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13TH GNLU INTERNATIONAL LAW MOOT COURT COMPETITION 2022

In the WORLD TRADE ORGANIZATION PANEL

VALARIA – MEASURES AFFECTING THE IMPORTATION AND MARKETING OF COSMETIC PRODUCTS WT/DSXXX

DANIZIA

(*CLAIMANT*)

v.

FEDERAL REPUBLIC OF VALARIA

(*RESPONDENT*)

WRITTEN SUBMISSION *for* COMPLAINANT

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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPANSIONS
AB/R	Appellate Body/Report
Art.	Article
Doc.	Document
DSB/M	Dispute Settlement Body/Mechanism
DSU	Dispute Settlement Understanding
ed.	Edition
et. Al.	And others
Govt.	Government
Id.	*Ibidem*
i.e.	Id Est
No.	Number
PR	Panel Report
p./ pp.	Page/ Pages
s.	Section
WTO	World Trade Organization
WT/DS	World Trade/ Dispute Settlement
v.	Versus

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STATEMENT OF FACTS

Danizia **["the Complainant" or "Danizia"]** is a developing island nation and a WTO member. The Danizian chemical industry is known for pioneering in scientific advancement resulted from animal testing. Such advancements include innovative psychiatric drugs and camouflage cosmetics. It relies extensively on test data obtained from decapods and cephalopods.

The Federal Republic of Valaria **["the RESPONDENT" or "Valaria"]** is a developed nation with a population of 24 million. It is known for high level of endemism as well as animal welfare legislations and products. It is a crusader for resilience at WTO.

DATES	EVENTS
April 1, 2014	The RESPONDENT enacted Sustainable Taxation Act with the primary aim of reducing carbon emission.
February-March, 2020	The RESPONDENT conducted an online survey to garner and understand opinion of all the stakeholders affected by Sustainable Consumption and Production Initiative.
May-June. 2020	The survey was followed by a follow-up survey which revealed that legislative action needs to be prioritized in the areas of housing appliances, and food and clothing before cosmetics industry in order to secure animal welfare.
July 4, 2020	Valaria set up a special committee with instructions to assess the environmental impact of animal testing. In its communication to the committee, Valaria expressed its intention to account for reasons favoring alternative test methods.
September 28, 2020	The special committee released its report in accordance with instructions from the Valarian Ministry.
October 15, 2020	Valarian Herald reported that the govt has already decided to curb

animal testing in cosmetic industry. It also reported that the domestic cosmetic industry is struggling to compete with imports.

April 1, 2021 The RESPONDENT published the draft Ethical Cosmetics Act, 2021 **["ECA"]** and draft Sustainable Taxation (Amendment) Act, 2021 **["STA"]**. CEO of Valaria's largest cosmetic producer supported these legislations. They have been campaigning for the same for they were losing market share to cheaper imports.

April 23, 2021 The RESPONDENT notified ECA to Technical Barriers to Trade [**"TBT"**] Committee.

Shortly after the Notification Danizia sent written comments to Valaria requesting it to review the inclusion of Cephalopods in ECA.

July 3-4 2021 Several WTO members expressed their concerns regarding ECA noting that the Act misleads consumer, disregards equivalency arrangements, sets up prohibitive costs and imposes barriers to trade for fast moving goods such as cosmetics.

October 17, 2021 The RESPONDENT enacted both the ECA and SCA without incorporating any of the suggested changes

November 23, 2021 The COMPLAINANT requested to form Panel.

December 2021 No Danizian certification body was accredited by Valaria.

January 8, 2022 Dispute Settlement Body **["DSB"]** accepted the request from Danizia and formed a panel chaired by Mr. George Oscar Bluth II.

February 4, 2022 Isle of Nysa requested to submit an *amicus curiae* brief before the first substantive meeting of the Panel. Valaria objected to acceptance of the said request.

February 6, 2022 The COMPLAINANT supported Isle of Nysa's request.

MEASURES AT ISSUE

I

WHETHER OR NOT THE PANEL SHOULD ACCEPT ISLE OF NYSA'S REQUEST TO FILE AN AMICUS CURIAE BRIEF?

II

WHETHER OR NOT THE LABELLING REQUIREMENT UNDER SECTION 6 OF THE ECA IS IN VIOLATION WITH ART. 2.2 OF THE TECHNICAL BARRIERS TO TRADE AGREEMENT?

III

WHETHER OR NOT THE CERTIFICATION REQUIREMENT UNDER SECTION 8 OF ECA IS IN VIOLATION OF ART. 5.2.6 OF THE TECHNICAL BARRIERS TO TRADE AGREEMENT?

IV

WHETHER OR NOT EQUIVALENCY FEE UNDER SECTION 5 OF THE STA IS IN VIOLATION OF ARTICLE III:2 OF THE GENERAL AGREEMENT ON TARIFF AND TRADE?

V

WHETHER OR NOT THE PANEL SHOULD EXERCISE ITS DISCRETION UNDER ARTICLE 19.1 OF THE DISPUTE SETTLEMENT UNDERTAKING WITH RESPECT TO DANIZIA'S REQUEST FOR RECOMMENDATION?

SUMMARY OF PLEADINGS

I. ISLE OF NYSA'S REQUEST TO FILE AN *AMICUS CURIAE* BRIEF SHOULD BE ACCEPTED AND CONSIDERED IN THIS DISPUTE.

Art. 13 of the DSU empowers the panel to accept unsolicited *amicus curiae* briefs from WTO member countries. Isle of Nysa's request for submitting an *amicus curiae* brief should be accepted as: *firstly*, the panel's authority under Art. 13 of DSU is comprehensive in nature; and *secondly*, Isle of Nysa's *amicus curiae* brief is unbiased and pertinent to the dispute. The brief seeks to submit both factual and legal information on issues that are directly relevant to the dispute. It shall assist the panel in arriving at an objective assessment of facts and circumstances pertaining to the dispute.

II. LABELLING REQUIREMENT UNDER S.6 OF THE ETHICAL COSMETICS ACT, 2021 IS IN VIOLATION WITH ART. 2.2 OF TBT AGREEMENT.

Art. 2.2 of TBT provides that, technical regulations must not be adopted with a view to or with the effect of creating unnecessary obstacles to international trade. Valaria imposed a labelling requirement on manufacturers of cosmetic products through Section 6 of the ECA. The labelling requirement is created with a view to restrict competitiveness of Daniza's cosmetic products as the measure requires them to be labelled as 'harmful'. The measure is in violation of obligations under Art. 2.2 of TBT as: *firstly*, it constitutes a technical regulation within the meaning of Annex 1.1 of TBT; *secondly*, it does not pursue a legitimate objective; *thirdly*, it is more trade restrictive than necessary to fulfil the stated objective; and *fourthly*, less trade restrictive alternative measures are reasonably available to Valaria.

III. THE CERTIFICATION REQUIREMENT UNDER SECTION 8 OF THE ECA IS IN VIOLATION OF ART. 5.2.6 OF THE TBT AGREEMENT.

Art. 5.2.6 of the TBT Agreement provides that siting of facilities used in conformity assessment procedures must not cause unnecessary inconvenience to applicants or their agents. Valaria mandated compliance with labelling requirement by obtaining a certification of recognition before marketing a product. This certification requirement is in violation of Art. 5.2.6 of TBT as: *firstly*, it is a conformity assessment procedure; *secondly*, it causes unnecessary inconvenience to the applicants or their agents; and *thirdly*, it is applied more strictly than necessary to provide adequate confidence of conformity to Valaria. The process is cumbersome, centrally controlled by the Valarian government, and creates a *de facto* restrictive ban on international trade.

IV. SECTION 5 OF THE STA VIOLATES OBLIGATIONS PROVIDED UNDER GATT.

GATT Art. III:2 establishes a National Treatment obligation on the contracting parties whereby no regulation, law, or taxation pattern can be applied as a protectionist measure. Valaria introduced a tax through Section 5 of STA to be borne by Danizian manufacturers for relying on animal test data while assessing the safety of cosmetic products. The taxation measure disregards the distinction between humane and inhumane methods of testing and results in imported cosmetic products getting taxed in excess of like domestic products. This measure violates the obligation set under GATT as: *firstly*, the taxation measure is not in compliance with GATT Art. III:2, *First Sentence*; and *secondly*, the taxation requirement is not justified under the substantive provisions of GATT Art. XX.

V. THE PANEL SHOULD EXERCISE ITS DISCRETION UNDER ART. 19.1 OF THE DSU WITH RESPECT TO DANIZIA'S REQUEST FOR A RECOMMENDATION.

Art. 19.1 of DSU stipulates that when a panel finds a measure to be inconsistent with a covered agreement, it shall recommend the member concerned to bring the measure inconformity with the agreement. Valaria has not accredited sufficient certification bodies outside of Valaria and the date of entry into force of the ECA did not provide sufficient time to the manufacturers to adjust to the new CAP. The panel should exercise its discretion to recommend Valaria to postpone the CAP measure for a year until sufficient certification bodies are accredited as: *firstly*, the established violations nullify or impair benefits accruing to Danizia within the meaning of Art. XXIII: 1(a) of GATT; and *secondly*, the panel has the discretion to recommend Valaria to postpone implementation of CAP.

LEGAL PLEADINGS

I. ISLE OF NYSA'S REQUEST TO FILE AN *AMICUS CURIAE* BRIEF SHOULD BE ACCEPTED AND CONSIDERED IN THIS DISPUTE

[¶ 1] *Amicus Curiae* is a "friend of the court",[1] and assists the proceedings by offering evidence outside the record and advancing unique arguments.[2] Art. 13.1 of the Dispute Settlement Understanding ("**DSU**") empowers the panel to seek information from any relevant source.[3] The Appellate Body ("**AB**") in *EC – Sardines*,[4] confirmed that it is entitled to accept *amicus curiae* briefs from a WTO member.

[¶ 2] *Amicus curiae* briefs have been accepted both when they were attached to the participant's submissions,[5] and when they were filed separately by private individuals and organizations.[6] The COMPLAINANT supports Isle of Nysa's request to file *amicus curiae* brief and submits that the Panel's authority under Art. 13 of DSU is comprehensive in nature **(A)**; and that Isle of Nysa's *amicus curiae* brief is unbiased and pertinent to the dispute **(B)**.

A. The Panel's authority under Art. 13 of DSU is comprehensive in nature.

[¶ 3] The panel's authority is comprehensive, and it may "seek information and technical advice" from any 'relevant' source it deems appropriate.[7] The panel is also empowered to accept unsolicited briefs.[8] For instance, the Panel sought relevant factual and legal information from the European Communities even when it was not a party to the dispute.[9] Further, the participation by a member as *amicus curiae* is not prohibited merely because DSU stipulates provisions for third party submissions.[10]

[¶ 4] Isle of Nysa could avail third party rights; however, it may choose to participate in

[1] World Trade Organisation, Chapter 9.3 *Participation in dispute settlement proceedings* of Dispute Settlement System Training Module, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm.
[2] Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 COLORADO LAWYER 23 (Apr. 2017).
[3] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13.1, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter 'DSU'].
[4] Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶¶ 164, 167, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002) [hereinafter ABR *EC-Sardines*].
[5] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶79, WTO Doc. WT/DS58/AB/R, (adopted Nov. 6, 1998) [hereinafter ABR *US-Shrimp*].
[6] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶55, WTO Doc. WT/DS135/AB/R (adopted Apr.5, 2001) [hereinafter ABR *EC -Asbestos*].
[7] ABR *US – Shrimp*, *supra* note 5, ¶ 104.
[8] ABR *US – Shrimp*, *supra* note 5, ¶¶ 108 &109.
[9] Panel Report, *Turkey – Restrictions on Import of Textile and Clothing Products*, ¶ 4.1- 4.3, WTO Doc. WT/DS34/R, (adopted May 31, 1999).
[10] Appellate Body Report *EC-Sardines*, *supra* note 4, ¶165.

the dispute as *amicus curiae* instead. The panel is authorized to even consider unsolicited briefs submitted by Non-Governmental Organizations ("**NGO**").[11] The AB in *US – Shrimp*,[12] agreed that a WTO Member must not be accorded a treatment less favorable than non-members with regards to participating in a dispute as *amicus curiae*. Since Isle of Nysa is a WTO member,[13] it must not be accorded a treatment less favorable than non-members. Hence, the Panel should exercise its discretion to accept and consider information put forth by Isle of Nysa as the brief is submitted without causing any undue delay in the proceedings.[14]

B. Isle of Nysa's *amicus curiae* brief is unbiased and pertinent to the dispute.

[¶ 5] Art. 11 of DSU requires that the panel makes an objective assessment of the facts present before it.[15] This obligation is further strengthened by Art. 12.2 of DSU calling for flexible procedures to ensure high quality panel reports.[16] The COMPLAINANT submits that Isle of Nysa's *amicus curiae* brief should be accepted by the Panel in the present proceedings because ***firstly***, the brief is relevant to the dispute; and ***secondly***, participation of many countries as third party undermines party's right to effective Dispute Settlement Mechanism ("**DSM**") redressal.

[¶ 6] ***Firstly***, participation of members as *amicus curiae* leads to better factual and legal information made available for the use of the panel.[17] The amicus briefs are relevant to this dispute as Isle of Nysa seeks to provide factual information which is pertinent to the terms of reference in the present dispute.[18] Since the COMPLAINANT is a developing country,[19] and predominantly relies on animal testing for scientific and cosmetic research,[20] it is unlikely to have access to evidence on lack of efficiency of alternative methods of testing. Hence, it would benefit largely from Nysan submissions of evidence and legal arguments.

[¶ 7] ***Secondly***, participation of many countries as third parties has been found to

[11] Appellate Body Report *US – Shrimp*, *supra* note 5, ¶¶ 104 106.
[12] *Id*.
[13] Moot problem, ¶3.2
[14] Statement by the Chairman of the Council, *Third Party Participation in Panels*, 1, WTO Doc. C/COM/3 (Jun. 27, 1994).
[15] DSU, Art. 11; Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complainant)*, ¶1139, WTO Doc. WT/DS353/AB/R (adopted Mar. 12, 2021).
[16] DSU, Art. 12.
[17] Joseph Keller, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments*, 33(3) INTERNATIONAL JOURNAL OF LEGAL INFORMATION 449, 456 (2005).
[18] Moot problem, ¶4.10
[19] Moot problem, Clarification no.1.
[20] Moot problem, ¶4.1

adversely affect the dispute settlement mechanism as it causes undue delays.[21] Further, compliance with the panel's findings has been less likely when the number of third parties is higher.[22] Submissions become redundant in a situation where there are several third parties, as their contentions have already been addressed by one of the parties.[23] It is to be noted that five countries have already participated as third parties.[24] Therefore, Isle of Nysa's brief would prevent the perils associated with unnecessary participation of many countries as third parties.

[¶ 8] ***Therefore***, the Panel should exercise its discretion and accept Isle of Nysa's amicus brief as it is pertinent to the dispute, assists the panel in objective assessment of facts, and saves the proceedings from incurring undue delays.

II. LABELLING REQUIREMENT UNDER SECTION 6 OF THE ETHICAL COSMETICS ACT, 2021 IS IN VIOLATION WITH ART. 2.2 OF TBT AGREEMENT.

[¶ 9] Art. 2.2 of Technical Barriers to Trade ("**TBT**") Agreement provides those technical regulations must not be adopted with a view to or with the effect of creating unnecessary obligations to international trade.[25] The COMPLAINANT submits that Ethical Cosmetics Act, 2021 ("**ECA**") is inconsistent with Art. 2.2 of TBT and hence, results in violation of WTO obligations. It stipulates that a member must ensure that the technical regulation does not create unnecessary obstacles to international trade, and that it is not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks that non-fulfilment would create.[26] It is submitted that the labelling requirement under ECA constitute a technical regulation **(A)**; pursue an illegitimate objective **(B)**; and is more trade restrictive than necessary to fulfill the stated objective **(C)**.[27]

A. Labelling requirement constitutes a technical regulation.

[¶ 10] A technical regulation should apply to an identifiable group of products, lay down product characteristics, and require mandatory compliance with the specified product

[21] Marc Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 58(3) WORLD POLITICS 446 – 477 (2006).
[22] Nikos Lavranos, *The (ab)use of Third-Party Submissions*, 5(1) EUROPEAN INVESTMENT LAW AND ARBITRATION REVIEW ONLINE 426-436 (2020).
[23] Lauren Konken, *Silence is Golden? Revisiting Third Party Participation in World Trade Organization Litigation* 23 (Sep. 2018).
[24] Moot Problem, ¶4.9.
[25] Agreement on Technical Barriers to Trade, art. 2.2, Jan. 1, 1995, 1868 U.N.T.S.120, 18 I.L.M. 1079 [hereinafter 'TBT']
[26] Appellate Body Report, *United States- Certain Country of Origin Labelling (COOL) Requirements*, ¶369, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted on Jun. 29, 2012) [hereinafter ABR *US – COOL*].
[27] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing & Sale of Tuna and Tuna Products*, ¶ 318, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter ABR *US - Tuna*].

characteristics.[28] Accordingly, a technical regulation must lay down product characteristics such as, *inter alia*, composition of product, symbols or labelling requirements.[29] Further, the elements such as enforceability, binding nature under the member's law, sanctions to non-compliance, enforcement mechanism, and prescriptive language indicate the mandatory nature of technical regulation.[30]

[¶ 11] In the present case, Section 6 of ECA is a technical regulation as, ***firstly***, it is applicable to 'cosmetics' which are defined in Section 2(g) of the ECA,[31] ***secondly***, it lays down conditions under which products 'must' be labelled as 'harmful' or 'not harmful';[32] and ***thirdly***, it lays down an enforcement mechanism which necessitates compliance with the regulation before a product is marketed in Valaria.[33] Further, compliance with labelling requirement is mandatory as evidenced by the use of 'must' for labelling of products.[34] Thus, labelling requirement provided under ECA is a technical regulation.

B. Labelling requirement does not pursue a legitimate objective.

[¶ 12] A legitimate objective refers to an aim that is lawful, justifiable or proper.[35] The technical regulation must pursue a legitimate objective for it to not violate Art. 2.2 of TBT.[36] However, the degree of contribution made by the measure to such objective must be assessed.[37] While making such an assessment, the panel must take into account all the evidence put forth before it and not be limited to member's characterization.[38]

[¶ 13] A careful perusal of "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure"[39] reveals that the objective of Valarian government *prima facie* is promoting its own cosmetic industry that is predominantly cruelty

[28] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.1, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted Jun. 18, 2014); ABR *EC – Sardines*, *supra* note 4, ¶ 176; Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.24, WTO Doc. WT/DS406/R (adopted Sep. 11, 2011) [hereinafter PR *US – Clove*].
[29] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.149, WTO Doc. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted Jun. 28, 2018) [hereinafter PR *Australia – Plain Packaging*].
[30] PR *Australia – Plain packaging*, *supra* note 29, ¶7.164 – 7.168.
[31] Moot problem, pg. 16, The Ethical Cosmetics Act 2021, § 2(g).
[32] Moot problem, pg. 16, The Ethical Cosmetics Act 2021, § 2(g).
[33] Moot problem, pg. 16, The Ethical Cosmetics Act 2021, §8.
[34] Moot Problem, pg. 21, The Ethical Cosmetics Act 2021, Annexure B.
[35] ABR *US - Tuna*, *supra* note 27, ¶318.
[36] TBT, Article 2.2.
[37] ABR *US* – Tuna, *supra* note 27, ¶321.
[38] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tune and Tune Products*, ¶7.405, WTO Doc. WT/DS381/R (adopted Sep. 15, 2011).
[39] ABR *US* – Tuna, *supra* note 27, ¶314

free and is struggling to compete with cheaper imported products.[40] The measure aims to create an unfounded doubt in the minds of the consumer that the product is "harmful" by mandating such label on the principle display panel.[41] This would adversely affect the competitiveness of the imported products that have used data obtained by animal testing. This objective pursued with malice cannot be termed as 'legitimate' within Art. 2.2.

[¶ 14] However, Valaria states that the objectives of ECA is preserving Valarian biodiversity, wildlife conservation, animal welfare, curbing animal testing in the cosmetics industry, promoting research on alternatives, and facilitating consumer choices.[42] Even if it is *assumed* that the pursued objective is legitimate, the measure at issue does not contribute to it. The degree of contribution of a technical regulation to its objective is revealed through the measure itself.[43] Labelling requirements, at best, only assist the consumers with information about the product.[44] Drawing an inference, it is concluded that they do not contribute to reduction of animal testing in the industry.

[¶ 15] The following reasons support this claim: ***Firstly***, while the preamble acknowledges that alternative testing should be promoted, ECA does not contain any provisions supporting research on alternative testing methods. ***Secondly***, labelling requirements do not have a nexus with animal welfare and prevention of Valarian biodiversity as the research demonstrates that negative labelling weighs heavier than positive labelling while influencing consumer choices.[45] ***Thirdly***, ECA includes cephalopods, which are not endemic to Valaria, but are heavily relied upon in Danizia for research and scientific advancement.

[¶ 16] Moreover, it is evident from the surveys conducted that the people of Valaria prioritized household products industry over cosmetics to safeguard animal welfare.[46] Additionally, pertaining to protection of wildlife biodiversity actions such campaigns, penalizing illegal trade are already undertaken.[47] Thus, the labelling requirement does not contribute towards the stated objective of protecting animals from cruelty.

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[40] Moot Problem, ¶2.13
[41] Moot Problem, pg. 21, The Ethical Cosmetics Act 2021, Annexure B.
[42] Moot Problem, pg. 21, The Ethical Cosmetics Act 2021, Preamble.
[43] ABR *US – COOL*, supra note 26, ¶ 373.
[44] K.B. HARRIS, NUTRIENT CLAIMS ON PACKAGING IN: ENCYCLOPEDIA OF MEAT SCIENCES 449-454 (2nd Edn., Academic Press 2014).
[45] Nanda Schrama, *Positive versus Negative eco-labelling; will negative labels change consumer behaviour*, STUDENT CONSUMER SCIENCE, 1 (Mar. 2010); Kahneman, D., & Tversky, *A. Prospect Theory: An Analysis of Decision under Risk*, 47(2) ECONOMETRICA 263–291 (1979).
[46] Moot Problem, ¶2.9.
[47] Moot Problem, ¶2.16.

C. Labelling requirement is more trade restrictive than necessary to fulfil the stated objective.

[¶ 17] Art. 2.2 of TBT imposes affirmative obligations on a member to ensure that technical regulations are not "more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create".[48] Even if the Panel finds that measure's objective could be regarded as legitimate, the COMPLAINANT submits that the measure is more trade restrictive than necessary taking into account the risks of non-fulfillment.

[¶ 18] The test of necessity is based on the one developed under Art. XX of GATT 1994.[49] The AB in *US – Tuna II*,[50] concluded that this requires a weighing and balancing of the degree of contribution that a measure makes to the stated objective (**1**); the trade-restrictiveness of the measure (**2**); and the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure (**3**).

1) THE MEASURE DOES NOT MAKE ANY SUBSTANTIAL CONTRIBUTION TO THE STATED OBJECTIVE.

[¶ 19] A genuine relationship of ends and means must necessarily exist between the objective pursued and the adopted measure at issue.[51] This relationship may be assessed in quantitative or qualitative terms.[52] The measure must be sufficient to make a material contribution to their realization of the objective pursued.[53] Thus, the degree of contribution made by labelling requirements to address the stated objectives is not substantial.

[¶ 20] The labelling requirement would reduce the consumption of imported products in Valarian market. However, there is no provision in the ECA that does away with animal testing in the Valaria itself. Additionally, it fails at facilitating informed consumer choice as

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[48] TBT, Art. 2.2.

[49] PR *US – Clove*, *supra* note 28, ¶7.368; Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶7.667, WTO Doc. WT/DS384/R / WT/DS386/R (adopted Jul. 23, 2012) [hereinafter PR *US – COOL*].

[50] ABR *US – Tuna*, *supra* note 27, ¶318; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter ABR *Brazil – Retreaded Tyres*]; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306-308, WTO Doc. WT/DS285/AB/R (adopted Apr.20, 2005) [hereinafter, ABR *US – Gambling*].

[51] ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶¶145, 146; PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS, 1513 (4th edn. Cambridge University Press, 2017).

[52] ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶¶145, 146.

[53] *Id*, ¶ 150.

such a label creates an unreasonable suspicion in the minds of the consumer.[54] Thereby, the labelling requirement does not make material contribution in replacing animal testing.

2) THE MEASURE IS TRADE RESTRICTIVE.

[¶ 21] A measure is trade restrictive if it has a limiting effect on trade,[55] and includes measures that limit competitive opportunities to imported products.[56] The technical regulation imposed by Valaria limits competitive opportunities of Danizian cosmetics by labelling them as "harmful". The label occupies a large space on the front panel of the product,[57] and it creates a fear in the minds of consumers regarding the product. Such labels discourage consumers from placing trust in products that are otherwise safe.

[¶ 22] Further, the measure violates Art. 2.12 of TBT as it disregards the obligation on Valaria to allow a reasonable time interval between publication of the technical regulation and its entry into force to the manufacturers of Danizia, which is a developing country.[58] Thus, the measure is trade restrictive as it limits competitive opportunities of Danizian products and does not allow a reasonable time interval to manufacturers of the developing country.

3) NO GRAVE CONSEQUENCES ARISE FROM NON-FULFILLMENT OF THE STATED OBJECTIVE

[¶ 23] The degree of restrictiveness should be proportional to the risk of non-fulfillment of the legitimate objective.[59] The nature of risks and the gravity of consequences that would arise from non-fulfilment in this case are minimal or at best uncertain. Animal testing is indispensable at the current stage of cosmetic production to ensure human safety. The measure only affects the sale of products relying on animal test data in Valarian market. It does not consecutively lead to the cessation of animal testing inside and outside Valaria, nor does it promote humane methods of animal testing or animal welfare. Thus, non-fulfillment of the stated objective is a pre-existing feature of the measure. This implies that no grave consequence arises from non-fulfillment of the objective.

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[54] Lisa A. Robinson et. Al., *Consumer Warning Labels Aren't Working*, HARVARD BUSINESS REVIEW (Mar. 13, 2022) https://hbr.org/2016/11/consumer-warning-labels-arent-working.
[55] ABR *US – COOL*, *supra* note 26, ¶ 375; ABR *US – Tuna*, *supra* note 27, ¶319.
[56] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶7.445, WTO Doc. WT/DS381/R (adopted Sep. 15, 2011) [hereinafter PR *US – Tuna*]; PR *US – COOL*, *supra* note 49, ¶7.572.
[57] Moot Problem, pg. 21, The Ethical Cosmetics Act 2021, Annexure B.
[58] TBT, Article 2.12.
[59] ABR *US – Tuna*, *supra* note 27, ¶321; Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, The Sanitary And Phytosanitary Measures Agreement, And The General Agreement On Tariffs And Trade: A Map Of The World Trade Organization Law Of Domestic Regulation Of Goods*, 36(5) JOURNAL OF WORLD TRADE 811, 832 (2002).

D. Less trade restrictive alternative measures are reasonably available.

[¶ 24] When there are less trade restrictive measures available, a legislation qualifies as being more restrictive than necessary.[60] The measure in concern is highly trade restrictive. Voluntary labelling, labelling products as "tested on animals" instead of "harmful", reducing the proportion of label, placing the label on the back panel alongside product details are less trade restrictive alternative measures.

[¶ 25] A comparison with alternative measures must be based on the criteria used in the relational analysis.[61] The proposed alternative measure of changing the label and shifting it to the backside of the display panel is less-trade restrictive than the measure at issue as it rightly informs the customer without creating a sense of unfounded distrust **(i)**; it would make an equivalent even if not identical contribution to the pursued objective, [62] **(ii)**; and is reasonably available for the respondent **(iii)**,[63] as is evidenced by the fact that Valaria successfully passed ECA, and it claims that its citizens are willing to buy non-animal tested products.

[¶ 26] The Respondent had the resources and means to employ less trade restrictive measures to achieve an equivalent contribution to the stated objective but chose a highly restrictive measure with malice to place the Danizian cosmetic industry in an unfavorable position in the Valarian market.

[¶ 27] ***Therefore***, the labelling requirements under the ECA are inconsistent with Art. 2.2 of TBT Agreement for they do not pursue a legitimate objective, and are more trade restrictive than necessary, taking into account the risk of non-fulfilment

III. THE CERTIFICATION REQUIREMENT UNDER SECTION 8 OF THE ECA IS IN VIOLATION OF ART. 5.2.6 OF THE TBT AGREEMENT.

[¶ 28] Section 8 of the ECA mandates certificate of recognition to be furnished in order to comply with the technical regulation.[64] The COMPLAINANT submits that the certification requirement is in violation of Art. 5.2.6 of TBT as it is a conformity assessment procedure (*hereinafter* "**CAP**") (**A**); it falls within the scope of Art. 5.1.2 **(B)**; it causes unnecessary

[60] PR *US – Tuna*, *supra* note 56, ¶ 5.204; Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶133, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000) [hereinafter ABR *Korea — Beef*]; Gabrielle Marceau, *The New TBT Jurisprudence*, 8 ASIAN JOURNAL OF. WTO & INTERNATIONAL HEALTH LAW & POLICY 1, 11 (Mar. 2013).
[61] PR *US – Clove*, *supra* note 28, ¶7.424; PR *Australia – Plain Packaging*, *supra* note 29, ¶7.1321.
[62] ABR, *US – COOL*, *supra* note 26, ¶5.215; Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications ad Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 6.496, WTO Doc. WT/DS435/AB/R WT/DS441/AB/R (adopted Jun. 9, 2020).
[63] ABR *US – Tuna*, *supra* note 27, ¶322.
[64] Moot Problem, pg. 13, The Ethical & Cosmetics Act, 2021, §8.

inconvenience to the applicants or agents (**C**); and is applied more strictly than necessary to provide adequate confidence (**D**).

A. The certification requirement is a conformity assessment procedure.

[¶ 29] It is submitted that the certification requirement is CAP. Annex 1.3 of the TBT agreement broadly defines CAP as any procedure used, directly or indirectly, to determine that relevant requirements in technical regulation or standards are fulfilled.[65] The explanatory note to the definition further clarifies that the CAP covers, *inter alia*, procedures for sampling, testing and inspection, evaluation, verification and assurance of conformity, registration, accreditation, and approval and in addition to their combinations.[66]

[¶ 30] The Panel in *EC-Seals*,[67] noted that the ambit of this definition of CAP under Art. 1.3 also encompasses the third-party accreditation. In the instant case, the certification requirement under Section 8 constitutes the combination of procedure for conformity evaluation and the siting facility for the accreditation of the product. Hence, the certification requirement is a CAP.

B. THE CERTIFICATION REQUIREMENT FALLS WITHIN THE SCOPE OF ART. 5.1.2.

[¶ 31] Art. 5.1.2 prohibits a member from implementing a CAP that causes unnecessary obstacle to international trade.[68] The certification requirement under Section 8 of the ECA falls within the scope of Art. 5.1.2. Three reasons support this claim: ***firstly***, the chapeau of Art. 5.2 refers to Art. 5.1 and clarifies the relationship between the two provisions.[69] Art. 5.2 requires the members to adhere to obligations of Art. 5.1.2 while undertaking the CAP. Further, Art. 5.2.6 ensures that the CAP is not applied in a manner as to cause unnecessary inconvenience to the agents. It is to be noted that requirements under Art. 5.2.6 are distinct from those of Art. 5.1.2, and its application is limited to the implementation stage of the CAP.[70]

[¶ 32] ***Secondly***, CAP is controlled by central government body. Annex 1.6 defines central government body as 'a body that is subject to control of the central government in respect of the activity in question'.[71] In the present case, the assessment of conformity is done by the list of certification body appointed only by the Valarian government under Section 8

[65] TBT, Annex 1.3.
[66] TBT, Annex 1.3
[67] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶7.523, WTO Doc. WT/DS400/R WT/DS401/R (adopted Nov. 25, 2013) [hereinafter PR *EC – Seals*].
[68] TBT, Article 5.1.2.
[69] PR *EC – Seals*, *supra* note 67, ¶7.556.
[70] PR *EC – Seals*, *supra* note 67, ¶7.559.
[71] TBT, Annex 1.6.

of the ECA.[72]

[¶ 33] ***Thirdly***, ECA requires positive assurance of conformity with technical regulation. Under ECA, the marketing of cosmetic product is, in principle, permitted, *provided* that the cosmetic products are certified by the certification body.[73] Thereby, through these certificates, the ECA requires a positive assurance of conformity with the technical regulations within the meaning of Art. 5.1.[74] Hence, the certification requirement is a mandatory CAP.[75]

C. The CAP is applied with a view to cause and the effect of causing unnecessary inconvenience to the applicants or their agents.

[¶ 34] The fifth recital of the TBT preamble establishes that one of the primary objectives of the agreement is to ensure that CAP does not create unnecessary barriers to international trade.[76] Art. 5.2.6 obligates the members to not use siting of facility and selection of sample in a manner causing unnecessary inconvenience to applicants or their agents.[77] Art. 31(1) of the Vienna Convention on the Law of Treaties [**"VCLT"**] states that a treaty must be construed in light of its intention and purpose, using the ordinary meaning assigned to the instrument's provisions in their context.[78] Thus, "unnecessary inconvenience to agents or applicants" implies that the process causes unnecessary trouble or hinders international trade.[79]

[¶ 35] The COMPLAINANT submits that the siting of facility used by Valaria creates unnecessary inconvenience to applicants and agents as: the certification bodies are only accredited by Central Government Bodies (**1**); and the date of entry into force of the EC act creates a 'restrictive ban' on the International Trade (**2**).

1) CERTIFICATION BODIES ARE ACCREDITED ONLY BY THE CENTRAL GOVERNMENT BODIES.

[¶ 36] Valaria on April 23, 2021, drafted the EC Act and after three months it published the list of accredited bodies.[80] Valaria had accredited multiple certification agencies only in

[72] Moot Problem, The EC Act, § 8.
[73] Moot Problem, The EC Act, § 6 & 8.
[74] TBT, Article 5.1.
[75] Panel Report, *Russia – Measures affecting the importation of Railway Equipment and Parts thereof*, ¶7.403, WTO Doc. WT/DS499/R (adopted Jul. 30, 2018) [hereinafter PR *Russia - Railway Equipment*].
[76] TBT, Preamble.
[77] TBT, Article 5.2.6.
[78] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
[79] Cambridge English Dictionary, https://dictionary.cambridge.org/dictionary/english/inconvenience (Last accessed Mar. 12, 2021); Shorter Oxford English Dictionary 2, 1895 (4th edn., 1993).
[80] Moot problem, ¶4.3.

countries with similar progressive animal testing legislation.[81] However, even after six months not more than 7 agencies were accredited in other regions.[82] EC Act provides for centralized accreditation authority, thereby, Valaria strictly controls number of certificate bodies. It is submitted this creates a centralized system of accreditation and fails to ensure speedy accreditation of outside of Valaria. Hence, efficiency of its CAP is totally dependent on Valarian Government's willingness to recognize certification bodies. Cosmetic Products are seasonal goods and require a quick conformity assessment procedure.[83] Thus, it causes unnecessary inconvenience to the applicants or agents as it fails to provide for sufficient accreditation authority.

[¶ 37] Additionally, Art. 6.4 of TBT Agreement encourages the members to accredit certification agencies in the other members countries under a no less favorable situation than those accorded to bodies located within their territory or the territory of any country.[84] In the present case, Valaria accredits certification agencies only if the countries concerned have a similar progressive animal legislation.[85] This discriminates against the countries that do not have animal progressive legislations. Hence, the siting of facilities violates Art. 6 of TBT.

2) THE DATE OF ENTRY INTO FORCE OF THE ECA CREATES A 'RESTRICTIVE BAN' ON INTERNATIONAL TRADE.

[¶ 38] Valaria failed to accredit certification bodies outside Valaria till December 2021.[86] Thereby, trade of cosmetic product was inconvenient for Danizia. It must be noted that ban can envisioned as the most trade-restrictive barrier to trade.[87] Hence, after ECA came into force, it created *effective* ban on trade of cosmetic product that use to enjoy unrestricted access to the Valarian Market. Conclusively, in the absence of any siting facility i.e., certification body outside Valaria, the CAP causes unnecessary inconvenience to the applicants and agents.

D. The CAP is applied more strictly than necessary to provide adequate confidence of conformity.

[¶ 39] Application of Art.5.2.6 does not require satisfying all elements of Art.5.1.2.[88] The

[81] Moot problem, ¶4.3.
[82] Moot problem, ¶4.3.
[83] Moot problem, ¶3.2.
[84] TBT, Article 6.4.
[85] Moot problem, ¶4.3.
[86] Moot problem, ¶4.3.
[87] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶7.114, WTO Doc. WT/DS332/R (adopted Jun. 12, 2007).
[88] Panel Report - Addendum, *European Communities – Measures Prohibiting the Importation and Marketing of*

"necessity" analysis is determined on a case-by-case basis.[89] The COMPLAINANT submits that the challenged measure should be compared against a proposed alternative to determine the strictness and contribution of the measure to adequate confidence.[90] It is observed that Art. 5.1.2 TBT draws similarities with Art. 2.2 of TBT[91] and hence Appellate Body's guidance is useful for the guidance for the interpretation of Art. 5.1.2.[92]

[¶ 40] In light of the above, the Art. 5.2.6 implies the weighing and balancing of a number of different factors as part of "relational analysis",93 and it is submitted that the CAP applied by Valaria, is applied more strictly than necessary **(1)**; do not contribute to the objective of giving importing member "adequate confidence" **(2)**; no grave concern would arise in case of non-conformity of the technical regulation **(3)**; can be replaced by the proposed alternative **(4)**.

1) THE CAP IS MORE TRADE RESTRICTIVE THAN NECESSARY.

[¶ 41] Given the similarities between Art. 2.2 TBT and Art. 5.1.2 TBT, it is useful to consider to the AB's guidance in *US - COOL* on Art. 2.2 to attain the meaning of "strictness" under the Art. 5.1.2.[94] "Necessary" refers to the trade restrictiveness of the measure and "restriction" implies having limiting effect on trade.[95] Thus, "strictness" here means that the CAP is applied more strictly than necessary and has a limiting effect on the trade.

[¶ 42] Valaria introduced a cumbersome CAP that restricted market access of the importing cosmetic products for a significant period of time. Thus, it is submitted that the CAP applied more strictly than necessary as ***firstly***, Valaria failed to accredit sufficient bodies outside of Valaria, and ***secondly*** the date of entry into force of EC act creates a 'restrictive ban' on international trade. Conclusively, the imposed trade restriction is unnecessary.

2) THE CAP DOES NOT CONTRIBUTE TO THE OBJECTIVE OF PROVIDING 'ADEQUATE

Seal Products, ¶128, WTO Doc. WT/DS400/R WT/DS401/R (adopted Nov. 25, 2013).

[89] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products*, ¶240, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009) [hereinafter ABR *China – Audio-visual*].

[90] PR - *Russia Railway Equipment*, *supra* note 75, ¶7.148.

[91] TBT, Article 2.2.

[92] Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts thereof*, ¶5.162, WTO Doc. WT/DS499/AB/R (adopted Feb. 2020) [hereinafter ABR *Russia- Railway Equipment*].

[93] ABR *US – Tuna*, *supra* note 27, ¶318, ABR *US-COOL*, *supra* note 26, ¶374.

[94] Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of DSU by Canada & Mexico*, ¶¶ 5.197, 5.198, WTO Doc. WT/DS384/AB/RW, WT/DS386/AB/RW (adopted May 18. 2015).

[95] ABR *US – Tuna*, *supra* note 27, ¶319.

CONFIDENCE' OF CONFORMITY TO VALARIA.

[¶ 43] Art. 5.1.2 states that the aim of CAP is to contribute to the objective of providing adequate confidence that the products conform with the technical regulation.[96] The term 'adequate confidence' refers to a degree of confidence that is 'sufficient' or 'satisfactory'.[97] Such a degree of contribution can be determined from the design, structure, and operation of the measure.[98] The analysis of Art. 2.2 can be used to determine whether the CAP is 'apt to produce a material contribution' towards providing adequate confidence.[99] Moreover, the panel must decide what is the objective pursued by the CAP at issue.[100]

[¶ 44] The omission to accredit a certification body necessarily prevented trade in conforming cosmetic products to the technical regulation. Thus, it does not achieve the objective of providing material contribution. The justified restrictions are those that are likely to be apt to the legitimate goal of CAP, that is, to establish with confidence that cosmetic products satisfy the requirements of a technical regulation.[101] However, failing to designate any other certification body outside Valaria is not apt to contribute to the objective.

[¶ 45] Additionally, the COMPLAINANT contends that the Valarian Government had an ulterior motive of protecting its domestic cosmetic industry behind the introduction of CAP, which cannot be termed legitimate. As reported by the "*Valarian Herald*", Valaria has a thriving cosmetics industry and is struggling to compete of the cheap imported products.[102] Valaria decided to impose trade restrictions the basis of surveys and the report by the Special Committee on the Animal Welfare Board.[103] However, it should be noted that the survey did not consider opinions of stakeholders outside Valaria,[104] the results were not transparent,[105] and the numerical estimates of the report were inaccurate.[106]

[¶ 46] Further, Valaria implemented the CAP in cosmetics only, which was an area of

[96] PR - *Russia Railway Equipment*, *supra* note 75, ¶7.420.
[97] ABR *US – Tuna*, *supra* note 27, ¶317.
[98] *Id.*
[99] TRACEY EPPS & MICHAEL J TREBILCOCK, RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE: IN RESEARCH HANDBOOK ON THE WTO 94 (2013) [hereinafter "Research Handbook on TBT"]; ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶150.
[100] PR - *Russia Railway Equipment*, *supra* note 75, ¶7.145.
[101] *Supra* note 99 at 94.
[102] Moot problem, ¶2.13.
[103] Moot problem, ¶2.13.
[104] Moot problem, ¶2.5.
[105] Moot problem, ¶¶2.5 & 2.9.
[106] Moot Problem, ¶2.12.

least priority.[107] These actions of the Valarian government are act of *de facto* discrimination[108] favoring of its own cosmetics industry. Conclusively, the CAP is designed and applied in a manner that deprives exporting countries market access to the Valarian cosmetic market and does not provide adequate confidence to Valaria.

3) NO GRAVE CONSEQUENCE ARISES FROM NON-CONFORMITY WITH THE TECHNICAL REGULATION.

[¶ 47] The nature of the risks and the gravity of consequences that would arise from not providing a positive assurance of conformity is used to determine whether the CAP is applied more strictly than necessary for providing adequate confidence.[109] Valaria mandates a certificate of recognition from a certification body to place a product on the market,[110] and applies an unnecessary burden on the producers to obtain the certificate even when they have already been certified. Hence, it is concluded that no grave consequences would arise even if the re-certification were not implemented.

4) REASONABLE AND LESS TRADE RESTRICTIVE ALTERNATIVE IS AVAILABLE.

[¶ 48] The COMPLAINANT submits that there exists reasonable and less-trade restrictive alternatives to CAP. These include, *inter alia*, equivalency arrangements with the other member countries and increase the pool of the certification bodies. The application of this alternative ***firstly***, is less trade restrictive, ***secondly***, makes an equivalent contribution to the objective of providing Valaria adequate confidence of conformity, and ***thirdly***, it is reasonably available to Valaria.[111]

[¶ 49] ***Firstly***, it contended that the proposed alternative is less trade restrictive. As established in submission (B), the accreditation of a CAP is centralized and is more trade restrictive than necessary. Equivalency arrangements will allow other countries to certify the cosmetic products. This could potentially alleviate the burden of certification on the Valarian authorities and will not have a limiting effect on the trade. Thus, the proposed alternative is less-trade restrictive.

[¶ 50] ***Secondly***, it is argued that the proposed alternative makes an equivalent contribution to the objective of providing adequate confidence to Valaria. It ensures that

[107] Moot problem, ¶2.9.
[108] Report of the Panel, *United States – Section 337 of the Tariff Act of 1930 and Amendments thereto*, ¶5.10, L/6439 - 36S/345 (Nov. 7, 1989).
[109] PR - *Russia Railway Equipment*, *supra* note 75, ¶7.423.
[110] Moot Problem, pg. 17, The EC Act, § 8.
[111] ABR *Russia- Railway Equipment*, *supra* note 92, ¶5.188; ABR *US-COOL*, *supra* note 26, ¶¶¶ 5.213, 5.215, 5.338.

Valaria's CAP *always* functions to enable trade to obtain certificate of recognition for conforming cosmetic products. Such system does not ban market access; rather, it facilitates a speedy CAP. Moreover, by accrediting sufficient certification bodies, it would make a substantial contribution to the objective of providing adequate confidence to Valaria.

[¶ 51] ***Thirdly***, it is submitted that the proposed alternative is available to Valaria. It is not merely hypothetical in nature and Valaria is capable of implementing it.[112] Further, mere establishment of the reasonable availability of the alternative measure shall relieve burden of proof on the complainant.[113] A similar alternative was proposed during the discussion in the WTO Technical Barriers to Trade Committee on July 2021.[114] Valaria enacted the EC Act on 17 October 2021,[115] which suggests that the alternatives were reasonably available to Valaria. Thus, the proposed alternative is less trade restrictive, provides adequate confidence and reasonably available to Valaria.

[¶ 52] ***Therefore***, the siting of facility used by Valaria to certify the cosmetic products under Section 8 of the ECA causes unnecessary inconvenience to the applicants and is applied more strictly than necessary thereby violating Art. 5.2.6 of the TBT Agreement.

IV. SECTION 5 OF THE STA VIOLATES OBLIGATIONS PROVIDED UNDER GATT.

[¶ 53] Section 5 of Sustainable Taxation Act **(STA)** introduces a taxation measure to be borne by importers for using animal test data to assess the safety of cosmetic products.[116] The COMPLAINANT submits that the Respondent has violated obligation set under General Agreement on Tariffs and Trade ("**GATT"**) as: the Taxation Measure is not in compliance with GATT Art. III:2, *first sentence* (**A**); and the taxation requirement is not justified under the provision of GATT XX (**B**).

A. The taxation measure is not in compliance with GATT Art. III:2, *First Sentence*.

[¶ 54] GATT Art. III:2 establishes a National Treatment Obligation on the contracting parties whereby no regulation, law, or taxation pattern can be applied as a protectionist measure.[117] Art. III:2 lays down that the taxation measure enforced should be non-discriminatory in nature i.e., should not hamper the competition of imported products in the

[112] ABR *Russia- Railway Equipment*, *supra* note 92, ¶5.189.
[113] *Id*.
[114] Moot problem, ¶3.2.
[115] Moot problem, ¶4.3
[116] Moot Problem, pg. 23, Sustainable Taxation (Amendment Act), 2021 §5.
[117] General Agreement on Tariff and Trade, Art. III:2, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter 'GATT'].

domestic market.[118] Moreover, AB in *Japan – Alcoholic Beverages II*,[119] distinguished between GATT III: *first sentence* and *second sentence*.

[¶ 55] GATT III:2 *first Sentence*, mandates that no imported product should be taxed in excess of the like domestic product.[120] It lays down two steps that ***firstly***, products at issue should be like, ***secondly***, imported products should not be taxed *in excess* of its domestic counterpart.[121] In the case at hand, taxation encompassed under Section 5 of STA violates GATT III:2, *first sentence.* The contention for same is delineated into two parts: animal-tested **(AT)** imported and non-animal tested **(NAT)** domestic products are like **1]**; and imported products are taxed in excess of the like domestic products **2].**

1) THE ANIMAL-TESTED IMPORTED AND NON-ANIMAL TESTED DOMESTIC PRODUCTS ARE LIKE.

[¶ 56] WTO Jurisprudence provides for factor-based test elaborated in Border tax Adjustment Report to determine likeness of the product at issue. [122] The test encompasses criteria such as products' physical properties, consumer tastes and habits, end uses and tariff classifications.[123] Case-by-case approach i.e., peripheral evidence along with the above-mentioned factors must be considered while examining the likeness of products.[124]

[¶ 57] The concept of likeness is objective in nature and thereby same product may be like in a certain market but the same shall not be true while comparing in the other market.[125] The products at issue are imported cosmetic products from Danizia and domestic cosmetic product from Valaria. The Danizian industry pre-dominantly comprises of animal tested product,[126] while the Valarian industry is recognized for its non-tested, vegan products. Valaria through the taxation measure brought the distinction between both the AT imported products and NAT Domestic Products. However, the COMPLAINANT put forth that both the products at issue are like.

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[118] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶¶ 14.121, 14.122, WTO Doc. WT/DS64/R (adopted Jul. 2, 1998).
[119] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, pg. 19, WTO Doc. WT/DS11/AB/R (adopted Oct. 4, 1996) [hereinafter ABR *Japan – Alcoholic Beverages II*].
[120] GATT, Article III:2.
[121] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, ¶¶ 22 & 23, WTO Doc. WT/DS31/AB/R (adopted Jun. 30, 1997) [hereinafter ABR *Canada – Periodicals*].
[122] Panel Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 43-45, WTO Doc. WT/DS11/R (adopted Jul. 11, 1996); ABR *EC -Asbestos*, *supra* note 6, ¶¶ 101, 102.
[123] Working Party Report, Border Tax Adjustments, ¶18, GATT Doc. L/3464, BISD 18S/97 (adopted Dec. 2, 1970) [hereinafter Working Party Report Border Tax Adjustments].
[124] ABR *EC -Asbestos*, *supra* note 6, ¶¶ 101, 102.
[125] Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, ¶168, WTO Doc. WT/DS396/AB/R, WT/DS403/AB/R (adopted Dec. 21, 2011) [hereinafter ABR *Philippines – Distilled Spirits*].
[126] Moot Problem, ¶ 4.1.

[¶ 58] ***Firstly,*** AT imported products and NAT domestic products are fundamentally same in their physical properties and end use.[127] It is to be noted that the difference between both the products is non-product related Production Process Methods ("**PPM**"),[128] thereby, they have similar color, fragrance and even their application leads to similar results. Despite the difference in the production process, the products at issue primarily have the same end usage that is, *inter alia*, to bring change in body appearance and fragrance.

[¶ 59] ***Secondly,*** AB in *Philippines - Distilled Spirits,*[129] added Tariff classification as a factor for determining likeness amongst product given the classification is sufficiently precise. The fact that products fall under the same tariff classification suggests their likeness.[130] AT imported products and NAT domestic products fall within the chapter 33 of Harmonized system of World Custom Organization.[131] The fact Valaria accepted that the taxation measure will affect products enlisted under same 6-digit HS indicates that the products at issue are like.

[¶ 60] ***Thirdly,*** ascertaining likeness is not limited to the BTA report rather it expands to nature of competitive relationship of the product at issue.[132] Additionally, nature of competition should be of degree that is higher than 'merely significant' in nature.[133] In the instant case, the NAT domestic products did not only compete with AT imported products, but have struggled to keep up with them.[134] This in turn indicates that competitive relation between the products is higher than 'merely significant', and that consumers have no specific preference between them on basis of its PPM qualities.

[¶ 61] It is submitted that distinction between both AT imported and NAT domestic product should not influence the panel. The demarcation on the basis of non-functional factor of otherwise like products indicates nothing but intention of Valaria to protect their struggling domestic market. Thereby, it is concluded that products at issue are like as all the considered factors favor such finding of likeness.

2) THE IMPORTED PRODUCTS ARE TAXED *IN EXCESS* OF THE LIKE DOMESTIC PRODUCTS

[¶ 62] Having established that AT imported products and NAT domestic products are like

[127] Moot problem, ¶2.13.
[128] Jason Potts, *The legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 3 (2008).
[129] ABR *Philippines – Distilled Spirits*, *supra* note 125, ¶¶ 161, 162.
[130] ABR *Japan – Alcoholic Beverages II*, *supra* note 119 at 21,22.
[131] World Custom Organisation, *Harmonised Tariff Schedule: Chapter 33* (2017).
[132] ABR *Philippines – Distilled Spirits*, *supra* note 125, ¶125.
[133] ABR *Philippines – Distilled Spirits*, *supra* note 125, ¶183.
[134] ABR *EC – Asbestos*, *supra* note 6, ¶103.

under GATT Art. III:2, *first sentence*, a violation of Art. III:2 would be proved upon showing that imported products are taxed *in excess* of like domestic counterparts.[135] Assessment of the said violation needs to be done in a manner that takes overall consideration of *de facto* tax liability imported products at one hand and domestic at other.[136]

[¶ 63] Any forms of indirect taxation qualify to be internal tax for the purpose of Art. III:2, *first sentence*.[137] AB in *Japan – Alcoholic Beverages II* held that even the smallest amount of excess in taxation for like product should be considered too much.[138] Ascertainment of taxation in excess is not conditional upon findings of either '*de minimus* standard' or 'trade effect test'.[139] For instance, people preferring one mosquito repellent over other merely on basis of nominal price difference.[140]

[¶ 64] The tax measure imposes next-to-no tax on NAT products that are produced domestically, but a heavy tax burden of additional six Valarian Krones on AT products that are imported from Danizia.[141] The tax imposed on imported products is 300 % *in excess* of that levied on domestic counterpart. Thereby, Valaria has violated Art. III:2, *first sentence*, by taxing imported products in excess of like domestic product.

B. The taxation measure is not justified by the substantive provisions of GATT Art. XX.

[¶ 65] Art. XX provides for general exceptions, wherein a member country can justify a measure that is inconsistent with core GATT obligations.[142] For a measure to form as exception under Art. XX must pass the two-tiered test that ***firstly***, qualifies as exception under GATT Art. XX, and ***secondly***, should not violate the chapeau.[143] The COMPLAINANT contends that the taxation measure is not justified under GATT as it does not qualify as an exception under the GATT Art. XX (**1**) and it violates the chapeau of GATT XX (**2**).

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[135] ABR *Japan – Alcoholic Beverages II*, *supra* note 119 at 27; ABR *Canada* – Periodicals, *supra* note 121 at 28 & 29; Appellate Body Report, *Chile – Taxes on Alcoholic* Beverages, ¶49, WTO Doc. WT/DS87/AB/R WT/DS110/AB/R (adopted Dec. 13, 1999).

[136] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶11.184, WTO Doc. WT/DS155/R (adopted Dec. 19, 2000) [hereinafter PR *Argentina – Hides and Leather*].

[137] Panel Report, *Brazil – Certain Measures Concerning Taxation and* Charges, ¶7.105, WTO Doc. WT/DS472/R, WT/DS497/R (adopted Aug. 30, 2017) [hereinafter PR *Brazil – Taxation*].

[138] ABR *Japan – Alcoholic Beverages II*, *supra* note 119 at 23. PR *Argentina – Hides and Leather*, *supra* note 136, ¶11.243.

[139] Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, ¶5.6, BISD 39S/206, DS23/R - 39S/206 (adopted Mar. 16, 1992); Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, L/6175 – 34S/136, BISD 34S/136 (Jun. 5, 1987).

[140] N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 90 (8th edn. Harvard University 2016).

[141] Moot Problem, pg. 24, The Sustainable Taxation (Amendment) Act, 2021, §4.

[142] PR *Brazil – Taxation*, *supra* note 137, ¶7.153.

[143] ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶139.

1) TAXATION MEASURE DOES NOT QUALIFY AS AN EXCEPTION UNDER GATT ART. XX

[¶ 66] The inquiry under GATT Art. XX is primarily focused on the justification of incongruity with GATT obligations, [144] and such incongruity can be concluded on basis of submissions made above. However, the AB *US – Shrimp,*[145] noted that panel needs to strike a balance between member's right to invoke an exception and its duty to comply with the obligation imposed by GATT.

[¶ 67] The onus of proving that measure at issue is an exception under GATT XX is on the country invoking the measure.[146] The COMPLAINANT contends that measure doesn't meet the requirements of general exception as the Taxation measure is not qualified as "necessary" under GATT Art. XX (a) **(a)**; and that the Taxation measure fails the 'necessity test' under GATT Art. XX (b) **(b)**.

a. The taxation measure does not qualify as "necessary" under GATT Art. XX (a).

[¶ 68] The AB report in *Colombia – Textiles*,[147] noted that even if a measure is designed in a way to protect public moral, it still needs to undergo the scrutiny of the necessity test. Moreover, while assessing the design of the policy, the panel doesn't examine the contribution of the measure to the objective but the objective itself.[148] The measure being 'necessary' must be analyzed more in-depth, it encompasses examination of relationship between the measure and the public objective sought.[149]

[¶ 69] A series of factors such as contribution of the measure (1), trade restrictiveness (2), alternatives available (3) are to be considered while conducting weighing and balancing process.[150] ***Firstly,*** a nexus between the contribution by measure at issue and public moral objective sought needs to be established in order to prove the necessity of measure.[151] In the instant case, the taxation measure has been invoked with the aim of upholding the public moral pertaining to preventing carbon leakage.[152] However, measure at issue imposes tax

[144] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, pg. 24, WTO Doc., WT/DS2/AB/R, (adopted May 20, 1996) [hereinafter ABR *US – Gasoline*].
[145] ABR, *US – Shrimp*, *supra* note 5, ¶121.
[146] ABR *US – Gasoline*, *supra* note 144 at 22.
[147] Appellate Body Reports, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶5.67, WTO Doc. WT/DS461/AB/R (adopted Jun. 7, 2016) [hereinafter ABR *Colombia – Textiles*].
[148] Panel Report, *United States – Tariff Measures on Certain Goods from China*, ¶7.140, WTO Doc. WT/DS543/R (adopted Sep. 15, 2020) [hereinafter PR *US – Tariff Measures*].
[149] ABR, *Colombia - Textiles*, *supra* note 147, ¶5.67-5.70; PR *US – Tariff Measures*, *supra* note 148, ¶7.125.
[150] ABR *China – Audio-visual*, *supra* note 89, ¶242.
[151] PR *US – Tariff Measures*, *supra* note 148, ¶7.178
[152] Moot Problem, ¶2.3.

liability for even using readily available animal test data.[153] Curbing the readily available animal testing data doesn't contribute to the public moral objective as it doesn't have a close nexus to carbon emissions which in turn doesn't lead air pollution.

[¶ 70] The more the contribution of measure to the objective sought, the higher the likeness of it to be characterized as 'necessary'.[154] Animal welfare policy in cosmetic industry was least preferred out of six industries showcased in the nation-wide survey conducted.[155] Thus, it shows the measure at issue doesn't directly contribute to the objective and even fails to uphold the moral of citizens highlighted by themselves.

[¶ 71] ***Secondly,*** the AB in *Brazil – Taxation*[156] considered both the actual and potential effects of measure while assessing the trade restrictiveness of the measure. The fact that AT imported products are imposed with 300% more tax than NAT domestic products, makes Valarian market effectively unavailable to imported products. This in turn illustrates trade restrictiveness of the measure at issue.

[¶ 72] ***Thirdly,*** the Respondent should alternatively impose carbon tax on all cosmetic products irrespective of the country in which they are manufactured.[157] Further, once the complainant demonstrates that an alternative is reasonably available, the onus of disproving the same shifts onto the respondent.[158] Valaria should adopt such alternative as the measure invoked fails to contribute to the objective sought and is more trade restrictiveness than necessary. Thus, the measure is not 'necessary' to protect public morals.

b. The taxation measure fails the 'necessity test' under GATT Art. XX (b).

[¶ 73] GATT XX Art. (b) provides for expectation invoked to protect human or Animal health.[159] The AB in *Brazil – Retreaded Tyres*,[160] also used the above-mentioned 3-factorial test to determine the necessity of the measure at issue under Art. XX (b), in which factors such as measures; contribution, trade restrictiveness, and available alternatives were taken into consideration.[161]

[¶ 74] ***Firstly***, as contended above the taxation also prohibits the use of previously

[153] Moot Problem, pg. 23, The Sustainable Taxation (Amendment) Act, 2021.
[154] ABR *China – Audio*-visual, *supra* note 89, ¶251.
[155] Moot Problem, ¶2.9.
[156] PR *Brazil – Taxation*, *supra* note 137, ¶7.607.
[157] The Climate Protection Act of 2013, § 332, 113th Congress (2009) (USA).
[158] ABR *China –Audio-visual*, *supra* note 89, ¶319.
[159] GATT, Article XX (b).
[160] ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶182.
[161] ABR *Korea — Beef*, *supra* note 60, ¶164. ABR *EC – Asbestos*, *supra* note 6, ¶172; ABR *US – Gambling*, *supra* note 50, ¶306.

gathered animal test data.[162] It is pertinent to note that the already available test data doesn't cause harm to the animals. Further, the rationale behind including cephalopods under this measure is malice ridden, as there is no sufficient evidence showing that cephalopods do feel pain.[163] Thereby, penalizing reliance on animal test data from an insentient being as well as that is already available does not contribute to the protection of animal.

[¶ 75] ***Secondly,*** the measure imposes tax liability on the importers but at same time it provides the domestic manufactures with tax rebates on exports.[164] Moreover, it imposes such heavy tax liability even on animal testing conducted for which no alternatives are available. Thereby, the measure at issue is more trade restrictive than necessary as it imposes heavy tax liability even when such testing is essential for human safety.

[¶ 76] ***Thirdly,*** a reasonably available alternative must not be overlooked just because it involves an administrative cost or some changes.[165] The taxation measure should recognize the difference between humane and inhumane animal testing. A developing country like the COMPLAINANT cannot comply with a measure that is highly trade restrictive in nature. Thus, the measure does not justify the protection of human or animal health. Thus, the taxation measure fails the 'necessity test' under GATT Art. XX (b).

2) THE MEASURE DOES NOT SATISFY THE REQUIREMENTS OF THE CHAPEAU OF GATT ART. XX.

[¶ 77] Any measure has to be consistent with the chapeau of GATT Art. XX for it to be justified as a general exception.[166] The core purpose of chapeau is to avoid unfair and illegitimate use of the exceptions.[167] Moreover, the chapeau keeps in check the members' right to invoke exceptions and their duty to do so in good faith so that the member invoking measures does not use it for outwitting the substantial provisions of GATT.[168] For the same purpose, the chapeau entails the elements such as arbitrary discrimination, unjustified discrimination, and disguised restriction as yardstick to assess the consistency of a measure.[169]

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[162] Moot Problem, pg. 23, The Sustainable Taxation (Amendment) Act, 2021.
[163] Moot problem, ¶4.2; *Do Invertebrates Feel Pain?* The Senate Standing Committee on Legal and Constitutional Affairs, https://sencanada.ca/content/sen/committee/372/lega/witn/shelly-e.htm.
[164] Moot Problem, pg. 24, The Sustainable Taxation (Amendment) Act, 2021.
[165] ABR, *China – Audio-visual*, *supra* note 89, ¶327.
[166] MITSUO MATSUSHITA ET. AL., THE WORLD TRADE ORGANISATION: LAW, PRACTICE AND POLICY 104 (3rd edn., Oxford University Press 2015).
[167] ABR, *US-Gasoline*, *supra* note 144 at 25.
[168] ABR *Brazil – Retreaded Tyres*, *supra* note 50, ¶215.
[169] GATT, Article XX.

[¶ 78] A measure falling any one of these would breach the chapeau and thus, fail to qualify as a general exception. The COMPLAINANT submits that the measure at issue is not a general exception for it is a disguised restriction on trade. The term 'disguised restriction' embraces restrictions that amount to arbitrary or unjustifiable discrimination in international trade adopted under the garb of general exceptions enlisted in GATT Art. XX.[170] For a restriction to be disguised, it is not required to be concealed or unannounced.[171]

[¶ 79] The AB in *US – Shrimp,*[172] noted that applying a uniform standard throughout territories without giving due regard to the particular conditions prevailing in those territories is not acceptable in international trade. Discrimination exists if the measure at issue disregards the prevailing conditions in exporting countries with respect to its appropriateness. [173] Valaria is a developed country, wherein leading cosmetic producers do not rely on animal test data.[174] However, Danizia is a developing country that thrives on research and development based on animal testing. The measure at issue is discriminatory as it does not take into account the conditions prevailing in Danizia.

[¶ 80] The Respondent has adopted measures that target cosmetic products imported from Danizia as these rely heavily on animal test data. The Respondent has failed to distinguish between humane and inhumane testing methods and has severely jeopardized the sales of products tested in animal friendly conditions. The series of measures adopted by Valaria, when considered together, are holistically designed to restrict Danizian products from entering, and competing in Valarian markets. Thus, the measure at issue leads to a disguised restriction in international trade, adversely affecting the cosmetic industry of the COMPLAINANT.

[¶ 81] ***Therefore***, Section 5 of STA violates GATT Art. III.2 as it taxes imported cosmetics *in excess* of their like domestic counterparts and is not justified as an exception under GATT Art. XX.

V. THE PANEL SHOULD EXERCISE ITS DISCRETION UNDER ART. 19.1 OF THE DSU WITH RESPECT TO DANIZIA'S REQUEST FOR A RECOMMENDATION.

[¶ 82] Art. 19.1 of DSU stipulates that when a panel finds a measure to be inconsistent with a covered agreement, it shall recommend the member concerned to bring the measure

[170] ABR, *US – Gasoline*, *supra* note 144 at 23 & 24.
[171] ABR, *US* – Gasoline, *supra* note 144 at 25.
[172] ABR, *US – Shrimp*, *supra* note 5, ¶164-165.
[173] ABR, *US – Shrimp*, *supra* note 5, ¶17.
[174] Moot problem, ¶2.15.

inconformity with the agreement.[175] It is submitted that the panel should exercise its discretion with respect to Danizia's request for recommendation in order to bring the measure in conformity as: the established violations nullify or impair benefits accruing to Danizia within the meaning of Art. XXIII: 1(a) of GATT **(A)**; and the panel has the discretion to recommend Valaria to postpone implementation of CAP (**B**).

A. The established violations nullify and impair benefits accruing to Danizia within the meaning of GATT Art. XXIII: 1(a).

[¶ 83] Art. XXIII: 1(a) of GATT states that a claim lies whenever a member has failed to carry out its obligation under the provisions of this agreement.[176] A claim under this provision can be made whenever the violation of GATT appears to nullify of impair benefits of the members accrued by the provisions of GATT.[177] Since TBT and GATT are always read in a consistent manner and harmoniously,[178] and TBT furthers the objectives of GATT,[179] it can be inferred that the violation of benefits accrued under TBT are also governed by Art. XXIII: 1(a) of GATT.

[¶ 84] In the present case, Valaria violates the benefits provided under Art. XXIII :1(a) of GATT by ***firstly*** creating unnecessary obstacles to trade under Art. 2.2 of TBT, ***secondly*** causing unnecessary inconvenience to the agents under Art. 5.2.6 of the TBT and ***thirdly*** charging the equivalency fee *in excess* of the like domestic products. Thus, these violations appear to nullify and impair benefits of the COMPLAINANT accrued under GATT and TBT.

B. The Panel shall recommend Valaria to postpone the implementation of the Valarian CAP measure.

[¶ 85] Art. 19.1 of DSU establishes a relationship between a panel's finding that "a measure is inconsistent with a covered agreement" and the respondent's request to "bring the measure into compliance."[180] The AB in *US – Zeroing*,[181] noted that Art. 19.1 of the DSU puts a discretionary right on panels and the Appellate Body, allowing them to suggest ways

[175] DSU, Article 19.1.
[176] GATT, XXIII: 1(a); Report of the Panel, *European Economic Community – Payment and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, ¶144, L/6627 (Mar. 13, 1992) BISD 37S/86 (adopted Jan. 25, 1990).
[177] ABR *EC – Asbestos*, *supra* note 6, ¶185.
[178] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶91, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012).
[179] ABR *EC – Asbestos*, *supra* note 6, ¶80.
[180] Appellate Body Report, *China – Measures Related to the Exploration of Various Raw Materials*, ¶251, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Jan. 30, 2012).
[181] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) – Recourse to Article 21.5 of the DSU by the European Communities*, ¶466, WTO Doc. WT/DS294/AB/RW (adopted May 14, 2009).

in which the recommendations and judgements could be implemented.[182] The panel can even suggest the members on how to implement the recommendation obligation.[183] Hence, it is within panel's discretion to determine how the measure can be modified or repealed.[184]

[¶ 86] As established above, Valaria has not accredited the certification bodies outside of Valaria and the date of entry into force of the EC act did not provide sufficient time to the producers to adjust to the new CAP. Hence, it shall disincentivize the producers as it is more trade restrictive than necessary and further it can cause significant delays and prohibitive cost in placing the product on the Valarian Market.

[¶ 87] Moreover, Danizia being a developing country,[185] the current CAP shall be cumbersome to adhere and hence the recommendation shall facilitate the supply chain to adjust to the current measure. Further, the suggestion by the panel can provide a useful guidance and assistance to Members and facilitate implementation of recommendations and rulings.[186]

[¶ 88] ***Therefore***, the panel should recommend Valaria to postpone the CAP measure for a year until sufficient certification bodies are accredited as it nullifies or impairs benefits accruing to Danizia and it is well within panel's discretion to do the same.

[182] *Id*, ¶466.
[183] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶8.6, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (adopted Jan. 16, 2003).
[184] Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, ¶ 5.208 WTO Doc. WT/DS442/AB/R (adopted Sep. 5, 2017).
[185] Moot problem, Clarification no. 1.
[186] Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Recourse to Article 21.5 by United States/ Second Recourse to Article 21.5 by Ecuador*, ¶325, WTO Doc. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (adopted Nov. 25, 2008).

REQUEST FOR FINDINGS

Wherefore in light of the measures at issue, legal pleadings, reasons given, and authorities cited, Danizia, the CLAIMANT, respectfully requests the Panel to:

I. Find that Isle of Nysa's amicus curiae brief is acceptable and relevant to the present dispute.

II. Find that Valaria's cosmetic labelling requirement in section 6 of the Ethical Cosmetics Act 2021, creates unnecessary obstacles to international trade and violates the obligations under Art. 2.2 of the TBT Agreement.

III. Find that Valaria's certification requirement in section 8 of the Ethical Cosmetics Act 2021, causes unnecessary inconvenience to the applicants or their agents and is in violation with the obligations under Art. 5.2.6 of the TBT Agreement.

IV. Find that equivalency fee in Section 5 of Sustainable Taxation (amendment) Act 2021, is not in excess of those applied to like domestic products and violates the national treatment obligations under GATT Art. III.2.

V. Find that the measures invoked are inconsistent with the covered agreements and make a recommendation under Art. 19.1 of the DSU to Valaria to postpone the CAP measure for a year until sufficient certification bodies are accredited.

All of which is respectfully affirmed and submitted

Agents for the Government of Danizia

(COMPLAINANT)