further, it does not seek to impose ‘any limitation on imports’ or ‘deny competitive opportunity to importers’ as the measure does not impose a complete ban on crystalline silicon cells. This is in sole consideration of the fact that a

¹³⁶ *US – COOL* Appellate Body Report, *supra* note 129, ¶¶ 373, 390.

¹³⁷ Annexure VIII, ¶ 4.

¹³⁸ *Ibid.*

¹³⁹ Panel Report, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.129, WT/DS90/R (Apr. 6, 1999); *US-COOL* Appellate Body Report, *supra* note 129, ¶ 371; *US-Tuna* Appellate Body Report, *supra* note 130, ¶ 319.

¹⁴⁰ *US-Tuna* Appellate Body Report, *supra* note 130.

¹⁴¹ *US-Tuna* Appellate Body Report, *supra* note 130; *US – COOL* Appellate Body Report, *supra* note 129, ¶ 375.

complete ban will result in significant losses to both foreign investors and domestic industry, who utilize the technology for production of Solar PV modules.¹⁴²

c) *Grave consequences arise from non-fulfillment of the objective.*

The term “risk of non-fulfillment”, under Article 2.2, requires consideration of the likelihood and the gravity of potential risks.¹⁴³ The determination requires taking into account the risks that would result from non-fulfillment of the stated objective. Further, relevant elements of consideration for the assessment of such risk are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products’.¹⁴⁴

It is submitted that in the instant case relevant considerations are, *inter alia*, the preliminary study by the Department of Health of Wingardium which reveals that Crystalline Silicon solar cells are cause allergies and in some cases result in skin cancer,¹⁴⁵ and the study conducted by Wingardian Health Initiative, which concluded that Crystalline Silicon Technology Solar Cells are a health hazard and should be avoided.¹⁴⁶

The objective of the Health Directive in mandating plain packaging of solar cells and modules is the protection of human health. Since the technology is harmful to persons coming in contact with the noxious highly pressurized gases deposited in the process,¹⁴⁷ the objective can be sufficiently achieved by reduction in the usage of the technology. In the instant case, the gravity of the potential risk is high as non-fulfillment of the objective leads to risks of fatal allergies and skin cancer and hamper the protection of human health. Thus, it can be concluded that if the objective is not achieved, grave consequences shall arise.

d) *No less-trade restrictive alternatives are reasonably available.*

A measure is not considered necessary if there are less trade restrictive alternatives reasonably available.¹⁴⁸ The alternatives should be capable of making an equivalent contribution to the objective and should be reasonable available.¹⁴⁹

¹⁴² Annexure VIII, ¶ 4.

¹⁴³ *US-Tuna* Appellate Body Report, *supra* note 130, ¶¶ 7.466–7.467.

¹⁴⁴ TBT Agreement, Article 2.2

¹⁴⁵ Factsheet, ¶ 16.

¹⁴⁶ Annexure VIII, ¶ 1.

¹⁴⁷ Annexure VIII, ¶ 2; Fact Sheet, ¶ 16.

¹⁴⁸ *US-Tuna* Appellate Body Report, *supra* note 130, ¶ 304.

¹⁴⁹ *US — Tuna II (Mexico)* Appellate Body Report, *supra* note 141, ¶ 322.

It is submitted that the Health Directive adopted the least trade restrictive measure by mandating plain packaging of solar cells and modules. In the present case, instead of banning the import of Crystalline Silicon Technology products altogether, the government chose the less-restrictive way by adopting plain packaging.¹⁵⁰

Therefore, it is submitted that no other reasonably available less trade-restrictive alternative will be able to achieve the objective at the same level.

Moreover, scholarly opinion suggests that when the measure seeks to achieve a highly valued interest such as protection of human life, presumption is in favor of this measure.¹⁵¹ If there is speculation whether the suggested alternative would be able to achieve the objective as efficaciously, the challenged measure is upheld.¹⁵² This is because for an objective as important as protection of health, the cost of erroneous decisions could be very high.

C. THE DIRECTIVE IS CONSISTENT WITH ARTICLE 16.1 OF THE TRIPS AGREEMENT.

Article 16 confers on the owner of a registered trademark a minimum level of exclusive rights which are to be guaranteed by all WTO Members in their domestic legislation.¹⁵³ It protects the owner against infringement by unauthorized third parties with similar or identical trademarks in course of trade.¹⁵⁴ The claim that the Directive violates this provision is unsustainable as 1) there exists no “right to use” a trademark, and 2) the provision does not preserve the right of Member countries to grant a right to use.

1. THERE EXISTS NO RIGHT TO USE A TRADEMARK UNDER INTERNATIONAL LAW.

It is a settled position of law that trademark rights are primarily negative rights as granted under Article 16.1.¹⁵⁵ They are a right to exclude, rather than a right to use.¹⁵⁶ Member nations had, in fact, rejected a proposal to include a positive right to use a trademark within

¹⁵⁰ Annexure VIII, ¶ 4.

¹⁵¹

¹⁵² Alan O. Sykes, *The Least Trade Restrictive Means*, 70(1) U. CHI. L. REV. 403, 416 (2003).

¹⁵³ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Feb. 1, 2002) [hereinafter *US – Section 211 Appropriations Act Appellate Body Report*].

¹⁵⁴ TRIPS, Article 16.1.

¹⁵⁵ CARVALHO, *supra* note 107, at 343; *EC – Trademarks and Geographical Indications (Australia)* Panel Report *supra* note 114 .

¹⁵⁶ CARVALHO, *supra* note 107, at 343.

the Agreement.¹⁵⁷ Additionally, in interpreting a treaty, the most obvious interpretation is always the one intended unless it leads to absurdity.¹⁵⁸ Since the Article only specifies the right of the owner to prevent other unauthorized uses, this cannot be extended to a right to use the trademark itself.

Moreover, there can be no implication of a right to use under Article 16.1 specifically. Gervais contends that there is an implied right to use in trademark law in consonance with the spirit of the Paris Convention.¹⁵⁹ The respondent believes that even if such a right did exist, it would not source from Article 16.1, but from other Articles of the Agreement and the Paris Convention.

2. WINGARDIAN ACT DOES NOT FALL WITHIN THE SCOPE OF ARTICLE 16.1 OF THE TRIPS AGREEMENT.

Article 16.1 grants the exclusive rights upon registered owners of trademarks, implying generally that rights emanate from the factum of registration.¹⁶⁰ The last sentence of the Article, however, recognizes that Members may make certain rights available “on the basis of use” of the trademark.¹⁶¹ In *US- Section 211 Appropriations Act*, the statement has been interpreted to permit Members to grant the exclusive rights on the basis of registration or use within their respective jurisdictions.¹⁶² Therefore, the Article only protects the “exclusive rights” contemplated under Article 16.1 but granted in a different manner by national legislations. It does not permit the expansion of the scope and nature of rights under the Article itself. Thus, although the Wingardium Trademarks Act protects the right to use,¹⁶³ it is not protected under Article 16. Any violation of the provision of the domestic laws, unless inconsistent with WTO law, should be claimed under the national judicial system of the country and cannot be protected at this forum.¹⁶⁴

Therefore, the measure is not inconsistent with the provisions of Article 16.1.

¹⁵⁷ Mark Davison, *The Legitimacy Of Plain Packaging Under International Intellectual Property Law* 4, in A. MITCHELL, T VOON AND J. LIBERMAN (EDS), *PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES* (Edward Elgar, 2012)[hereinafter DAVIDSON].

¹⁵⁸ *Ibid.*, at 7.

¹⁵⁹ Gervais, *supra* note 107, at pp. 59, 66.

¹⁶⁰ TRIPS, Article 16.1.

¹⁶¹ *Ibid.*

¹⁶² *US – Section 211 Appropriations Act* Appellate Body Report, *supra* note 153, ¶¶ 186–188.

¹⁶³ Wingardium Trademark Act, § 28.

¹⁶⁴ *US – Section 211 Appropriations Act* Appellate Body Report, *supra* note 153.

D. THE MEASURE IS CONSISTENT WITH THE OBLIGATIONS IMPOSED BY ARTICLE IX:4 OF GATT 1994.

Article IX:4 of GATT provides that laws and regulations of a Member country concerning marks of origin of imported products shall not materially reduce value or unreasonably increase costs of the products.¹⁶⁵ The Directive is in conformity with the provision as 1) it falls beyond the scope of the Article and 2) in *arguendo*, it does not materially reduce value and unreasonably increase cost of the products.

1. THE MEASURE FALLS BEYOND THE SCOPE OF THE ARTICLE.

Article IX of GATT deals with marks of origin and refers to the regulation of marking of imported products.¹⁶⁶ A mark of origin is a permanent sign on a product that identifies its geographical origin,¹⁶⁷ its primary purpose being the protection of consumers against fraudulent or misleading indications.¹⁶⁸ These marks indicate the national origin of a country specifically,¹⁶⁹ and do not concern with trademarks in general. Moreover, the provision does not forbid the adoption of laws or regulations by the Member country, rather merely imposes a limit on such regulations.¹⁷⁰

The Technical Requirements provided for a “country of origin” marking on the products,¹⁷¹ which went unchallenged by the Claimants. Moreover, the Directive permitted the marking requirement as required under the Technical Regulations and did not impose any new restrictions.¹⁷² Restrictions were placed on trademarks and therefore, the directive is beyond the scope of Article IX.

¹⁶⁵ GATT 1994, Article IX:4.

¹⁶⁶ *US-Tuna* Panel Report, *supra* note 75, ¶ 5.41.

¹⁶⁷ ALAN V DEARDORFF, *TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS* (2001); EUROPEAN COMMISSION Directorate-General for Trade, *Made in the EU Origin Marking – Working Document of the Commission Services* available at < http://trade.ec.europa.eu/doclib/docs/2005/may/tradoc_115557.pdf > at p. 1.

¹⁶⁸ GATT, Article IX:2; League of Nations, International Economic Conference. ‘Marks of Origin.’ Geneva. 1927. C.E.I. 20, at 18

¹⁶⁹ Wendy A. Johnecheck, *Consumer Information, Marks of Origin and WTO Law: A Case Study of the United States – Certain Country of Origin Labeling Requirements*, Dispute Discussion Paper No. 43,10 available at < http://www.nutrition.tufts.edu/documents/fpan/wp43_cool.pdf >.

¹⁷⁰ *Ibid.*

¹⁷¹ Annexure-1, ¶ (d)(iv).

¹⁷² Annexure VIII, ¶¶ 6 (i)-(iii).

2. ALTERNATIVELY, IT DOES NOT MATERIALLY REDUCE VALUE AND UNREASONABLY INCREASE COST.

Even if the Directive was considered to be falling within the scope of Article IX, it is not inconsistent with Article IX:4 as the measure a) does not materially reduce the value of the product and b) does not unreasonably increase its cost.

a) *It does not materially reduce the value of the products.*

Article IX, as interpreted by the Panel, imposes an MFN requirement upon the Members.¹⁷³ The Members are therefore, not required to accord the products national treatment in order to maintain their value. The Directive merely requires the marking on the product to conform to certain prescribed and acceptable regulations.¹⁷⁴ This requirement has been imposed on all products of all origins without any differentiation, including goods from Leviosa, Redendo and Wingardium.¹⁷⁵ Therefore, there is no violation of a National Treatment or MFN clause.

Since, all the products are brought at par, there is no reduction in the value of the product. The origin country of the product shall still be present on the product along with other information. Therefore, the measure does not materially reduce the value of the goods.

b) *It does not unreasonably increase the cost of production.*

The cost of the packaging of the products has not been increased due to the Directive. In fact, maintaining uniformity shall prove to be more cost-efficient for the manufacturers as lesser resources shall be utilized in the deigning and marketing of the products to enable differentiation. Therefore, the directive does not unreasonably increase the cost of production of the products. The measure is, thus, not violative of Article IX:4 of GATT.

Therefore, the Health Directive is consistent with international law.

¹⁷³ *US – Tuna Panel Report, supra note 75, ¶ 5.41.*

¹⁷⁴ *Annexure VIII, ¶¶ 6 (i)-(iii).*

¹⁷⁵ *Ibid.*

REQUEST FOR FINDINGS

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

1. Leviosa's exercise of procedural rights under the Dispute Settlement Understanding lacks good faith and the Panel declines to exercise jurisdiction;
2. The Domestic Content Requirements are in conformity with WTO Agreements and consistent with –
 - a. Articles 3.1(b) and 3.2 of the SCM Agreement since coupled with the FIT Scheme it cannot be classified as a subsidy;
 - b. Article III of the GATT 1944 since it maintains an equality of competitive conditions between like products;
 - c. Article 2.1 of the TRIMS Agreement since it is not inconsistent with Article III of the GATT 1994; and
3. The Health Directive mandating plain packaging is in conformity with the WTO Agreements as it is consistent with –
 - a. Article 20 of the TRIPS Agreement since it does not unjustifiably encumber the use of trademarks;
 - b. Article 2.2 of the TBT Agreement since it does not qualify as a technical barrier to trade;
 - c. Article 16.1 of the TRIPS Agreement since the provision does not incorporate a right to use;
 - d. Article IX:4 of the GATT 1994 since it does not impose requirements of marking that materially reduce the value and/or unreasonably increase the costs of the products.

All of which is most respectfully submitted.

COUNSEL FOR THE REPUBLIC OF WINGARDIUM
(Respondent)

-Written Submissions on behalf of the Respondent-