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**JHJMCC 2020 - 2021**

Team: 059

**JOHN H. JACKSON MOOT COURT COMPETITION  
2020 - 2021**

**Budica – Measures Relating to the  
Importation and Marketing of Nutrition  
Food Bars**

Dale  
*(Complainant)*

**VS**

Budica  
*(Respondent)*

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**SUBMISSION OF THE RESPONDENT**

# GENERAL PARTBUDICA [RESPONDENT]

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  - i. General Agreement on Tariffs and Trade, Annex A [GATT 1994]
  - ii. Agreement on Technical Barriers to Trade, Annex 1A [TBT]
  - iii. Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1A, [SPS]
  - iv. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, [DSU]
  - v. Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C [TRIPS]
  - vi. Protocol amending the Marrakesh Agreement Establishing the World Trade Organization (Agreement on Trade Facilitation) 2017, Annex 1A [TFA]
2. Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331 [VCLT]

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<i>Australia – Plain Packaging</i>	<i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/DS441/AB/R, WT/DS435/AB/R, adopted 29 June 2020
<i>Brazil – Retreaded Tyres</i>	<i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
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<i>EC – Sardines</i>	<i>European Communities – Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002</i>
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<i>Dominican Republic – Import and Sale of Cigarettes</i>	<i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
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<i>US – Gasoline</i>	<i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996
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Abbreviation	Long Form
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Holzer 2018	Holzer K, 'Addressing tensions and avoiding disputes: Specific Trade Concerns in the TBT Committee,' 2018 WTO Staff Working Papers ERSD-2018-11
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### LIST OF ABBREVIATIONS

<b>AB</b>	Appellate Body
<b>ABR</b>	Appellate Body Report
<b>BCA</b>	Budican Customs Authority
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>e.g.</b>	For example
<b>FAO</b>	Food and Agriculture Organization
<b>FIP</b>	Presidential Decree No. 457 ( <i>Food Information Package</i> )
<b>HS</b>	Harmonised System

<b><i>i.e.</i></b>	That is
<b>NCD</b>	Non-communicable disease
<b>PR</b>	Panel Report
<b>RAHO</b>	Regional Azula Health Organization
<b>STC</b>	Specific Trade Concern
<b>UNTS</b>	United Nations Treaty Series
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization

## **SUBSTANTIVE PARTBUDICA [RESPONDENT]**

### **SUMMARY OF ARGUMENTS**

#### **Preliminary Matters**

- \_\_\_\_\_The Panel should exercise its inherent adjudicative powers to decline to address all the Claims in this dispute. The Presidential Decree No. 457 (*Food Information Package*) (FIP) was not a measure ‘taken’ as it was suspended by the Budican administrative tribunal and thus was not in existence at the time of establishment of the Panel. Dale’s bringing of the dispute was premature as measures with the same or similar WTO inconsistencies are not likely to be imposed in the near future due to legal barriers within the Budican legal system. Furthermore, Dale’s actions are inconsistent with the requirements of DSU Article 3.7, as there is no matter to which a positive solution is required.

#### **1. The FIP is consistent with TBT Article 2.1**

- The FIP is not a ‘technical regulation’ within the meaning of TBT Annex 1.1 as it does not enforce mandatory compliance. In the event the Panel finds otherwise, Dalean food bars are not ‘like’ Budican food bars (domestic origin) and Engen food bars (other origins) as they differ in physical qualities and characteristics, end uses, consumer tastes and habits, and tariff classifications. If the Panel finds the products to be like, the FIP does not accord less favourable treatment to Dalean food bars: there is no genuine relationship between the FIP and the adverse impact on the competitive opportunities of Dalean food bars. In any event, the detrimental impact stems exclusively from a legitimate regulatory distinction: the FIP is even-handed in its design, architecture, revealing structure, operation, and application, as it is calibrated to the risks it aims to mitigate and is not a means of arbitrary and unjustifiable discrimination.

#### **2. The FIP is consistent with TBT Article 2.2**

- The text, structure, and legislative history of the FIP show that it pursues the legitimate objectives of protection of human health and the provision of consumer information. It is not more trade-restrictive than necessary. Firstly, analysis of the design, structure, operation, and application of the FIP shows that it is apt to make a material contribution towards the legitimate objectives that Budica pursues. Secondly, the risks of non-fulfilment of the objectives are high. Thirdly, the design and operation show that the trade-restrictiveness is minimal. Fourthly, when compared with the FIP, there are no reasonably available alternatives that make an equivalent contribution to the objectives.

#### **3. Budica did not violate any obligations under TBT Article 10.1.1**

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- The failure of the Budican enquiry point to answer Dale's enquiry on 15 September 2019 and the follow-up request on 2 October is not a violation of Article 10.1.1. The obligation is to establish an enquiry point *capable* of answering all reasonable enquiries. To determine whether this obligation is fulfilled, all relevant factors must be considered. Firstly, the Budican enquiry point received 50 enquiries regarding the Draft Decree, of which a majority were responded to directly in written form. Secondly, Dale received all the information it sought in their enquiry in the Specific Trade Concern (STC) brought on 16 October. Thirdly, Budica is a developing country and is granted special and differential treatment under Article 12.1 of the TBT, which should inform the examination of whether an enquiry point has been established. As the AB has held that enquiry points should not be held to a standard of perfection, and as the examination of all relevant factors show the responsiveness of the Budican enquiry point, Budica has established an enquiry point capable of answering all reasonable enquiries.

### **4. The FIP is consistent with TRIPS Article 20**

- The FIP does not impose a 'special requirement' as its labelling requirements are not closely connected to the use of trademarks, and its trademark restrictions do not specifically prescribe the manner in which trademarks are to be used. In the event the Panel finds otherwise, the FIP does not encumber the use of a trademark in the course of trade as labelling does not impede such use, and the trademark requirements do not include an enforcement mechanism. If the Panel does find that it encumbers the use of a trademark, the balancing of all factors shows that the encumbrance is justifiable. Firstly, the FIP is imposed to protect human health, which has been acknowledged as an important policy concern. Secondly, the encumbrance is limited as producers can still distinguish their products.

### **5. Budica's actions regarding Spear Bars Inc.'s shipment are consistent with TFA Article 10.8.2**

- Spear Bars Inc., the importer, was given 10 days to re-consign or return the shipment rejected for non-compliance with the FIP. To determine whether this is a reasonable period of time, consideration must be given to all circumstances. Firstly, the importer effectively received the notification from the Budican Customs Authority (BCA). Secondly, they expected to receive the good within 3 to 6 days. However, they did not respond to the BCA. As a developing country, Budica has limited storage facilities and cannot keep the goods in storage for an unlimited time. Considering these factors, 10 days *is* a reasonable period of

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time to re-consign or return the goods. Accordingly, the BCA correctly exercised its discretion to destroy the non-compliant goods.

## SUBSTANTIVE PARTBUDICA [RESPONDENT]

### STATEMENT OF FACTS

- Dale, a developed country, Budica, a developing country, and Enge, a least-developed country, are Members of the World Trade Organization (WTO), United Nations Food and Agriculture Organization (FAO), World Health Organization (WHO) and Regional Azula Health Organization (RAHO). Both Budica and Dale are parties to the TFA.
- The WHO has recognized obesity as a blatantly visible yet neglected public health problem globally. Obesity in Budica has been growing steadily since the 1990s. In 2018, non-communicable diseases (NCDs) were the main cause of death in Budica, and half of all NCD-related deaths were linked to obesity. This rise in obesity is due a shift in consumption habits towards fast foods and packaged foods with high contents of unhealthy nutrients. Without proper intervention, the proportion of obese men and women in Budica would rise to 60% and 40% respectively.
- In response, Budica published a Draft Decree on 1 August 2019 that aimed to promote the consumption of healthy food products by providing consumers with understandable and accurate information about packaged processed food products through front-of-pack labels. The measure categorizes products into ‘Free,’ ‘Low’ and ‘High-Content’ labels based on the content of added sugar, sodium, and saturated fats. Products in the ‘High-Content’ category are also subject to trademark restrictions. This draft measure enacted as the FIP came into force on 1 April 2020.
- On 15 September 2019, Dale sought to clarify certain aspects of the Draft Decree through an enquiry, which was acknowledged by the Budican enquiry point. Budica received 50 enquiries regarding the Draft Decree, of which 32 have been answered. All substantive matters of Dale’s enquiry were discussed in the STC brought by Dale on 16 October.
- The main competitors in the Budican market for nutrition food bars are *Healthy Spear Bars* (Dale), *Celtic Flavour Bars* (Budica), and *Wild Tropic – All Natural* (Enge). Dalean food bars are classified as ‘High-Content.’ On 3 April 2020, a shipment carrying 10 containers of *Healthy Spear Bars* was rejected by the BCA for non-compliance with the FIP. The importer did not respond to the notification from the BCA. As the goods were not re-consigned or returned within 10 days, they were destroyed.
- The FIP was suspended by an interim measure of the Budican administrative tribunal on 23 August 2020 for up to 2 years. Similar measures cannot be enacted during the pendency of the case. Upon Dale’s request, a Panel was established by the Dispute Settlement Body (DSB) on 5 September 2020.

## **SUBSTANTIVE PARTBUDICA [RESPONDENT]**

### **IDENTIFICATION OF MEASURES AT ISSUE**

- Measure 1: Presidential Decree No. 457 (Food Information Package), which sets out voluntary labelling requirements and restrictions on the use of trademarks for packaged processed food.
- Measure 2: Failure by the Budican enquiry point to reply to Dale's request dated 15 September 2019.
- Measure 3: The application of the Presidential Decree No. 457 (*Food Information Package*) by the Budican Customs Authority through the domestic regulatory system, which resulted in the destruction of a Dalean shipment of nutritional food bars.

### **LEGAL PLEADINGS**

#### **PRELIMINARY MATTERS – THE PANEL SHOULD EXERCISE ITS INHERENT ADJUDICATIVE POWERS TO DECLINE TO ADDRESS ALL CLAIMS**

1. Following an interim measure by the Budican administrative tribunal, the FIP was suspended prior to the establishment of this Panel.<sup>1</sup> While Budica does not contend the jurisdiction of the Panel, even if a panel's jurisdiction has been validly established, there are instances where a panel is precluded from ruling on the claims before it.<sup>2</sup> Panels have certain powers that are inherent in their adjudicative functions under Dispute Settlement Understanding (DSU) Article 11,<sup>3</sup> which can be exercised to decline to rule on the claims before them.<sup>4</sup> The Appellate Body (AB) in *EU – PET* found that panels have a margin of discretion in the exercise of these powers in deciding whether to decline addressing all claims.<sup>5</sup>

2. The Panel should exercise its inherent adjudicative powers to decline to address all the Claims in this dispute as: (1) the measure (FIP) was not 'taken,' as it was not in existence at the time of the establishment of the Panel; (2) Dale's bringing of the dispute to the DSB was premature as measures with the same or similar WTO inconsistencies are not likely to be imposed in the near future; and (3) Dale's actions were inconsistent with the requirements of DSU Article 3.7 to determine whether the Claims would be fruitful before bringing them.

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<sup>1</sup> Case, [5.2], [5.8].

<sup>2</sup> ABR, *EU – PET*, [5.16-5.17].

<sup>3</sup> ABR, *EU – PET*, [5.16].

<sup>4</sup> ABR, *EU – PET*, [5.18].

<sup>5</sup> ABR, *EU – PET*, [5.16-5.17].

**1. The FIP was not a measure ‘taken’ as it was not in existence at the time of the establishment of the Panel**

3. When deciding on whether to exercise their inherent adjudicative powers to address claims that have expired or been revoked, panels have considered the timing of the expiry, *i.e.*, whether the expiry occurred *before* or *after* the establishment of the panel.<sup>6</sup> While panels have made findings on the latter, they have declined to make findings on measures that have expired<sup>7</sup> or been revoked<sup>8</sup> before the establishment of the panel. This is consistent with the general rule that measures must be ‘in existence’ at the time of the establishment of the panel,<sup>9</sup> as well as the rationale that the DSU aims to achieve a positive solution to disputes that exist and not to make law.<sup>10</sup> A temporal distinction between a measure that was suspended *before* in comparison to *after* the establishment of the panel would exist, as a similar rationale to expired or revoked measures would apply.

4. The FIP was suspended in its entirety for all domestic and imported products<sup>11</sup> by the Budican administrative tribunal on 23 August 2020,<sup>12</sup> *before* the Panel was established by the DSB on 5 September 2020.<sup>13</sup> Since the FIP has been suspended and is no longer in operation, it has ceased to have any effect on trade. Further, contrary to Dale’s contention that lingering trade effects still exist, there is no evidence of such as the import level of Dalean food bars is stable even after the suspension of the FIP.<sup>14</sup> Thus, due to the suspension, the FIP was not in effect at the time the Panel was established and does not constitute a measure ‘taken’ by a Member.

**2. Dale’s bringing of the dispute was premature as measures with the same or similar WTO inconsistencies are not likely to be imposed in the near future**

5. In *EU – PET* (where the measure expired *after* the establishment of the panel), the measure was examined as there was a reasonable possibility that measures with the same or similar WTO inconsistencies would be imposed.<sup>15</sup> In past disputes, panels considered the

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<sup>6</sup> ABR, *EU – PET*, [5.38].

<sup>7</sup> PR, *US – Gasoline*, [6.19].

<sup>8</sup> PR, *Argentina – Textiles and Apparel*, [6.4], [6.12-13].

<sup>9</sup> ABR, *EC – Chicken Cuts*, [156].

<sup>10</sup> ABR, *US – Wool Shirts and Blouses*, 18, 19.

<sup>11</sup> Clarifications, [27].

<sup>12</sup> Case, [5.2].

<sup>13</sup> Case, [5.8].

<sup>14</sup> Case, Annex III.

<sup>15</sup> ABR, *EU – PET*, [5.47].



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likelihood<sup>16</sup> and ease of reimposition.<sup>17</sup> Unlike prior disputes, in this instance, however, there are substantial barriers to the imposition of such a measure.

6. The suspension of the FIP by the tribunal maintains the *status quo* that existed before the enactment of the FIP, and can only be lifted if the underpinning risk of irreparable harm to Spear Bars Inc.'s interests ceases to exist.<sup>18</sup> In the Budican legal system, the government of Budica is prohibited from enacting further regulations that substantially replicate a measure that has been suspended or invalidated.<sup>19</sup> The suspension lasts for the duration of the tribunal proceedings<sup>20</sup> and potentially the appeal process as well.<sup>21</sup> Dale's contention that it is likely the tribunal would find the FIP to be in full conformity with local regulations would be to impute a decision on the administrative tribunal and undermine the judicial capabilities of Budica.

7. As measures with the same or similar WTO inconsistency cannot be imposed unless and until the legal barriers are overcome, the likelihood of the imposition of such a measure is reduced. Thus, as measures with the same or similar WTO inconsistency are not likely and not easily imposed in the near future, Dale's bringing of the dispute was premature.

### **3. Dale's actions were inconsistent with the requirements of DSU Article 3.7 to determine whether the Claims would be fruitful before bringing them**

8. While under DSU Article 3.7 Members are expected to be self-regulatory in deciding whether an action would be fruitful,<sup>22</sup> the deference accorded to the exercise of their judgment is not entirely boundless.<sup>23</sup> One such limitation is that a panel's consideration must go beyond a Member's request for findings and objectively assess whether there remains a 'matter' to which a 'positive solution' is required,<sup>24</sup> as amicable settlements outside litigation in the DSB is preferable.<sup>25</sup> This 'positive solution' in Article 3.7 refers to a solution that leads to compliance, which is implementable in various ways.<sup>26</sup> A panel is required to make findings to assist the DSB in making recommendations or rulings to achieve a positive solution.<sup>27</sup> Due to the prospective nature of the DSU, this recommendation is that the Member

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<sup>16</sup> PR, *US – Gasoline*, [6.19].

<sup>17</sup> PR, *India – Additional Import Duties*, [7.69-70].

<sup>18</sup> Case, [5.2]; Clarifications, [26].

<sup>19</sup> Clarifications, [23-24].

<sup>20</sup> Clarifications, [26].

<sup>21</sup> Case, [5.3].

<sup>22</sup> ABR, *EC – Bananas III*, [135].

<sup>23</sup> ABR, *Peru – Agricultural Products*, [5.19].

<sup>24</sup> ABR, *EC – PET*, [5.42-43].

<sup>25</sup> Van den Bossche 2017, 189.

<sup>26</sup> ABR, *EC – Bananas (Recourse to Article 21.5 – Ecuador and US)*, [212].

<sup>27</sup> DSU, Art 11.

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concerned brings the measure into consistency.<sup>28</sup> However, when a measure is no longer in force, it is unnecessary for a panel to make recommendations as there is no measure to be brought into consistency.<sup>29</sup>

9. As the measure is suspended and has no legal effect,<sup>30</sup> there is no measure that requires to be brought into compliance presently and potentially permanently. Unlike in *EU – PET*, as stated, the measure was not in force at the time of the establishment of the Panel, and as established in paras 5-7, the reimposition of measures with the same or similar WTO inconsistency is unlikely. Hence, the matter in the present dispute is not ripe to be addressed by the Panel as the Claims are moot and it is unnecessary to make findings to assist the DSB in making recommendations or rulings. Thus, the bringing of the Claims is not fruitful.

10. Therefore, considering the above factors, the Panel should exercise its inherent adjudicative powers and decline to address all Claims.

### 1. THE FIP IS CONSISTENT WITH TBT ARTICLE 2.1

11. To establish inconsistency with TBT Article 2.1: (i) the measure should be a technical regulation within the meaning of TBT Annex 1.1; (ii) the imported products must be ‘like’ domestic products and products of other origins; and (iii) they must be treated less favourably.<sup>31</sup> As the FIP does not fulfil any of these requirements, it is consistent with TBT Article 2.1.

#### 1.1 The FIP is not a ‘technical regulation’ within the meaning of TBT Annex 1.1

12. A document is a technical regulation if it: (i) applies to an identifiable product or group of products; (ii) lays down product characteristics; and (iii) is mandatory.<sup>32</sup> The FIP is not a technical regulation as the third element of this conjunctive test is not satisfied. The AB emphasized that when analysing these criteria, a measure must be examined as a whole.<sup>33</sup> As both technical regulations and standards can have conditions to use a label which could be ‘compulsory, binding or enforceable,’ it is necessary to consider additional characteristics of the measure.<sup>34</sup> Accordingly, the FIP establishes two labels using the word ‘may,’<sup>35</sup> which indicates an option rather than an obligation.<sup>36</sup> This is further supported by the use of the

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<sup>28</sup> DSU, Art 19.1.

<sup>29</sup> PR, *US – Poultry (China)*, [8.7]; PR, *Dominican Republic – Import and Sale of Cigarettes*, [7.363], [7.393], [7.419].

<sup>30</sup> Case, [5.2]; Clarifications, [25], [27].

<sup>31</sup> ABR, *US – Clove Cigarettes*, [87]; ABR, *US – Tuna II (Mexico)*, [202].

<sup>32</sup> ABR, *EC – Sardines*, [176].

<sup>33</sup> ABR, *EC – Asbestos*, [64].

<sup>34</sup> ABR, *US – Tuna II (Mexico)*, [188].

<sup>35</sup> FIP, Arts 7.1, 8.1.

<sup>36</sup> PR, *EC – Tariff Preferences*, [7.38]; Cook 2015, 327.

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word ‘may’ in the enforcement mechanism,<sup>37</sup> unlike *US – Tuna II (Mexico)* where the measure contained comprehensive surveillance and specific enforcement mechanisms.<sup>38</sup> As such, when considering all of the requirements of the FIP as a whole, it is not mandatory.

### 1.2 Dalean food bars are not ‘like’ Budican food bars and Engen food bars

13. The ‘likeness’ of products under TBT Article 2.1 involves an assessment of the competitive relationship between the products.<sup>39</sup> The AB has consistently evaluated this on four criteria:<sup>40</sup> (1) the properties, nature, and quality of the products, particularly the those that influence their competitive relationship;<sup>41</sup> (2) end uses of the products, which is the possibility and capability of carrying out the same or similar functions;<sup>42</sup> (3) consumers’ tastes and habits, which is their willingness to use each product to fulfil the possible end uses;<sup>43</sup> and (4) the tariff classification of the products.<sup>44</sup> These interrelated criteria<sup>45</sup> must be weighed to make an overall determination of likeness.<sup>46</sup> Evaluation of these criteria establishes that Dalean food bars are not ‘like’ Budican food bars and Engen food bars.

14. *Dalean food bars are not ‘like’ Budican food bars.* For food products, the most important physical characteristic is the ingredients, as this influences all other aspects of the food (e.g., flavour, texture, etc). Dalean food bars are made of oats, muesli, rice, whey protein, and dehydrated apple and banana.<sup>47</sup> Budican food bars, on the other hand, contain wheat and do not contain any fruit product. This difference in ingredients will affect the taste, appearance, and other factors that consumers consider when purchasing products. Further, the health risks that arise from the difference in physical characteristics should be considered.<sup>48</sup> Dalean food bars contain three times more sodium and saturated fats and two times more added sugar than Budican food bars.<sup>49</sup>

15. This is reflected in consumer tastes and preferences. Due to the higher levels of unhealthy nutrients in Dalean food bars,<sup>50</sup> consumers who are aware of the health risks would perceive them to be more harmful than Budican food bars. Additionally, unlike Dalean food

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<sup>37</sup> FIP, Art 16.1.

<sup>38</sup> ABR, *US – Tuna II (Mexico)*, [194].

<sup>39</sup> ABR, *US – Clove Cigarettes*, [120].

<sup>40</sup> ABR, *EC – Asbestos*, [101].

<sup>41</sup> ABR, *EC – Asbestos*, [114].

<sup>42</sup> ABR, *US – Clove Cigarettes*, [125] citing ABR, *EC – Asbestos*, [117].

<sup>43</sup> ABR, *US – Clove Cigarettes*, [125] citing ABR, *EC – Asbestos*, [117].

<sup>44</sup> ABR, *EC – Asbestos*, [101].

<sup>45</sup> ABR, *US – Clove Cigarettes*, [126].

<sup>46</sup> ABR, *EC – Asbestos*, [109].

<sup>47</sup> Case, [2.8].

<sup>48</sup> ABR, *EC – Asbestos*, [116].

<sup>49</sup> Case, [2.3], [2.8].

<sup>50</sup> Case, [2.3], [2.8].

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bars, Budican food bars are marketed to consumers as meal replacement bars and nutritional boost bars, which would affect preferences.<sup>51</sup> The end-uses also differ. Budican food bars are used to meet nutritional needs in a short period of time and as meal replacement bars,<sup>52</sup> while Dalean food bars are used for recovery after exercise.<sup>53</sup> The latter are not used as meal replacements, while the former are not used after exercise.

16. As tariff classifications are not decisive in showing likeness,<sup>54</sup> the similar tariff classifications of Budican food bars (HS19042014) and Dalean food bars (HS190420) do not make them like. Further, as the shared subheading (5<sup>th</sup> and 6<sup>th</sup> digits)<sup>55</sup> is broad, it does not show the other differences that are reflected in the further subdivision of Budican bars (7<sup>th</sup> and 8<sup>th</sup> digits).<sup>56</sup> Thus, weighing the above four factors shows that Dalean food bars and Budican food bars are not like.

17. *Dalean food bars are not 'like' Engen food bars.* Unlike Dalean food bars, Engen food bars contain gluten-free ingredients (including rice and quinoa), vegan proteins (as opposed to the non-vegan whey proteins in the Dalean bars), and dehydrated fruits and coconuts.<sup>57</sup> They contain no sodium or added sugar, and 62 times less saturated fats<sup>58</sup> than Dalean bars, which contain 0.5g of sodium and 11g of added sugar.<sup>59</sup> This difference in physical properties can be further confirmed by the tariff classification,<sup>60</sup> as Engen food bars (HS190421) fall under a different subheading of prepared foods obtained from gluten-free products,<sup>61</sup> specifically distinguished from Dalean food bars, which fall under prepared foods obtained from cereals.<sup>62</sup>

18. The consumer tastes and preferences are not similar. Consumers who are vegan/vegetarian or cannot/do not consume gluten (for instance, those with celiac diseases<sup>63</sup>) perceive the two food bars differently. The difference in the levels of sodium, added sugar and saturated fats also influences consumers' tastes and preferences. Additionally, the bars' end-uses also differ. Engen food bars are used for extended study hours and working

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<sup>51</sup> Case, [2.4].

<sup>52</sup> Case, [2.4].

<sup>53</sup> Case, [2.8].

<sup>54</sup> ABR, *EC – Asbestos*, [140].

<sup>55</sup> Clarifications, [10].

<sup>56</sup> Clarifications, [11].

<sup>57</sup> Case, [2.6], [2.8].

<sup>58</sup> Calculation from Case, [2.6], [2.8].

<sup>59</sup> Case, [2.8].

<sup>60</sup> ABR, *EC – Asbestos*, [102].

<sup>61</sup> Case, footnote 15.

<sup>62</sup> Cases, [2.8]; Clarifications, [12].

<sup>63</sup> Reilly 2016, 206.

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schedules,<sup>64</sup> unlike Dalean food bars which are used for recovery after exercise.<sup>65</sup> Unlike Engen bars, Dalean food bars cannot be used as a vegan or gluten-free bar. Thus, weighing the above criteria shows that Dalean food bars and Engen food bars are not ‘like’ products.

### **1.3 The FIP does not accord ‘less favourable treatment’ within the meaning of TBT Article 2.1**

19. In the unlikely event that the products are like, the FIP does not treat Dalean bars less favourably. The two-tier test to examine ‘less favourable treatment’ is whether: (i) there is a detrimental impact on competitive opportunities for the group of imported products *vis-à-vis* the group of like domestic products and a group of like products originating from any other country; and (ii) it stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.<sup>66</sup>

#### 1.3.1 There is no detrimental impact on the competitive opportunities of Dalean food bars

20. The detrimental impact may be seen from the design, architecture, revealing structure and operation of the measure within the market.<sup>67</sup> There must be a genuine relationship between the measure and the adverse impact on the competitive opportunities of the imported product.<sup>68</sup>

21. To the extent Dale argues that the reduction in import volume shows detrimental impact, there is no genuine relationship between this and the FIP. During the period between April and September 2019, though Dalean food bars had a higher level of imports than Engen food bars, the market shares (which is a company’s total sales as a proportion of the total sales of the industry<sup>69</sup>) of both bars were similar.<sup>70</sup> This implies that prior to the imposition of the FIP, a mismatch between consumer demand for Dalean food bars (total sales) and the supply (the volume of imports) existed. The reduction in import volumes is thus a response to market forces existing prior to the FIP. Further, the imports of Dalean food bars began declining before the enactment of the FIP and continued to fluctuate after the enactment of the FIP.<sup>71</sup> Thus, the changes in the imports do not have a genuine relationship with the FIP.

22. In the event the Panel finds that the FIP does have a detrimental impact on the competitive opportunities of Dalean food bars, it is unrelated to the country of origin but instead stems exclusively from a legitimate regulatory distinction.

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<sup>64</sup> Case, [2.6].

<sup>65</sup> Case, [2.8].

<sup>66</sup> ABR, *US – Tuna II (Mexico)*, [215]; ABR, *US – Clove Cigarettes*, [182].

<sup>67</sup> ABR, *US – Clove Cigarettes*, [182]; ABR, *US – COOL*, [269], [286].

<sup>68</sup> ABR, *US – COOL*, [270].

<sup>69</sup> Clarifications, [31].

<sup>70</sup> Case, Annex III.

<sup>71</sup> Case, Annex III.

1.3.2 The detrimental impact stems exclusively from a legitimate regulatory distinction

23. The detrimental impact stems from a legitimate regulatory distinction when the measure is even-handed in design, architecture, revealing structure, operation, and application.<sup>72</sup> A measure is even-handed when it is ‘calibrated’ to the risks it aims to address,<sup>73</sup> or is not a means of arbitrary or unjustifiable discrimination,<sup>74</sup> *i.e.*, if the discrimination can be reconciled with or is rationally related to the policy objective.<sup>75</sup>

24. The legitimate regulatory distinction is the ‘High-Content’ thresholds in FIP Articles 9 and 15. The FIP does not draw arbitrary or unjustifiable distinctions as this threshold is designed and applied in a manner rationally connected with a policy objective, *i.e.*, the protection of human health by reducing the risk of obesity. Firstly, the design is such that the FIP imposes certain labelling and trademark requirements on both domestic and imported products based on the thresholds of sodium, added sugar, and saturated fats;<sup>76</sup> these, when consumed in excessive amounts, are major contributors to obesity.<sup>77</sup> Secondly, the distinctions for the ‘High-Content’ threshold are structured to encourage the healthy intake of these nutrients based on daily consumption limits as recommended by the WHO, FAO, and RAHO to address obesity.<sup>78</sup>

25. Thirdly, the front-of-pack labelling applied to these ‘High-Content’ products is recommended as an effective method of reducing obesity.<sup>79</sup> Further, the FIP is structured to combine labelling with trademark restrictions to prevent ‘High-Content’ products from making false health claims and deceiving customers.<sup>80</sup> Thus, the design, structure, and application of the FIP show that the detrimental impact caused to Dolean bars stems from a legitimate regulatory distinction.

26. When examining calibration under TBT Article 2.1, the relevant distinction to be examined is that which accounts for the detrimental impact.<sup>81</sup> Dale may argue that the FIP is not calibrated because it does not include natural sugars and trans fats. However, the classifications in the FIP are based on added sugar content<sup>82</sup> as it is more informative of diet

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<sup>72</sup> ABR, *US – Clove Cigarettes*, [215].

<sup>73</sup> ABR, *US – Tuna II (Mexico)*, [297].

<sup>74</sup> ABR, *US – COOL*, [271].

<sup>75</sup> ABR, *EC – Seal Products*, [5.306].

<sup>76</sup> FIP, Arts 7, 8, 9.

<sup>77</sup> WHO Obesity.

<sup>78</sup> Case, Annex IV.

<sup>79</sup> WHO Best Buys, 8; Case, [1.10].

<sup>80</sup> Case, [3.3]; FIP, Art 15.

<sup>81</sup> ABR, *US – Tuna II (Article 21.5 – US and Mexico II)*, [6.79-81].

<sup>82</sup> FIP, Art 1.

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quality than natural or total sugars.<sup>83</sup> RAHO recommends promoting the intake of fresh and dehydrated fruits and vegetables.<sup>84</sup> Including sugar found naturally in fresh and dehydrated fruits would contradict this, as it would discourage buyers from their consumption. The exclusion of trans fats is not relevant to the findings under TBT Article 2.1, as the trans fats contents of the products are not specified and thus cannot be considered part of the relevant distinction. As the FIP is calibrated to the risks it aims to mitigate, it is even-handed.

27. Thus, the detrimental impact caused by the FIP stems exclusively from a legitimate regulatory distinction, and the FIP is consistent with TBT Article 2.1.

### 2. THE FIP IS CONSISTENT WITH TBT ARTICLE 2.2

28. The three-tier conjunctive test to prove consistency with TBT Article 2.2 is whether the measure at issue: (i) is a technical regulation; (ii) fulfils a ‘legitimate objective’; and if it does, (iii) whether it is ‘not more trade-restrictive’ than necessary.<sup>85</sup> As established in para 12, the FIP is not a technical regulation. If the Panel finds otherwise, the other criteria are satisfied.

#### 2.1 The FIP fulfils the ‘legitimate objectives’ of protection of human health and provision of consumer information

29. The objective of a measure can be ascertained from its text, structure, and legislative history.<sup>86</sup> A technical regulation can pursue more than one objective.<sup>87</sup> The objectives of the FIP are firstly to protect human health by reducing the rates of obesity, and secondly to provide consumers with accurate, understandable, and simple information to allow them to make healthy dietary choices.<sup>88</sup>

30. TBT Article 2.2 supplies an illustrative list of legitimate objectives, including the protection of human health and the prevention of deceptive practices.<sup>89</sup> The protection of human health through the elimination or reduction of health risks is ‘both vital and important in the highest degree.’<sup>90</sup> Obesity is a major health concern<sup>91</sup> that has been recognized as a disease<sup>92</sup> that impacts human life, and is a prevalent issue in Budica.<sup>93</sup>

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<sup>83</sup> Louie and Tapsell 2015, 856.

<sup>84</sup> Case, [1.10].

<sup>85</sup> ABR, *US – Tuna II (Mexico)*, [313-14], [322]; ABR, *Australia – Plain Packaging*, [6.3].

<sup>86</sup> ABR, *US – Tuna II (Mexico)*, [314].

<sup>87</sup> PR, *US – Clove Cigarettes*, [7.342].

<sup>88</sup> FIP, Preamble; Case, [3.2].

<sup>89</sup> ABR, *US – Tuna II (Mexico)*, [313].

<sup>90</sup> ABR, *EC – Asbestos*, [172].

<sup>91</sup> Caballero 2019, 4.

<sup>92</sup> FIP, Preamble.

<sup>93</sup> Case, [1.13].

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31. The provision of consumer information is also considered a legitimate objective, connected to the prevention of deceptive practices.<sup>94</sup> Consumers who lack scientific knowledge to choose healthy products are likely to be deceived by marketing practices.<sup>95</sup> Budicans' lack of understanding of nutritional information,<sup>96</sup> illustrates the need for information that is easy for all consumers to understand. Thus, the objectives pursued by Budica are legitimate.

### **2.2 The FIP is 'not more trade-restrictive than necessary'**

32. Ascertaining whether a measure is more trade-restrictive than necessary requires a relational analysis of the measure on its own, considering: (i) the degree of contribution to the objective pursued; (ii) the trade-restrictiveness of the technical regulation; and (iii) the risks that non-fulfilment would create.<sup>97</sup> When considering all three criteria, the FIP is not more trade-restrictive than necessary.

#### 2.2.1 The FIP makes a material contribution to the objectives

33. The degree of contribution can be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.<sup>98</sup> The FIP is designed, structured, and applied in a manner apt to make a material contribution to the objectives by imposing labelling and trademark requirements. This is done firstly, by giving consumers information on harmful nutrients that contribute to obesity,<sup>99</sup> and secondly, by preventing the misleading use of trademarks.<sup>100</sup>

34. Studies show that 92% of Budicans do not understand nutrition facts labels printed on packaged food products.<sup>101</sup> Front-of-pack labelling, however, effectively improves consumers' selection of healthier food products.<sup>102</sup> The 'Stop Sign' nutrient labelling system used in the FIP<sup>103</sup> has shown the most success within other countries in terms of visualization, understanding, and ability to modify purchasing decisions.<sup>104</sup> Consumers across multiple demographics find such interpretative labelling the most useful and easy to use.<sup>105</sup> It fills the information gap for consumers who cannot make healthy choices with their limited

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<sup>94</sup> ABR, *US – COOL*, [445], [453]; PR, *US – COOL*, [7.651].

<sup>95</sup> Hawkes *et al* 2015, 2415.

<sup>96</sup> Case, Annex IV (2017 Obesity: Front of Pack Labelling and Consumer Behaviour).

<sup>97</sup> ABR, *US – Tuna II (Mexico)*, [322]; ABR, *Australia – Plain Packaging*, [6.517].

<sup>98</sup> ABR, *US – Tuna II (Mexico)*, [317]; ABR, *US – COOL*, [461].

<sup>99</sup> Case, [3.3].

<sup>100</sup> FIP, Art 15; Case, [3.3].

<sup>101</sup> Case, Annex IV (2017 Obesity: Front of Pack Labelling and Consumer Behaviour).

<sup>102</sup> Cecchini and Warin 2015, 201.

<sup>103</sup> Jones *et al* 2019, 4.

<sup>104</sup> Reyes *et al* 2019, 3.

<sup>105</sup> UNICEF 2016, 21.



understanding of nutritional information.<sup>106</sup> Accordingly, the FIP will effectively communicate the required information to consumers to influence them to make healthier decisions at the point-of-purchase, and is thus apt to make a material contribution to achieve its legitimate objectives.

2.2.2 The risks of non-fulfilment of the legitimate objectives are high

35. Determining the risks that non-fulfilment of the objective would create requires analysis of the nature of the risks and the gravity of the consequences that would arise, taking into account available scientific and technical information.<sup>107</sup> As established in paras 30-31, obesity is a pressing health concern in Budica and consumers' lack of understanding on nutrition information makes them incapable of making healthy choices. Without intervention, 40% of women and 60% of men in Budica would become obese by 2050, while 10 out of 100 Budicans are projected to die before the age of 60 due to obesity.<sup>108</sup> Thus, the risks of non-fulfilment of Budica's objectives are high.

2.2.3 The trade-restrictiveness of the FIP is minimal compared to its material contribution and the risks of non-fulfilment

36. A measure that has a limiting effect on trade,<sup>109</sup> and a detrimental impact on the competitive opportunities available to imported products, is trade restrictive.<sup>110</sup> TBT Article 2.2 does not prohibit measures that have *any* trade-restrictive effect, but only those that exceed what is necessary to achieve the degree of contribution towards the legitimate objective.<sup>111</sup> As established in paras 20-21, the FIP is not discriminatory and there is no detrimental impact on the competitive opportunities for Dalean food bars.

37. Dale may argue that the deviation from the *Codex Guidelines* by creating a 'High-Content' label results in the FIP being more trade-restrictive than necessary. However, Members can take measures necessary to pursue legitimate objectives to the level they consider appropriate,<sup>112</sup> and are free to adopt regulations with higher levels of consumer and health protection than what is contained in the *Codex Guidelines*.<sup>113</sup> Further, these standards are voluntary and are not intended to create a universal standard,<sup>114</sup> ensuring policy space for

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<sup>106</sup> Hawkes *et al* 2015, 2415.

<sup>107</sup> TBT, Art 2.2; ABR, *US – COOL (Article 21.5 – Canada and Mexico)*, [5.217].

<sup>108</sup> Case, [1.12-13].

<sup>109</sup> ABR, *US – Tuna II (Mexico)*, [319]; Sanchez and Aneno 2016, 371.

<sup>110</sup> ABR, *Australia – Plain Packaging*, [6.385].

<sup>111</sup> ABR, *US – Tuna II (Mexico)*, [319].

<sup>112</sup> ABR, *US – Tuna II (Mexico)*, [316].

<sup>113</sup> Codex: Nutrition and Health.

<sup>114</sup> FAOUN and WTO 2017, 5.

national governments.<sup>115</sup>

38. Weighing the material contribution by the FIP to the objectives, the high risks of non-fulfilment and the minimal trade-restrictiveness, shows that the FIP is not more trade-restrictive than necessary.

**2.3 No alternative measures are reasonably available or make an equivalent contribution to the objectives**

39. The AB has clarified that a comparative analysis between the challenged measure and alternative measures is a useful conceptual tool in determining whether the measure is more trade-restrictive than necessary.<sup>116</sup> The alternative measures must: (i) be less-trade restrictive; (ii) make an equivalent contribution to the objective; and (iii) be reasonably available.<sup>117</sup> It is the burden of the complaining party to establish a *prima facie* case that alternative measures exist.<sup>118</sup> Dale may propose various alternative measures including promotion of physical activities, and voluntary labelling based on the *Codex Guidelines*.

40. The suitability of a measure varies from country to country due to behaviour, preferences, economic characteristics, environment, and structures.<sup>119</sup> The promotion of physical activities and taxation were considered when drafting the FIP and rejected due to lack of evidence regarding their effectiveness.<sup>120</sup> Furthermore, physical activity alone is ineffective in combating obesity as individual compliance is often very low.<sup>121</sup>

41. Nutrient information labelling already exists,<sup>122</sup> and is ineffective, particularly in demographics of lower literacy levels and socio-economic status.<sup>123</sup> Usage of only ‘Free’ and ‘Low-Content’ labelling will not achieve the level of protection that Budica seeks, as it would not convey what the most harmful products are to consumers, unlike the ‘High-Content’ label. Further, voluntary labelling schemes are ineffective as the rate of compliance is low.<sup>124</sup> Thus, there are no alternative measures that make an equivalent contribution to the objectives.

42. A measure is not reasonably available if there is an undue burden on the Member, such as prohibitive costs or substantial technical difficulties.<sup>125</sup> Physical exercise plans which

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<sup>115</sup> Thow *et al* 2020, 4.

<sup>116</sup> ABR, *US – Tuna II (Mexico)*, [320].

<sup>117</sup> ABR, *Australia – Plain Packaging*, [6.461].

<sup>118</sup> ABR, *US – Tuna II (Mexico)*, [323].

<sup>119</sup> Hawkes *et al* 2015, 2415; McKinsey 2014, 36.

<sup>120</sup> Case, Annex IV.

<sup>121</sup> DiPietro and Stachenfeld 2017, 10.

<sup>122</sup> Clarifications, [33].

<sup>123</sup> Hawkes *et al* 2015, 2415.

<sup>124</sup> McKinsey 2014, 49.

<sup>125</sup> ABR, *Brazil – Retreaded Tyres*, [156].

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include infrastructural changes<sup>126</sup> such as encouraging active transport,<sup>127</sup> involve expenses that place a far greater burden on the state than labelling requirements. Therefore, there are no reasonably available alternative measures.

43. Thus, when comparing the FIP with the alternative measures which are not reasonably available and do not make an equivalent contribution to the objectives, the FIP is not more trade restrictive than necessary, and thus consistent with TBT Article 2.2.

### 3. BUDICA'S ACTIONS WERE CONSISTENT WITH TBT ARTICLE 10.1.1

44. On 15 September 2019, Dale sought to clarify certain aspects of the Draft Decree through an enquiry, which was acknowledged by the Budican enquiry point.<sup>128</sup> All substantive matters of Dale's enquiry were subsequently discussed in the STC brought by Dale on 16 October.<sup>129</sup> TBT Article 10.1.1 states that Members shall ensure the existence of an enquiry point which can answer all reasonable enquiries and provide documents regarding, *inter alia*, any technical regulations, to Members and interested parties. The present dispute concerns the scope of the obligation in Article 10.1.1. To ascertain the obligation, DSU Article 3.2 requires the Panel to clarify the WTO covered agreements in accordance with customary rules of interpretation, namely Article 31 of the Vienna Convention on the Law of Treaties (VCLT).<sup>130</sup>

45. Article 31(1) establishes the general rule of interpretation whereby a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose. Accordingly, the Panel will find that Budica acted consistently with TBT Article 10.1.1 as: (1) the enquiry sent by Dale to the Budican enquiry point was regarding the FIP, which is not a technical regulation, as established in para 12; or, if the Panel finds otherwise, (2) Budica established an enquiry point capable of answering all reasonable enquiries.

#### 3.1 Budica established an enquiry point capable of answering all reasonable enquiries

46. According to the general rule of interpretation, Budica's obligation is to ensure that an enquiry point that is capable of answering all reasonable enquiries exists. Firstly, dictionary meanings are instructive in determining the ordinary meaning.<sup>131</sup> In Article 10.1, the use of the word 'shall' denotes a requirement which is obligatory, and this requirement is to 'ensure

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<sup>126</sup> Case, [1.17]; WHO Global Action Plan on Physical Activity, 16-18, 32-33, 42.

<sup>127</sup> McKinsey 2014, 38 (exhibit 14).

<sup>128</sup> Case, [3.7]; Clarifications, [38].

<sup>129</sup> Clarifications, [17].

<sup>130</sup> ABR, *US – Gasoline*, 17; ABR, *Japan – Alcoholic Beverages II*, 10.

<sup>131</sup> Gardiner 2015, 161.

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an enquiry point exists.’<sup>132</sup> ‘Exist’ is defined as ‘occur or be found, especially in a particular place.’<sup>133</sup>

47. Secondly, as stated by the AB, the interpretation of other WTO covered agreements can provide context by virtue of Marrakesh Agreement Article II:2, though caution must be exercised when doing so.<sup>134</sup> Therefore, the AB’s interpretation of SPS Annex B(3) in *Korea – Radionuclides*, which provides a near identical transparency obligation to establish an enquiry point, offers guidance to interpret the obligation to establish an enquiry point in TBT Article 10.1.1. Accordingly, the AB found that a single failure to respond to an enquiry would not result in an inconsistency with the obligation to establish an enquiry point.<sup>135</sup>

48. Thirdly, the AB stated that the object and purpose of the TBT is to strike a balance between trade liberalization and Members’ right to regulate.<sup>136</sup> The collaborative transparency requirement in Article 10.1.1 fosters dialogue among WTO Members,<sup>137</sup> and thereby prevents obstacles to trade while ensuring Members’ right to regulate. Answering enquiries and STCs are part of this same collaborative transparency requirement.<sup>138</sup>

49. To determine whether an enquiry point that is capable of answering all reasonable enquiries exists, all relevant factors should be considered.<sup>139</sup> In *Korea – Radionuclides*, the relevant factors considered by AB were: (i) whether the enquiry point repeatedly failed to respond; (ii) the nature and scope of the information sought; and (iii) the number of questions received by the enquiry point and the proportion of and extent to which these were answered.<sup>140</sup>

50. As stated by the AB, other covered agreements may be relevant in providing context, but a panel need not adopt an identical interpretation and thus, it is justified to consider two additional relevant factors.<sup>141</sup> They are: (iv) the enquiry being answered in an STC; and (v) the special and differential treatment accorded to developing countries in the TBT. Although Budica does not contend that the scope and nature of the information sought was unreasonable, considering all other relevant factors, an enquiry point capable of answering all reasonable enquiries exists.

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<sup>132</sup> PR, *EC – Sardines*, [7.110].

<sup>133</sup> Oxford Dictionary 2020.

<sup>134</sup> ABR, *Australia – Apples*, footnote 285.

<sup>135</sup> ABR, *Korea – Radionuclides*, [5.211].

<sup>136</sup> ABR, *US – Clove Cigarettes*, [174].

<sup>137</sup> Karttunen 2020, 59.

<sup>138</sup> Karttunen 2020, 63, 83.

<sup>139</sup> ABR, *Korea – Radionuclides*, [5.211].

<sup>140</sup> ABR, *Korea – Radionuclides*, [5.211].

<sup>141</sup> ABR, *EC – Asbestos*, [89].

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### 3.1.1 The Budican enquiry point received numerous enquiries and responded to a majority

51. The number of enquiries, and the proportion and extent to which they were answered, are considered when assessing whether a Member has violated its obligation to establish an enquiry point.<sup>142</sup> As an enquiry point must not be held to a ‘standard of perfection,’<sup>143</sup> answering a majority of enquiries is sufficient to prove its establishment. After the publication of the draft FIP, Budica received 50 enquiries and 32 of them were answered amounting to 64%.<sup>144</sup> Thus, Budica received a large number of enquiries and responded to a majority of them.

### 3.1.2 The Budican enquiry point only failed to respond directly to one Dalean enquiry

52. The AB in *Korea – Radionuclides* reversed the panel finding that a single failure to respond would amount to an inconsistency, and stated that an examination of the responsiveness of the enquiry point based on only a single failure is inadequate.<sup>145</sup> Dale sent one request dated 15 September 2019, which the enquiry point acknowledged.<sup>146</sup> Thereafter, Dale merely followed up on what was included in the same request on 2 October.<sup>147</sup> Thus, the Budican enquiry point only failed to respond to one enquiry.

### 3.1.3 In any event, the substantive matters of Dale’s request were answered in the STC

53. The obligation to establish enquiry points arises from ‘interactive’ or ‘collaborative’ transparency that results in an exchange of information for the purpose of dialogue between WTO Members.<sup>148</sup> Similarly, the bringing of STCs allows Members to discuss and clarify or improve technical regulations, share experience and best practices, address overlaps with issues under other WTO agreements, and settle trade-frictions at low-cost.<sup>149</sup> This collaborative process serves a similar purpose to enquiry points, and thus contact with enquiry points and discussion in STCs in the TBT Committee are part of the same process.<sup>150</sup>

54. Dale’s enquiry sought clarifications on the definitions provided in FIP Article 1 and the application of Article 15. In the STC raised by Dale at the TBT Committee meeting on 16 October, *all* substantive matters outlined in Dale’s request dated 15 September were answered.<sup>151</sup> Thus, Dale received the information they sought in the STC.

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<sup>142</sup> ABR, *Korea – Radionuclides*, [5.211].

<sup>143</sup> PR, *Korea – Radionuclides*, [7.507]; ABR, *Korea – Radionuclides*, [5.211].

<sup>144</sup> Clarifications, [37].

<sup>145</sup> ABR, *Korea – Radionuclides*, [5.212], [5.214].

<sup>146</sup> Clarifications, [38].

<sup>147</sup> Case, [3.7].

<sup>148</sup> Karttunen 2020, 83.

<sup>149</sup> Holzer 2018, 8-10.

<sup>150</sup> TBT Enquiry Point Guide 2018, 62.

<sup>151</sup> Clarifications, [17].

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### 3.1.4 Budica should be granted special and differential treatment

55. TBT Article 12.1 provides ‘special and differential treatment’ for developing country Members. As such, the obligation of Article 10.1.1 should be informed by the special and differential treatment accorded to developing countries. Therefore, as Budica is a developing country,<sup>152</sup> the enquiry point’s failure to respond to Dale’s enquiry should not automatically result in a violation of Article 10.1.1. The TBT Committee has acknowledged that enquiry points face challenges in responding to enquiries,<sup>153</sup> particularly in developing countries.<sup>154</sup> This is evident from the fact that the Budican enquiry point’s processing of enquiries slowed down when they received a large number of enquiries.<sup>155</sup>

56. Considering all the relevant factors, Budica had established an enquiry point capable of answering all reasonable enquires and acted consistently with TBT Article 10.1.1.

## **4. THE FIP IS CONSISTENT WITH TRIPS ARTICLE 20**

57. The three-tier conjunctive test to show inconsistency with TRIPS Article 20 examines whether: (i) there is a special requirement; (ii) that special requirement encumbers the use of a trademark in the course of trade; and (iii) this encumbrance is done unjustifiably.<sup>156</sup> The FIP does not fulfil any of these criteria.

### **4.1 The FIP does not impose a ‘special requirement’**

58. A ‘special requirement’ is a condition that must be complied with, has a close connection with or specifically addresses the use of a trademark in the course of trade, and is limited in application.<sup>157</sup> Unlike *Australia – Plain Packaging*, where the measure was found to be a special requirement as it permitted use *only* in a specifically prescribed manner (without stylized elements, in a standard font and colour),<sup>158</sup> the FIP does not specifically prescribe a manner in which trademarks should be used, but rather only sets out grounds on which their use may be restricted.<sup>159</sup> Further, as the FIP’s labelling requirements do not contain any explicit or direct conditions related to trademarks,<sup>160</sup> it does not have a close connection with or specifically address the use of a trademark. Finally, these requirements are

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<sup>152</sup> Case, [1.1].

<sup>153</sup> TBT Committee (November 2012), [16].

<sup>154</sup> TBT Committee (October 2002), [4.5.1].

<sup>155</sup> Case, Annex IV.

<sup>156</sup> ABR, *Australia – Plain Packaging*, [6.643].

<sup>157</sup> PR, *Australia – Plain Packaging*, [7.2231].

<sup>158</sup> PR, *Australia – Plain Packaging*, [7.2241].

<sup>159</sup> FIP, Art 15.

<sup>160</sup> FIP, Arts 7, 8, 9.

not limited in application as they apply to a broad range of products, namely all packaged processed foods.<sup>161</sup> Thus, the FIP does not impose a special requirement.

#### **4.2 The FIP does not encumber the use of a trademark in the course of trade**

59. In the event the Panel finds that the FIP is a special requirement, it does not encumber the use of a trademark in the course of trade. A special requirement may be considered to encumber the use of a trademark if it restricts or impedes the use of the trademark.<sup>162</sup> The ‘use’ of a trademark is essentially a factual matter to be considered and includes the extraction of economic value by the right holder.<sup>163</sup> Firstly, unlike *Australia – Plain Packaging*,<sup>164</sup> the trademark restrictions in FIP Article 15 do not include an enforcement mechanism and the sale, production or purchase of products in violation of the trademark restrictions is not an offence, nor are penalties included. Secondly, the labelling does not restrict or impede the use of trademarks, as it provides owners sufficient flexibility in determining the placement of trademarks.<sup>165</sup> Thus, neither the labelling nor the trademark restrictions encumber the use of a trademark in the course of trade.

#### **4.3 In the alternative, the special requirement imposed by the FIP encumbers justifiably**

60. If the Panel finds that the FIP encumbers the use of a trademark, this is done justifiably. An encumbrance is consistent with TRIPS Article 20 if it is justifiable.<sup>166</sup> As this Article is not an exception nor does it confer a positive right to trademark owners, the burden is on the complaining party to prove that the measure encumbers unjustifiably.<sup>167</sup> Assessing the justifiability of the encumbrance requires a consideration of: (i) the nature and extent of the encumbrance; (ii) the reasons for the imposition of the special requirement; and (iii) whether the reasons for the imposition of the special requirement support the resulting encumbrances.<sup>168</sup> Evaluation of these shows that the encumbrance by the FIP is justifiable.

##### **4.3.1 The nature and extent of the encumbrance are limited**

61. The nature and extent of the encumbrance must be analysed bearing in mind the legitimate interests of the trademark owner and whether the trademark is permitted to fulfil its intended function.<sup>169</sup> Trademark owners have a legitimate interest in protecting the ability to

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<sup>161</sup> FIP, Art 2.

<sup>162</sup> PR, *Australia – Plain Packaging*, [7.2235].

<sup>163</sup> PR, *Australia – Plain Packaging*, [7.2285].

<sup>164</sup> PR, *Australia – Plain Packaging*, [7.166], [7.2288].

<sup>165</sup> Case, Annex I, II.

<sup>166</sup> ABR, *Australia – Plain Packaging*, [6.610].

<sup>167</sup> ABR, *Australia – Plain Packaging*, [6.642-43]; Buzard and Voon 2019, 13.

<sup>168</sup> ABR, *Australia – Plain Packaging*, [6.651].

<sup>169</sup> ABR, *Australia – Plain Packaging*, [6.650].

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distinguish their trademarks,<sup>170</sup> and in the potential for extracting economic value from them.<sup>171</sup> The panel in *Australia – Plain Packaging* considered the prohibitive and permissive elements of the measures, and recognized that the restrictions are mitigated by allowing producers to use word trademarks to distinguish their products.<sup>172</sup> The restrictions in the FIP are even lower. Firstly, the trademark restrictions only apply to products above the ‘High-Content’ threshold.<sup>173</sup> Secondly, consumers can still distinguish between products, as all aspects of the trademarks or brand names not evoking healthiness are permitted.<sup>174</sup> Therefore, while in *Australia – Plain Packaging* the measure *prohibited* all but some trademarks, the FIP *permits* all but some trademarks and thus creates a lesser encumbrance.

62. Though the label must be placed on the front of the pack, the exact placement of such a label can be determined by the producer,<sup>175</sup> and has been applied as such.<sup>176</sup> One label can take 13% of the front side of the package for products with less than 30cm<sup>2</sup>, and 15.6% on average of those between 30cm<sup>2</sup> and 60cm<sup>2</sup>.<sup>177</sup> This leaves adequate space for producers to use elements to distinguish their product. These factors ensure that products can still be distinguished, and economic value extracted. Thus, the encumbrance is not far-reaching and is instead limited.

### 4.3.2 The FIP is imposed to protect human health

63. The underlying policy concerns addressed by special requirements must be considered.<sup>178</sup> The panel in *Australia – Plain Packaging* recognised the aim of protecting human health as a vital policy concern and societal interest,<sup>179</sup> as supported by TRIPS Article 8.1.<sup>180</sup> As established in para 35, the prevention of obesity is of vital concern, linked to the protection of human health in Budica. The FIP seeks to protect human health by reducing the risk of obesity and providing accurate information to assist consumers and families in making healthy decisions concerning their diet and the diet of their children.<sup>181</sup>

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<sup>170</sup> PR, *EC – Trademarks and Geographical Indications (Australia)*, [7.664].

<sup>171</sup> ABR, *Australia – Plain Packaging*, [6.672].

<sup>172</sup> PR, *Australia – Plain Packaging*, [7.2570].

<sup>173</sup> FIP, Art 15.1.

<sup>174</sup> FIP, Art 15.1; Case, Annex II.

<sup>175</sup> Case, Annex I.

<sup>176</sup> Case, Annex II.

<sup>177</sup> Calculations from Case, Annex 1, Table 1.

<sup>178</sup> PR, *Australia – Plain Packaging*, [7.2586].

<sup>179</sup> PR, *Australia – Plain Packaging*, [7.2587-88].

<sup>180</sup> ABR, *Australia – Plain Packaging*, [6.658]; Cottier 2005, 1078.

<sup>181</sup> Case, [3.2]; FIP, Preamble.



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### 4.3.3 The reasons for the imposition of the FIP support the resulting encumbrance

64. The reason for the measure must sufficiently support the resulting encumbrances.<sup>182</sup> In *Australia – Plain Packaging*, the panel considered whether the measure is capable of and does in fact contribute to the given reason.<sup>183</sup> The FIP is capable of protecting human health. It empowers consumers to make healthy dietary choices through trademark restrictions and labelling requirements. As established in paras 33-34, these measures can effectively contribute to reducing the risk of obesity. Labelling requirements and trademark restrictions prevent unhealthy products from being portrayed as healthy.<sup>184</sup> They therefore work in tandem to alter the conscious and subconscious perception consumers have of unhealthy products.<sup>185</sup> This alteration of the subconscious environment is an important method of combating obesity.<sup>186</sup>

65. The consideration of any alternative measures Dale may propose is not a necessary element to prove justifiability, as TRIPS Article 20 provides a degree of latitude regarding the regulatory autonomy of a Member to choose an intervention to address a policy objective.<sup>187</sup> In any event, there are no reasonably available alternative measures that makes an equivalent contribution to the objectives as established in paras 40-42.

66. Therefore, the FIP is justified as the reasons for the FIP provide sufficient support for the limited encumbrance, and it is thus consistent with TRIPS Article 20.

## **5. BUDICA'S ACTIONS REGARDING SPEAR BARS INC.'S SHIPMENT WERE CONSISTENT WITH ARTICLE 10.8.2 OF THE TFA**

67. On 3 April 2020, BCA rejected Spear Bars Inc.'s shipment for its failure to meet labelling requirements set out in the FIP and provided 10 days to re-consign or return the goods.<sup>188</sup> In the absence of a response from Spear Bars Inc., the goods were destroyed pursuant to Section 48 of the Budican Customs Act.<sup>189</sup> TFA Article 10.8.1 states that Members shall allow importers the option to re-consign or return the rejected goods on the grounds of failure to comply with, *inter alia*, technical regulations. If this option is given and not exercised by the importer within a reasonable period of time, the competent authority

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<sup>182</sup> ABR, *Australia – Plain Packaging*, [6.659].

<sup>183</sup> PR, *Australia – Plain Packaging*, [7.2592].

<sup>184</sup> Hawkes *et al* 2015, 2415.

<sup>185</sup> McKinsey 2014, 43-49.

<sup>186</sup> McKinsey 2014, 43-49.

<sup>187</sup> ABR, *Australia – Plain Packaging*, [6.695], [6.697].

<sup>188</sup> Case, [4.1-4.2].

<sup>189</sup> Case, [4.3].

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may take ‘a different course of action’ to deal with the non-compliant goods under Article 10.8.2.

68. The present dispute concerns the scope of the obligation in Article 10.8.2, which must be read in conjunction with Article 10.8.1. To interpret these Articles, recourse must be made to customary rules of interpretation, *i.e.*, VCLT Article 31.<sup>190</sup> Accordingly, the Panel will find that the actions of the BCA are consistent with TFA Article 10.8.2 as: (1) the FIP is not a technical regulation, as established in para 12; and, if the Panel finds otherwise, (2) the option to re-consign or return the goods was not exercised within a reasonable period of time by the importer (Spear Bars Inc.’s representative in Budica); and (3) the BCA correctly exercised its discretion to destroy the non-compliant goods.

### **5.1 The option to re-consign or return the goods was not exercised by the importer within a ‘reasonable period of time’**

69. Article 10.8.2 allows Members to objectively determine a reasonable period of time, balancing their interests against the concerns of importers. The general rule of interpretation shows that the 10 days provided by the BCA is reasonable, as it is sufficient to allow the importer to exercise the option. Firstly, dictionary meanings are instructive to determine the ordinary meaning of a treaty.<sup>191</sup> ‘Reasonable’ is defined as ‘in accordance with reason,’ ‘sensible’ and ‘fair.’<sup>192</sup> Additionally, the AB has interpreted that a ‘reasonable period of time’ implies a degree of flexibility, involving the consideration of all circumstances of a particular dispute on a case-by-case basis.<sup>193</sup> Based on the circumstances of this dispute, the 10 days is reasonable as Spear Bars Inc.’s representative expected to receive the shipment in 3 to 6 days,<sup>194</sup> and Spear Bars Inc. ‘effectively received’ the decision to reject the goods via e-mail without any delay on the same date it was sent.<sup>195</sup>

70. Despite the BCA effectively notifying the importer of the option to re-consign or return the goods, the importer was unresponsive.<sup>196</sup> It is practical, fair, and reasonable to expect a response from the importer within 10 days. An interpretation stating that 10 days is unreasonable would incorrectly introduce a strict standard into Article 10.8. This Article is only a best endeavour obligation on Members to provide a reasonable period of time *to the extent that it is possible*.<sup>197</sup>

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<sup>190</sup> ABR, *US – Gasoline*, 17; ABR, *Japan – Alcoholic Beverages II*, 10.

<sup>191</sup> Gardiner 2015, 184.

<sup>192</sup> Oxford Dictionary 2020.

<sup>193</sup> ABR, *US – Hot-Rolled Steel*, [84]; ABR, *Japan – Agricultural Products II*, [93].

<sup>194</sup> Clarifications, [7].

<sup>195</sup> Clarifications, [21].

<sup>196</sup> Case, [4.2].

<sup>197</sup> Hamanaka 2014, 344, 347.

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71. Secondly, for context, the third recital of the preamble of the TFA refers to ‘expediting the movement, release and clearance of goods, including goods in transit,’ and the fourth recital recognises the needs of developing countries. The context assists in the interpretation of the object and purpose of a provision.<sup>198</sup> The object and purpose of Article 10.8.2 is to strike a balance between the destruction of goods, which cannot facilitate trade, and Members’ (especially developing countries) right to regulate. Accordingly, due to the limited warehouse capabilities of developing countries, goods cannot remain at ports or warehouses for an unlimited period of time.<sup>199</sup> If not, due to a lack of infrastructure,<sup>200</sup> merchandise would occupy space and cause congestion, becoming an unreasonable burden on Members.

72. Thirdly, the object and purpose of the agreement must be considered in its entirety.<sup>201</sup> The TFA is structured into three parts: Section I obliges Members to expedite the release of goods; Section II contains special and differential treatment; and Section III sets out institutional arrangements.<sup>202</sup> Therefore, the structure of the TFA further supports the fact that the object and purpose of the treaty is to expedite the release of goods (Section I), taking into account the needs and difficulties of developing countries (Section II).

73. Thus, considering the fact that Budica is a developing country, the 10 days granted to Spear Bars Inc. is a reasonable period of time to exercise the option.

### **5.2 The Budican Customs Authority correctly exercised its discretion to destroy the non-compliant goods**

74. Dale may argue that BCA wrongly exercised its discretion to destroy the goods. However, Article 10.8.2 does not explicitly prohibit the competent authority from destroying the goods if the importer fails to exercise the option. The fundamental rule of treaty interpretation requires the panel to interpret the words actually used in the agreement,<sup>203</sup> without the importation of ‘words that are not there’ or ‘concepts that were not intended.’<sup>204</sup> Therefore, an interpretation introducing a prohibition of the destruction of the good would modify the Article to state that the ‘competent authority may take a different course action *other than the destruction of the goods*’ to deal with the non-compliant goods.

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<sup>198</sup> Gardiner 2015, 210.

<sup>199</sup> ITC 2020, 115.

<sup>200</sup> Voordijk and De Boer 2014, 3.

<sup>201</sup> ABR, *EC – Chicken Cuts*, [238].

<sup>202</sup> Eliason 2015, 653.

<sup>203</sup> ABR, *EC – Hormones*, [181].

<sup>204</sup> ABR, *India – Patents (US)*, [45].

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75. Further, Dale may attempt to rely upon the *Codex Guidelines for The Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems*,<sup>205</sup> to argue that when products are not in compliance with labelling requirements, the competent authority *must* allow the importer to restore conformity instead of destroying the goods. However, this is erroneous as the *Codex Guidelines* are voluntary and non-binding on Members.<sup>206</sup> Requiring compliance with these guidelines would deprive Members of their discretion, limit regulatory autonomy,<sup>207</sup> and go beyond Budica's Category A commitments under TFA Article 10.8.

76. Thus, the BCA correctly exercised its discretion to destroy the non-compliant goods. Therefore, as the importer failed to exercise the option after being informed and provided with a reasonable period of time to re-consign or return the goods, the decision made to destroy the non-compliant goods is consistent with Article 10.8.2 TFA.

### **REQUEST FOR FINDINGS**

For the above stated reasons, Budica respectfully requests the Panel to find that:

1. The Panel should exercise its inherent adjudicative powers and decline to address all of Dale's Claims.
2. The FIP does not constitute a technical regulation within the meaning of the Annex 1.1 of the TBT Agreement.
3. The FIP is consistent with Article 2.1 of the TBT Agreement.
4. The FIP is consistent with Article 2.2 of the TBT Agreement.
5. The failure of the Budican enquiry point to reply to Dale's request dated 15 September 2019 is not inconsistent with Article 10.1.1 of the TBT Agreement.
6. The FIP is consistent with Article 20 of the TRIPS Agreement.
7. The application of the FIP by Budica to Spear Bars Inc.' shipment is consistent with Article 10.8.2 of the TFA.

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<sup>205</sup> Codex: Design, Operation and Assessment.

<sup>206</sup> Lynch 2005, 43.

<sup>207</sup> Pereira 2008, 1693.