

**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)

SUBMISSION OF THE RESPONDENT

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List of References

Short Title	Full Title and Citation
I. TREATIES, CONVENTIONS, & COMMITTEE DECISIONS	
<i>ARO</i>	<i>Agreement on Rules of Origin</i> , 15 April 1994, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1868 UNTS 397.
<i>GATT 1994</i>	<i>General Agreement on Tariffs and Trade 1994</i> , 15 April 1994, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1867 UNTS 190.
<i>TBT</i>	<i>Agreement on Technical Barriers to Trade</i> , 1 January 1995, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1868 UNTS 190.
<i>TBT Committee</i>	Decisions and Recommendations Adopted by the TBT Committee on Technical Barriers to Trade Since 1 January 1995, 9 June 2011, <i>TBT Committee</i> , G/TBT/1/Rev.10.
<i>TFA</i>	<i>Agreement on Trade Facilitation</i> , 22 February 2017, being Article X3 of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1868 UNTS 190.
<i>TRIPS</i>	<i>General Agreement on Trade-Related Aspects of Intellectual Property</i> , 1 January 1995, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1869 UNTS 299.
<i>VCLT</i>	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155 U.N.T.S 331 (1969).
II. ELSA DOCUMENTS	

Clarifications	Corrections and Clarifications, John H. Jackson Moot Court Competition, Case 2019-2020, <i>Budica- Measures relating to the Importation and Marketing of Nutrition Food Bars.</i>
Case	Problem, John H. Jackson Moot Court Competition, Case 2019-2020, <i>Budica- Measures relating to the Importation and Marketing of Nutrition Food Bars.</i>
III. WTO REPORTS	
<i>Australia – Salmon (Art. 21.5, Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon, Recourse to Art. 21.5 by Canada</i> , WT/DS18/RW, circulated 18 February 2000.
<i>Australia - Tobacco Plain Packaging</i>	Panel Report, <i>Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/ DS467/R, adopted 27 August 2018.
<i>Brazil— Retreaded Tyres</i>	Appellate Body Report, <i>Brazil—Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, circulated 3 December 2007.
<i>Canada/Japan - SPF Lumber</i>	Panel Report, <i>Canada/Japan - Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber</i> , BISD 36S/167, adopted 19 July 1989.
<i>Chile—Alcoholic Beverages</i>	Appellate Body Report, <i>Chile—Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, circulated 13 December 1999.
<i>EC—Asbestos</i>	Appellate Body Report, <i>European Communities—Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 05 June 2001. Panel Report, <i>European Communities—Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R, circulated 18 September 2000.

<i>EC-Bananas III (Art 21.5 DSU)</i>	Appellate Body Report, <i>European Communities - Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW2/USA, circulated 26 November 2008.
<i>EC – Hormones (US)</i>	Panel Report, <i>European Communities—Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States</i> , WT/DS26/R/USA, circulated 18 August 1997.
<i>EC-Sardines</i>	Appellate Body Report, <i>European Communities - Trade Description of Sardines</i> , WT/DS231/AB/R, circulated 26 September 2002.
<i>EC–Seal Products</i>	Appellate Body Report, <i>European Communities—Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R, adopted 16 June 2014. Panel Report, <i>Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS/401, WT/DS/401/R, circulated 25 November 2013.
<i>EC–Tariff Preferences</i>	Appellate Body Report, <i>European Communities—Conditions for the Granting of Preferences to Developing Countries</i> , WT/DS246/AB/R, circulated 7 April 2004.
<i>India – Agricultural Products</i>	Panel Report, <i>India—Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R, circulated 14 October 2014.
<i>Japan - Agricultural Products II</i>	Appellate Body Report, <i>Japan - Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, circulated 22 January 1999.
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, circulated 4 October 1996.
<i>Indonesia–Autos</i>	Panel Report, <i>Indonesia - Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS64/R, circulated 02 July 1998.

<i>Japan–Alcoholic Beverages</i>	Appellate Body Report, <i>Japan - Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, circulated 4 October 1996.
<i>Korea-Radionuclides (Japan)</i>	Appellate Body Report, <i>Korea - Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/13, WT/DS495/AB/R, WT/DS495/AB/R/Add.1, adopted 26 April 2019. Panel Report, <i>Korea - Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/R, WT/DS495R/Add.1, circulated 22 February 2018.
<i>Korea-Variou s Measures on Beef</i>	Appellate Body Report, <i>Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS/161/AB/R, circulated 11 December 2000.
<i>Turkey–Textiles</i>	Appellate Body Report, <i>Turkey–Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999. Panel Report, <i>Turkey–Restrictions on Imports of Textile and Clothing</i> , WT/DS24/R, circulated 31 May 1999.
<i>US – Animals</i>	Panel Report, <i>United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS/447/R, adopted 31 August 2015.
<i>US–Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, circulated 4 April 2012.
<i>US-COOL</i>	Appellate Body Report, <i>United States - Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS386/AB/R, 29 June 2012.
<i>US–Gambling</i>	Panel Report, <i>United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, circulated 10 November 2004.

<i>US–Gasoline</i>	Appellate Body Report, <i>United States—Standards for Reformulated and Conventional Gasoline</i> , WT/DS52/AB/R, circulated, 29 April 1996.
<i>US – Tuna II (Mexico) Art. 21.5</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Recourse to Art. 21.5 of the DSU by the United States</i> , WT/DS381/AB/RW/USA, WT/DS381/AB/RW2, circulated 14 December 2018.
<i>US–Textiles Rules of Origin</i>	Panel Report, <i>United States–Rules of Origin for Textiles and Apparel Products</i> , WT/DS243/R, circulated 20 June 2003.
<i>US-Zeroing (Japan) (Art 21.5 DSU)</i>	Appellate Body Report, <i>United States - Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/RW, circulated 18 August 2009.

IV. Secondary Sources

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3. D Nolan and S Meredith, *OSCOLA: Oxford University Standard for the Citation of Legal Authorities* (Univ of Oxford, 2012)
4. ‘OSCOLA Quick Reference Guide’ (*OSCOLA*, 4th Edn, Oxford Univ, 2006) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf> accessed 9 January 2021.
5. Univ of Southern Indiana, ‘Consumer Preferences’ <<http://www.usi.edu/business/cashel/331/consumer.pdf>> accessed 1 December 2020.
6. Anyi Wang, *The Necessity Test in Article 2.2 of the TBT agreement* (MA Diss., Wageningen University, 2019).
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8. World Health Organization, 'Controlling the Global Obesity Epidemic'
<<https://www.who.int/activities/controlling-the-global-obesity-epidemic> (accessed 1 December 2020).
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<<https://www.who.int/ncds/prevention/physical-activity/global-action-plan-2018-2030/en/>> accessed 1 December 2020.
10. World Health Organization, 'Tackling NCDs: 'best buys' and other recommended interventions for the prevention and control of noncommunicable diseases'
<https://apps.who.int/iris/handle/10665/259232> accessed 15 November 2020.

List of Abbreviations

Abbreviation	Full Meaning
AB	Appellate Body
ABR	Appellate Body Report
Art.	Article(s)
BCA	Budica Customs Act

A. General Section**Respondent (Budica)**

CFB	Celtic Flavour Bars
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FAO	Food and Agriculture Organization of the United Nations
FIP	Food Information Package
GDP	Gross Domestic Product
HS	Harmonized System
HSB	Healthy Spear Bars
MFN	Most Favoured Nation
NFB	Nutrition Food Bars
PR	Panel Report
RAHO	Regional Azula Health Organization
RTA	Regional Trade Agreement
Spear Bars	Spear Bars Incorporated
TBT	Agreement on Technical Barriers to Trade
The Decree	Presidential Decree No. 457
TFA	Agreement on Trade Facilitation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WHO	World Health Organization
WTB	Wild Tropic All-Natural Bars
WTO	World Trade Organization

STATEMENT OF FACTS

1. Budica is a developing country and a member of the WTO, TFA, FAO, and RAHO.
2. The WHO acknowledges obesity is an epidemic and one of the significant risk factors for NCDs - the primary cause of deaths and preventable diseases in Budica. Poor availability and affordability of healthy foods contribute to health systems worldwide expending substantial portions of their GDP treating obesity-related diseases. The Budican treatment of NCDs in its health system amounts to 5% of its GDP per year.
3. Globally, consumers consider NFB as healthier alternatives to other snacks. Budica is a developing country with a world-renowned NFB industry. Budica markets several NFB including Budica's CFB and Enge's WTB. CFB market their NFBs as both meal replacement bars and nutritional boost bars.
4. In January, 2019, Budica began importing their first HSBs. Dale has exported no other NFB to Budica.
5. The RAHO and WHO recommend front-of-pack nutrition labels to impact consumers' eating habits and reduce consumption of added sugar, fats, and sodium. On October 1, 2019, Budica commenced the FIP to reduce obesity in Budica. Entered into force on April 1, 2020, the FIP provides consumers with accurate, understandable, and simple information for families to make healthy decisions concerning their diet and the diets of their children by indicating "free," "low," and "high" added sugar, saturated fats, and sodium contents. The restrictions help to prevent deceptive or misleading marketing related to health and health habits. "Free-Content" and "Low Content" labelling is not required for sale on the national market.
6. On April 3, 2020, Budica's customs authority rejected the import of Dale's first shipment of NFB on the grounds of its failure to meet the labelling requirements set out in the FIP Art. 9, Art. 15, and Art. 16.2. Budica notified Dale on April 3, 2020, that a failure to exercise re-consignation within ten days would result in the merchandise being declared uncleared as per Section 48 of the BCA. Budica, in compliance with the BCA and the TFA, initiated the process to re-consign or return the shipment the same day. In compliance with Section 48 of the BCA and Art.s 10.8.1 and 10.8.2 of the TFA, the goods were destroyed on April 16, 2020 after no response from the exporter by April 13, 2020.

7. On August 23, 2020, the Budican Tribunal suspended the FIP through an interim measure. The tribunal has not yet decided, and the measure has not taken effect due to the tribunal's interim decision.

Summary of Arguments

Preliminary Objection - Dale's dispute is premature and inconsistent with the DSU.

- The FIP is not in force, nor does it have any legal effect in Budica due to Dale's requested interim measures.
- As it stands, the measure was not taken, and Dale's claim is premature under Art.3.7 of the DSU.
- Under Art. 3.3 and Art. 3.7, Dale's claim is not fruitful.

1. The FIP is not a technical regulation under the TBT.

- The measure as a whole is not a technical regulation.
- The FIP does not meet the definition under Annex 1.1 because the labelling requirement is not mandatory. Thus, the measures are not subject to the TBT agreement, and the Applicant's claims 1, 2, and 3 must fail.

1.1 Even if the FIP is a technical regulation, it is consistent with Art. 2.1 of TBT.

- Dalean HSB are not like-products to domestic Budican CFB or the imported bars of other countries.
- Even if these are like products, there is no less favourable treatment of HSB. The measure does not modify competition conditions for HSB.
- Any detrimental impact on HSB stems exclusively from the legitimate regulatory distinction in the FIP.

2. Even if the FIP is a technical regulation, it is consistent with Art. 2.2 of TBT.

- The FIP fulfils a legitimate health objective of addressing the obesity epidemic.
- This objective is urgent, and the FIP is not more trade-restrictive than necessary to fulfil that objective. The risk of non-fulfilment outweighs any restrictiveness.

3. The failure of Budica's enquiry point to reply is still consistent with Art. 10.1.1 of the TBT.

- A Budican enquiry point exists, and Budica acknowledged Dale's enquiry.
- Dale's enquiries overlap with available documents that were subsequently discussed at a TBT Committee meeting with Dalean representatives, making a reply redundant.
- Dale's enquiry was not reasonable because it went beyond NFB and asked the broader requirements of the FIP for each pre-packaged product.

4. The FIP is consistent with Art. 20 of the TRIPS Agreement.

- The FIP measure is not a special requirement.
- The measure does not unjustifiably encumber, by special requirements, the use of trademarks in the course of trade.

5. The application of the FIP by Budica's customs authorities is consistent with Art. 10.8.2 of the TFA.

- Budica rejected the HSB because the bars failed to meet the requirements in the FIP.
- Budican customs notified Spear Bars on the date of the rejected shipment and gave them the option to re-consign or return the shipment.
- The importer failed to exercise its option within the provided reasonable period of time.

IDENTIFICATION OF MEASURES AT ISSUE

1. Whether Dale's application to the DSB is consistent with Art. 3.7 of the DSU.
2. Whether the FIP is a technical regulation according to Annex 1.1 to the TBT Agreement and whether the FIP is consistent with Art. 2.1 of the TBT.
3. Whether the FIP is no more trade-restrictive than necessary.
4. Whether the Budican enquiry point failed to reply to Dale's September 15, 2019 request.
5. Whether the FIP labelling requirement is consistent with Art. 20 of the TRIPS Agreement.
6. Whether the application of FIP to Spear Bars' shipment by the BCA is consistent with Art. 10.8.2 of the TFA.

LEGAL PLEADINGS**PRELIMINARY OBJECTION: DALE'S DISPUTE IS PREMATURE AND INCONSISTENT UNDER THE DSU.****A. The FIP is not in force, nor does it have any legal effect in Budica due to Dale's requested interim measures.**

[1] On October 1, 2019, as per Art. 18 of the FIP, the FIP entered *into force* six months after publication in the *Official Gazette*.¹ The formal entry into force for the FIP was April 1, 2020. Since August 23, 2020, there has been an interim injunction imposed by the Budican courts at Dale's request. Thus, there has been no measure in effect for the Dalean government to dispute for some time. As per *US-Zeroing (Japan)*, even if the measure is considered WTO inconsistent, one must be given a reasonable period of time to withdraw the measure.² The AB found that the United States failed to comply with reasonable periods of time for DSU Procedures because the measure was still in effect three years later.³ In this case, Budica withdrew its measure within four months.

¹ Case, [3.6, FIP, Art. 18]; Case, [5.7, BCA, Art. 5.7].

² PR, *US-Zeroing (Japan)*, [57].

³ *ibid.*

B. The claim is premature and not fruitful under Art. 3.7 of the DSU.

[2] Under Art. 3.7 of the DSU, a claimant must assess their case is fruitful before bringing it to Panel. Bringing this dispute measure is premature. Dale has not determined fruitfulness per Art 3.7. Since January 2019, HSB is the first and only product Dale exports to the Budican market.⁴ If negotiations continued, a mutual agreement could be decided.⁵ In *EC – Bananas III*, the AB found that Members can be largely self-regulating in their interpretation of “fruitfulness.”⁶ However, they also state that the complainant must determine whether the benefit impugned is “essential to the effective functioning of the WTO.”⁷

[3] Budican courts are already addressing the measure at the time of application. Further, Dale obtained an interim measure within a fortnight of the WTO Panel request. The WTO panel request was less than four months from the original Budican court submission on April 20, 2020. Thus, the measure is not in effect and has not been in effect for some time. It is not ripe for dispute.⁸

I. THE FIP IS NOT A TECHNICAL REGULATION SUBJECT TO THE TBT.**A. The FIP measure as a whole is not a technical regulation.**

[4] The test for technical regulation states:

- i. the document must apply to an identifiable product(s);
- ii. the document must lay down one or more characteristics of the product (which may include labelling requirements); and
- iii. compliance with the product characteristics is mandatory.⁹

[5] The main thrust of the FIP is to address obesity in the Budican population by providing informative and accurate labels for consumers. The measure generally applies to all packaged processed food products sold in Budica, not a specific identifiable product.¹⁰ The

⁴ Case, [2.7]-[2.8].

⁵ DSU, Art. 3.7; DSU, Art. 4.7.

⁶ ABR, *EC - Bananas III (Art 21.5 DSU)*, [211-212].

⁷ *ibid*, [211]

⁸ DSU, Art. 3.7.

⁹ TBT Agreement, [Annex 1.1]; ABR, *EC – Sardines*, [176]; ABR, *EC – Asbestos*, [66]-[70].

¹⁰ Case, [3.6, FIP, Art. 2].

document's labelling requirement addresses ingredients and nutritional content levels, as opposed to product characteristics.¹¹

[6] Even if the Panel deems the labelling requirement is a product characteristic, compliance is voluntary for all products except those in the highest content category. The prohibitive elements and enforceability are restricted to Art. 9. Weighing these prohibitive and permissive components, the FIP measure as a whole is not a technical regulation.

[7] In *EC - Seal Products*, the EU argued, in light of the entirety of the regime, including all permissive and prohibitive elements, the measure is not laying down product characteristics. The AB agreed the "measure as a whole" must be assessed.¹² When the AB ruled the *Seal Product Measure* not a technical regulation, they did not proceed with the complainant's TBT claims.¹³ In the same way, the Applicant's claims 1, 2 and 3 must fail.

B. The labelling requirement is not mandatory.

[8] Even if the labelling requirement is considered a product characteristic, many processed foods sold in Budica are not required to carry labels. Any product containing sodium, sugar and saturated fat levels below the free- or low- content threshold may include a front-of-pack nutrition label. However, the use of this label is not required to place these products for sale on the national market,¹⁴ and Budica may not enforce disregard for the measure.¹⁵ There follows a significant gap, within which no front-of-pack label applies or is available for use.

[9] Only packaged processed food products which equal or exceed the high-content thresholds listed in FIP shall include a front-of-pack health warning label. Warning labels apply to a narrow category of products and the measure is not a total prohibition on these contents.¹⁶ Therefore, the FIP is not a technical regulation and Applicant's claims 1, 2 and 3 should be dismissed.

¹¹ *ibid*, Art 7-9.

¹² ABR, *EC - Seal Products*, [5.29].

¹³ *ibid*, [5.70].

¹⁴ Case, [3.6, FIP, Arts. 7.3, 8.3].

¹⁵ *ibid*, Art. 16.1.

¹⁶ TBT Agreement, Art. 2.1; *See ABR, EC - Asbestos*, [64].

LI IF THE FIP IS A TECHNICAL REGULATION, IT DOES NOT MEET THE TBT ART 2.1 TEST FOR INCONSISTENCY

[10] The FIP does not meet the test to establish inconsistency with Art. 2.1. The following elements must be demonstrated:

- ii) the imported products must be like products with the domestic product and the products of other origins; and,
- iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.¹⁷

A. Dale's food bars are not like products to Budican bars or products of other origins.

[11] Likeness is demonstrated by the nature of a competitive relationship between products, as determined by an analysis of the other four criteria:

- i. physical characteristics;
- ii. functional likeness (end-uses);
- iii. consumer tastes and habits;¹⁸
- iv. tariff classification;¹⁹ and,
- v. determination of competitive relationship.²⁰

i. The physical properties of Dale's bar is distinctly different from other imported bars

[12] Unlike other products, such as Enge's WTB and Budica's CFB, Dale's product is high in salt, saturated fats, and sugar. Although CFB and HSB both contain cereals, the composition is quite different. CFB' unroasted cereals are essentially a healthy cereal bar; HSB is a food bar. A "food bar" versus a NFB may both fit in similar packages but have very different nutritional values. To call both bars the same thing confuses consumers who are seeking different end-uses by either product.

[13] The health risks associated with physical properties are relevant to the competitiveness of products. In *EC-Asbestos*, levels of toxicity in product properties were

¹⁷ TBT Agreement, Art. 2.1; ABR, *US - Clove Cigarettes*, [87]

¹⁸ ABR, *EC-Asbestos*, [117].

¹⁹ *Traditional criteria outlined in the ABR, Japan - Alcoholic Beverages*, [242]; GATT 1994, Art III; ABR, *EC-Asbestos* [114]-[117].

²⁰ ABR, *US - Clove Cigarettes*, [110]; ABR, *EC-Asbestos*, [99].

considered different because of their negative impact on consumers.²¹ In HSB, the high levels of sodium, sugar, and fat exceed WHO and RAHO guidelines in all content;²² Therefore, this detracts from the competitive relationship with other bars.

ii. The end-uses of HSB are very different than NFB.

[14] Budicans consume a variety of nutritional bars, including bars from other developing countries.²³ The purpose of these bars is to reduce obesity. Unfortunately, HSB promote the obesity consumers are trying to prevent. Where CFB are energy meal replacements or supplements for studying and long work hours, HSB are sweet snacks for after exercise.

[15] The complainant's addition of "Healthy" to their name HSB misleads consumers into believing the product meets a nutritional purpose. This impacts the upfront end-use. Bars that meet Budica's low-content standards help curb obesity via a healthy diet, whereas Dale's bars are a sweet snack.

iii. Budican consumers do not prefer HSB.

[16] Evidenced by their booming, world-renowned NFB industry, Budicans prefer health food bars. The purpose of a health bar is to be healthy. Budican consumers are attempting to eat healthier and reduce obesity by consuming HSB. Almost eighty percent of Budicans surveyed indicate food labels influence their food choices.²⁴ Yet, HSBs contain 13 g of sugar and excessive amounts of salt and saturated fats. By creating the false impression that food products containing potentially harmful amounts of sugar, salt, and fats are beneficial, HSB mislead or entice consumers away from their preferred healthy diet.

iv. Budica and Dale's bars have separate tariff classifications.

[17] The tariff classifications of both bars have a similar base product, but the products' actual properties are entirely different. In *Canada/Japan - SPF Lumber*, while the lumber between Japan and Canada was similar, they were distinct products because the tariff classification was not identical.²⁵

²¹ ABR, *EC-Asbestos*, [114].

²² Case, [Annex IV, "RAHO, 2019 Report on Consequences of Unsaturated Fats Intake on Health and Obesity in Adults"]; Case, [Annex IV, "WHO-FAO, Report on Diet, Nutrition and the Prevention of Chronic Diseases"].

²³ *ibid*, [111].

²⁴ Case, [Annex IV, "RAHO, 2017 Obesity: Front of Pack Labelling and Consumer Behaviour"].

²⁵ PR, *Canada/Japan - SPF Lumber*, [5.2]-[5.5].

[18] Dale's HSB is under HS1904.20.14. This means HSB are prepared foods, obtained from unroasted cereal flakes or mixtures of unroasted cereal flakes and roasted cereal flakes or swelled cereals. Dale's bars are cooked, with a barley base, which allows for prolonged energy and feeling full longer than basic sugar.

[19] Budica's CFB are under HS1904.20 and this product is left raw. By not baking their product, CFBs preserve the nutrients found in the raw ingredients of their bar. Although the products are both food bars within a prepared foods category, the base tariff classifications are not the same. The distinction between the bars differentiates preparation and base, and a vastly different nutritional value.

v. Physical properties and end uses show no competitive relationship

[20] The physical properties of the two bars keep them from a competitive relationship. Dale's HSB have almost three times the amount of added sugar as Budica's CFB. The HSB have almost five times the amount of saturated fats and sodium as CFBs.

[21] Unlike CFB, consumers don't view HSB as nutritional food because of its high-content of flagged ingredients, and do not prefer HSBs when appropriately labelled. In fact, Enge's WTB is extremely successful, due to the fact consumers distinguish and want a healthy alternative.²⁶ This preference held 37% of the Budican Market in 2019-2020. When the average market share of HSB decreased by 26.5% in 2019, the share of Budica's bars decreased by 18%, yet the average market share of WTB increased by 20%.²⁷

[22] Regulatory concerns, such as health risks, may be relevant in a likeness test to the extent they impact the competitive relationship between products.²⁸ Budica has demonstrated their objective of addressing obesity, based on research that the obesity epidemic contributes to the rise in non-communicable disease. Thus, it is important to carefully distinguish between products with potentially harmful characteristics.

[23] Here, HSBs and CFBs have two very different uses, properties, and end-result, and are not in a competitive relationship. As such, the food bars of Dale and Budica are not like products, and there can be no less favourable treatment.

²⁶ Case, [Annex III, "Nutrition Food Bar Shares in Budica's Market"].

²⁷ *ibid.*

²⁸ ABR, *US – Clove Cigarettes*, [119].

B. The treatment of Dalean food bars is no less favourable than domestic products.

[24] Even if Dalean food bars *are* like those of national origin and those originating in another country, Budica accords Dalean bars no less favourable treatment.

[25] The test for Less Favourable Treatment under Art. 2.1 is:

I. treatment *de jure* discrimination against imported products is prohibited;

II. treatment *de facto* discrimination against imported products is prohibited;

III. detrimental impact that stems exclusively from legitimate regulatory distinctions is permitted.

[26] Art. 2.1 prohibits both *de jure* and *de facto* discrimination against imported products, while permitting detrimental impact on competitive opportunities that stems exclusively from legitimate regulatory distinctions. The treatment of Dale's food bars is neither discriminatory *de jure*, nor *de facto*. Any detrimental impact stems from legitimate regulatory distinctions.

i. FIP does not discriminate on its face (*de jure*).

[27] The measure is even-handed in its design, operation, and application. There is no discrimination.²⁹

ii. The FIP does not modify competition conditions for Dale's food bars (*de facto*).

[28] The test for *de facto* less favourable treatment under Art. 2.1 has two elements:

(i) whether the technical regulation modifies the competition conditions to the detriment of imported products *vis-à-vis* like products of domestic origin and/or like products originating in any other country; and

(ii) whether such detrimental impact "stems exclusively from a legitimate regulatory distinction."³⁰

a) The regulation does not modify competition conditions.

[29] The FIP is applied even-handedly and applies the same to both domestic and international goods.³¹ The FIP labelling measures neither distinguish between products based

²⁹ *ibid*, [95]

³⁰ *ibid*.

³¹ *ibid*.

solely on origin, nor discriminate against products not from Budica. The standards are identical for all countries. The WHO and the RAHO provides a “gold-standard” for health knowledge and policies.

[30] Like Budica, developing countries are not forced to sell products as “healthy” which are well below WHO standards for health, without minimal measures for consumer awareness. Budica is not attempting to restrict products from Dale. Should Dale wish to import healthy alternatives, it can meet all objective criteria and compete with domestic and international products already in Budica. Should Dale be opposed to labelling its products, it could simply make the product with less sugar, sodium, or saturated fat. The success of products such as WTBs is not due to discrimination; they are simply healthier products.

[31] The AB in *US - TUNA* ruled the labelling measure modified competition conditions, excluding Mexican tuna, while granting access to most US tuna products.³² In contrast, the FIP does not modify the competition conditions to the effect of excluding Dalean food bars or favouring domestic bars. Budica does not direct the measure at Dalean bars. The measure minimally affects packaged, processed food products with high sugar, sodium and saturated fat content.

[32] As such, Dalean food bars do not experience a detrimental impact or *de facto* Less Favourable Treatment.

b) Any detrimental impact from the FIP stems from a legitimate regulatory distinction

[33] If detrimental impact occurred, the “no less favourable treatment” obligation does not prohibit detrimental impact on competitive opportunities, if it stems exclusively from a legitimate regulatory distinction. The analysis for legitimate regulatory distinction asks:

- (i) is there a legitimate objective;
- (ii) does the distinction discriminate against a “group” of products; and,
- (iii) is the regulation even-handed.

[34] (i) FIP has the legitimate objective of addressing the obesity epidemic in Budica. Protecting health is a legitimate objective, as seen in *US CLOVE*, where a reduction in youth smoking was a legitimate objective.³³ The FIP measure stems from the need to limit rising

³² ABR, *US--Tuna II (Mexico)*, [239].

³³ ABR, *US--Clove Cigarettes*, [236].

health care costs due to obesity. It is based directly on the WHO and RAHO's recommendations regarding reducing sodium, sugar, and saturated fat intake to curb obesity. These standards protect citizens from numerous NCDs through consumer awareness of their eating habits, and do not require citizens to rely on complicated charts.

[35] (ii) The distinction does not discriminate against one group of products. It does not act to protect domestic bars, as the vast majority of imports can enter Budica's market. Countries like Enge who meet the requirements have enjoyed success in Budica's health food market. The detrimental impact is minimal, because Dalean products could still enter the market without a label, provided their ingredients meet the required thresholds. FIP is consistent with the TBT's object and purpose, and Budica interpreted the Agreement in good faith.³⁴

[36] (iii) The regulation is even-handed in design, operation and application.³⁵ The FIP protects citizens and allows trade to flow. NFB, even those that are candy bars, are allowed into Budica; Budica just asks that the goods be honest to consumers. The regulatory scheme is largely voluntary to limit the impediment on trade, however the effects of the scheme are dramatic. The FIP lays out a legitimate regulatory distinction between (the level of sugar, sodium and fat content in marketed food). It is even-handed by basing the products chosen on WHO and RAHO standards and recommendations.

[37] The FIP bases its regulatory distinction on a legitimate objective, does not discriminate against one group of products, and the measure is even-handed. Therefore, any detrimental impact to Dale's food bar stems exclusively from a legitimate regulatory distinction.

[38] As such, the FIP is consistent with Art. 2.1 of TBT.

³⁴ *VLCT*, Art. 31, Art. 32.

³⁵ *ABR, US--Clove Cigarettes*, [182]; affirmed in *ABR, US-COOL*, [271].

II. THE FIP IS CONSISTENT WITH ART. 2.2 BECAUSE IT DOES NOT CREATE UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE.

[39] To demonstrate consistency with Art. 2.2, a provision must:

- (i) be a legitimate objective; and,³⁶
- (ii) be no more trade-restrictive than necessary to fulfil a legitimate objective.³⁷

A. The FIP has the legitimate objective of addressing Budica's obesity epidemic

[40] To demonstrate the legitimacy of an objective:

- (i) the objective of the measure is identifiable
- (ii) the objective corresponds with the legitimate examples listed in Art 2.2.³⁸

[41] The FIP identifies its objective as addressing obesity. Based on WHO and RAHO research, the FIP promotes consumption of healthy foods, by targeting the largest contributors to obesity - sodium, sugar, and saturated fats.³⁹ This legitimate objective, as set out in Art. 2.2, can be classified under "protection of human health or safety."⁴⁰

B. The FIP is not more trade-restrictive than necessary because it fulfils the objective and the risks of non-fulfilment are devastating.

³⁶ ABR, *EC-Seal Products*, [5.69].

³⁷ ABR, *Korea—Various Measures on Beef*, [164]; *US – Gambling*, [306]; ABR, *Brazil – Retreaded Tyres*, [182]; and ABR, *EC-Seal Products*, [5.169].

³⁸ TBT Agreement, Art. 2.2.

³⁹ Case, [Annex IV, "RAHO, 2019 Report on Consequences of Unsaturated Fats Intake on Health and Obesity in Adults"]; Case, [Annex IV, "WHO-FAO, Report on Diet, Nutrition and the Prevention of Chronic Diseases"].

⁴⁰ TBT Agreement, Art. 2.2.

[42] The purpose of the TBT Agreement is to strike a balance between the objective of trade liberalization and Members' right to regulate.⁴¹ To evaluate whether a measure is more trade-restrictive than necessary to fulfil a legitimate objective, the following analyses apply:

Relational Analysis:

- (i) the trade restrictiveness of the measure;
- (ii) the degree of contribution made by the measure to the legitimate objective;
- (iii) the risks non-fulfilment would create;

Comparative Analysis:

- (iv) whether the measure fulfils the objective;
- (v) comparison with proposed alternative measures; and
- (vi) the risks and the gravity of consequences non-fulfilment would create.

i. Relationally, the FIP measure contains minimal restrictions on trade.

[43] The FIP seeks to achieve a legitimate objective by asking producers to voluntarily enter the market with appropriate packaging. There are “special and differential treatment policies for developing countries.”⁴² However, this measure is not an attempt at trade restriction, but one of basic health awareness. The nutrition label merely asks for clarification on three items: added sugar, added sodium, and saturated fats. These three items are selected because they are the biggest contributors to obesity and NCDs. A label allows individuals to easily read and understand basic contents of their food to make decisions that suit their family’s needs. Dale is a developed country with full ability to comply with Budica’s FIP.

ii. The FIP contributes directly to the objective of addressing obesity.

[44] The measure contributes and is necessary to address obesity. RAHO notes the key factors to obesity are high contents of added sugar, sodium, and saturated fats.⁴³ Thus, this is a fact-based, global standard. Appropriate packaging is optional for most products under the FIP, but for some packaged products that contain significant amounts of sugar, sodium, and saturated fats, there are stricter measures. It allows consumers to be aware of the products they are consuming and forces producers to be honest with the products they are providing.

⁴¹ ABR, *US--Clove Cigarettes*, [113].

⁴² Case, [Annex IV, “Codex Alimentarius Guidelines on Nutrition Labelling (CAC/GL 2-1985, p2)”].

⁴³ Case, [Annex IV, “RAHO, 2019 Report on Consequences of Unsaturated Fats Intake on Health and Obesity in Adults”].

Due to the domestic and global epidemic decreed by the WHO, the measure is stringent to curb the high risks that arise from obesity.⁴⁴

iii. Non-fulfilment of FIP measures would create increased health risks.

[45] The measure comes out of both WHO and RAHO objectives and recommendations.⁴⁵ It considers the nature and the gravity of the risks that would arise from the non-fulfillment of Budica's objectives. For example, by reducing obesity, Budica can reduce the non-communicable diseases that place Budican populations at risk of COVID-19.

iv. Comparatively, the FIP fulfills the objective of addressing obesity.

[46] While Budica concedes that some restriction on the trade of processed foods occurs, the AB has previously ruled that health reasons support the legitimacy of a measure's objectives.⁴⁶ In *Australia - Tobacco Plain Packaging*, the AB found the labelling measures on Tobacco products were apt to make a meaningful contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.⁴⁷ Here too, the labeling scheme meets its objectives of addressing obesity by promoting the consumption of healthy products.

v. The FIP is more effective and less trade-restrictive than proposed alternative measures.

[47] FIP is the most effective means of fulfilling Budica's objective: addressing obesity by raising awareness of salt, sugar, and saturated fat contents. Since these ingredients are the main contributors of obesity (above genetics and general fitness), labelling is the simplest way to empower consumers to make healthy choices. As a developing country, a simple measure is important because detrimental impacts to human health start small. The entire population must have access to the measure, which still allows for efficient trade. As a country with a lower GDP, Budica requires a cost-effective and efficient method to slow obesity and rising health costs.

[48] FIP is the least trade-restrictive possible, requiring only that products with the highest sugar levels, sodium, and saturated fats be labelled. Most measures are voluntary, and Budica

⁴⁴ World Health Organization, 'Controlling the Global Obesity Epidemic.'

⁴⁵ Case, [Annex IV, "RAHO, 2017 Obesity: Front of Pack Labelling and Consumer Behavior"]; Case, [Annex IV, "WHO-FAO, Report on Diet, Nutrition and the Prevention of Chronic Diseases"].

⁴⁶ *Australia - Tobacco Plain Packaging*, [88].

⁴⁷ *ibid.*

has imposed no additional tariffs, trade restrictions, bans, import quotas or other burdens on producers. The FIP is *calibrated* according to the risks and allows for flexibility of Members.

[49] There is no evidence other alternatives, such as tariffs and promotion of physical activity are effective against curbing the rate of obesity. The promotion of physical activity has further barriers in that not all Budicans have access to recreation centers. An alternative for Dale is that Spear Bars could make healthier bars and food products for Budicans, or provide honest packaging and marketing. Any other alternative would likely have much higher trade distortive effects to achieve the same objective.

vi. The risks of non-fulfillment are devastating.

[50] The risks of not fulfilling the FIP measure include the rippling effects of an obesity epidemic. The WHO has clarified that obesity has often-deadly effects, including heart disease, diabetes, and stroke. The recent Covid-19 pandemic has shown how detrimental the effects of obesity are, with the virus proven to be deadly for those with non-communicable diseases, including obesity.

[51] The consequences of not fulfilling the objective includes the declining health of the Budican population and economic system. In 2018, NCDs were the main cause of death in Budica, and the yearly cost of treating NCDs amounted to 5% of Budica's GDP.⁴⁸ As a developing country striving to join the global economy, an epidemic's additional costs can be catastrophic to Budica's economy.

[52] In *Korea-Radionuclides*, the AB stressed the importance of the *potential* of the disease in light of relevant conditions.⁴⁹ Japan sought consultations with Korea in regards to their testing and certification of radionuclides. The AB found that Korea did not demonstrate that their increased export measures relied on evidence from independent experts. Unlike *Korea-Radionuclides*, Budica has significant evidence from the WHO and RAHO to conduct a risk assessment. Budica has evidence from the WHO, the RAHO, and years of scientific evidence backing these claims. An obesity epidemic, in light of the recent pandemic, relays the importance of the availability of healthy foods and clear consumer labelling. In this case, FIP is only standardizing the highest contributors of obesity - salt, sugar, and saturated fat in processed foods.

⁴⁸ Case, [1.12].

⁴⁹ ABR, *Korea Radionuclides*, [5.210].

[53] The FIP measure is most reasonable, as demonstrated by the analysis of both relational and comparative factors. FIP fulfils its objective, and the trade restrictiveness of the measure pales compared to the risks of non-fulfilment.

[54] As such, the FIP is not more trade-restrictive than necessary to fulfil its legitimate objective, and therefore, consistent with Art. 2.2 of TBT.

III. THE FAILURE OF BUDICA'S ENQUIRY POINT TO REPLY IS STILL CONSISTENT WITH ART. 10.1.1 OF THE TBT.

A. The Budican enquiry point acknowledged Dale's request.

[55] Art. 10.1.1 requires Members to ensure an enquiry point exists which can answer reasonable enquiries.⁵⁰ Further, the TBT Committee recommends the enquiry point should acknowledge the receipt of the enquiry.⁵¹ Dale's original communication of September 15, 2019 was repeated on October 2, and, as recommended, Budica's enquiry point acknowledged their request.

B. Budica is not obligated to respond.

[56] Art. 10.1.1 does not obligate Members to respond, but rather, the enquiry point must be *able* to respond to reasonable enquiries. Since Budica's enquiry point fielded fifty requests at the time, processing and response time was slowed down.⁵² Enquiries were filtered and Budica responded to thirty-two. This is consistent with *Korea - RadioNuclides* in which the AB found a single failure to respond was not automatically inconsistent with an obligation.⁵³

C. Dale's enquiry overlaps with available documents.

[57] Art. 10.1.1 requires Members to provide relevant documents regarding any technical regulations or standards proposed within its territory⁵⁴, but does not require communication to be in any specific format. The Decree, available to Dale, outlined the definitions and trademark restrictions Dale enquired about. Additionally, the issues presented by Dale were addressed at the TBT Committee meeting a month after the initial enquiry, at which Dalean

⁵⁰ TBT Agreement, Art. 10.1.1.

⁵¹ TBT Committee, [34].

⁵² Case, [Annex IV, "Specific Trade Concern (Excerpts)"].

⁵³ ABR, *Korea - RadioNuclides*, [5.210].

⁵⁴ TBT Agreement, Art. 10.1.1.

representatives were present.⁵⁵ As such, the official communication answers all of Dale's questions on a measure not yet in force, and a further response is redundant.

D. The enquiry from Dale is not reasonable.

[58] Art. 10.1.1 applies to reasonable enquiries. The TBT Committee recommends "an enquiry should be considered *reasonable* when it is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations."⁵⁶

[59] The enquiry from Dale goes beyond its food bar, and challenges the broader nutritional guidelines which inform FIP labelling requirements for every packaged processed food product sold into Budica.⁵⁷ Therefore, the enquiry is not reasonable, and the failure to reply is not a violation of Art. 10.1.1.

IV. THE FIP IS CONSISTENT WITH ART. 20 OF THE TRIPS AGREEMENT.

[60] While the FIP measure impacts the use of trademarks, it does not unjustifiably encumber the HSB trademark in the course of trade. FIP is not a special requirement since the labelling and trademark restrictions do not affect HSB in the suggested manners. Nor is the measure an encumbrance, as it falls within the scope of the exclusion, and the permissive components far outweigh any prohibitive ones. Finally, FIP is justifiable as it applies only to the packaging of high-content processed food products for the purpose of protecting the health of Budican consumers.

[61] The legal test scrutinizes the measure for the following:

- (i) the existence of special requirements;
- (ii) that special requirements encumber the use of a trademark in the course of trade;
- and,
- (iii) that they do so unjustifiably.⁵⁸

A. The FIP measures are not a special requirement.

[62] FIP Arts. 9 and 15 do not correspond with any of the examples of special requirements listed in TRIPS Art. 20, "use with another trademark, use in a special form or

⁵⁵ Case, [3.8].

⁵⁶ TBT Committee, [34]-[35].

⁵⁷ Case, [3.7].

⁵⁸ PR, *Australia -- Tobacco Plain Packaging*, [7.2156].

use in a manner detrimental to its capability to distinguish the goods.”⁵⁹ The limited restriction is not directed at Spear Bars, and does not infringe on the HSB name or the consumer’s ability to distinguish Spear Bar’s goods. Additionally, no product distinguishment has been acquired through use, since the name HSB was registered only seven months before publication of the Decree.⁶⁰ As such, FIP does not constitute a trademark infringement issue.

[63] Instead, FIP generally requires warning labels and prohibits misleading words or pictures on the packaging of food products containing high-content levels of the flagged ingredients. The trademark restriction is specific and not totally prohibitive, because it narrowly impacts only those particular food products.

[64] The Panel in *Australia -- Tobacco Plain Packaging* notes the compliance element of a special requirement.⁶¹ In this case, FIP permits any Member to use said words and pictures on food products whose sodium, sugar, and saturated fat contents fall below the high-content threshold. Therefore, compliance is not mandatory.

[65] Finally, Spear Bars sent a shipment while aware of this restriction. In *Indonesia – Autos*, the Panel found that, “if a foreign company enters into an arrangement with a [...] company, it does so voluntarily and in the knowledge of any consequent implications for its ability to use any pre-existing trademark.”⁶² In that case, the Panel found the trademark provisions were not special requirements. Similarly, FIP measures are not a special requirement.

B. Even if FIP measures are special requirements, the measures do not encumber the use of a trademark in the course of trade.

[66] Although FIP applies to all packaged processed food products sold in Budica, the prohibitive measures do not rise to the level of encumbrance. The exclusion limiting the scope of Art. 20 captures the limited restriction on the HSB trademark “healthy.” Here, it distinguishes the use of a trademark identifying the *undertaking* producing the goods from the use of a trademark distinguishing the specific *goods* in question.⁶³ As such, the narrow restriction and the labelling requirement on high-content HSB is not an encumbrance.

⁵⁹ TRIPS Agreement, [Art. 20].

⁶⁰ Case, [2.8].

⁶¹ PR, *Australia -- Tobacco Plain Packaging*, [7.2261].

⁶² PR, *Indonesia – Autos*, [14.277].

⁶³ TRIPS Agreement, Art. 20.

[67] While Spear Bars suggests the trademark restriction may portray healthy foods as unhealthy, the resulting absence of the word healthy on their packaging makes no further comment on the quality of their product. In fact, Spear Bars' use of the descriptive word *healthy* is used unfairly based on the final composition of their product, so the restriction on misleading words might not be characterized as an encumbrance.

[68] Notably, Spear Bars is not prohibited from using their brand name entirely, but only the preface "healthy," and only on high-content packaged food labels. This restriction does not affect the brand's market or reputation, and does not constitute an actual prohibition of a trademark.⁶⁴ It therefore cannot be understood as an *extensive encumbrance*.

C. Even if FIP measures are an encumbrance, they do not unjustifiably encumber the use of a trademark.

[69] Art. 20 prohibits only those measures where the use of a trademark is encumbered in a manner that lacks sufficient justification. There may then be legitimate reasons for imposing encumbrance. The assessment balances how the encumbrance affects the interest of the trademark owner with the right of Members to adopt measures that protect their interests. TRIPS Art. 8 allows that encumbrances "may be imposed in pursuit of public health objectives."⁶⁵

[70] Three factors to consider are:

- (i) nature and extent of the encumbrance resulting from special requirements;
- (ii) reasons for which special requirements are applied; and,
- (iii) how these reasons support the resulting encumbrance.⁶⁶

[71] Any encumbrance resulting from FIP is limited to restricting misleading words or pictures on the *packaging* of high-content processed food products. The labelling requirements and trademark restrictions specifically include those words evoking healthiness contained in brand names and trademarks. FIP does not prohibit the general use of the word healthy, but in this case, the HSB exceeds the content threshold in all three categories and is prohibited from using the word on its packaging.⁶⁷

⁶⁴ See PR, *Australia – Tobacco Plain Packaging*, [7.2239].

⁶⁵ ABR, *Australia – Tobacco Plain Packaging*, [6.649]; TRIPS Agreement, Art. 8.

⁶⁶ ABR, *Australia – Tobacco Plain Packaging*, [6.651].

⁶⁷ Case, [2.8].

[72] The prohibitive measures in FIP are for expressed public health objectives: addressing Budica’s obesity epidemic, promoting consumption of healthy foods, increasing nutritional awareness, and protecting consumers.⁶⁸ Since obesity is a critical problem in Budica, with its increased risk of non-communicable disease, this narrow application assists consumers with making informed, healthy food choices, alleviates the burden on Budica’s healthcare system, and saves lives.

[73] The public health objectives provide sufficient support for the limited encumbrance. The research of WHO and RAHO indicates a strong connection between restricting the use of misleading packaging, and protecting and empowering consumers with making healthy food choices.⁶⁹ The FIP restriction takes into account the legitimate trade interests of Dale and the impact on Spear Bars. It balances the interests of Budican consumers and their public health objectives, and considers the trade partnership with third party, Enge.

[74] Therefore, any encumbrance is justifiable, and on this basis the FIP is consistent with Art. 20.

V. THE APPLICATION OF THE FIP BY CUSTOMS AUTHORITIES IS CONSISTENT WITH ART. 10.8.2 OF THE TFA

A. Budican authorities rejected the HSB shipment because it failed to meet FIP measures.

[75] With its goal of expediting trade, TFA Art. 10.8.1 provides context for the destruction of the shipment of HSB. It allows that goods presented for import may be “rejected by the competent authority of a Member because of their failure to meet prescribed measures or technical regulations.”⁷⁰

[76] In addition, FIP Art. 16, in force for one day before the HSB shipment arrived, emphasizes non-compliant food products will be subject to measures. Budican Customs Authority, designated by the Member government and empowered by the BCA, acted within their mandate when they rejected ten containers filled with HSB because use of the word “healthy” violates FIP Art. 15.

⁶⁸ *ibid*, [3.1]-[3.2].

⁶⁹ Case, [Annex IV, “RAHO, 2017 Obesity: Front of Pack Labelling and Consumer Behavior”]; *see also* BMJ Global Health (BMJGH), 4 (2019): 1.

⁷⁰ TFA, Art 10.8.1.

B) Budica, in compliance with the *BCA* and the *TFA*, initiated the process to re-consign or return the shipment the same day.

[77] TFA Art. 10.8.1 instructs the [rejecting] Member to “allow the importer to re-consign or return the rejected goods,” per their laws and regulations. While Art. 10.8.2 requires the importer to exercise this option within a “reasonable period of time”⁷¹, it does not define what is reasonable. The jurisprudence allows flexibility to consider the relevant circumstances, stating it must be “established on a case-by-case basis”.⁷²

[78] Given the priority not to hold perishable goods and to maintain an efficient port, *BCA* specifies this as ten days.⁷³ In keeping with this provision, Budica sent an email to the Spear Bars representative on the *same date* the shipment was rejected for import. In the communication, Budica notified the importer they were obligated to re-consign or return the bars within ten calendar days, and referenced applicable domestic law, the *BCA*. The importer did not respond until seventeen days later.

C) The Importer Failed to Exercise its Option Within the Reasonable Period Provided.

[79] According to TFA Art. 10.8.2, if the importer fails to exercise the re-consign or return option within a reasonable period of time, “the competent authority *may* take a different course of action to deal with non-compliant goods.”⁷⁴ Subject to Budica’s domestic law, FIP Art. 16 and *BCA*, s 48, forewarns importers that merchandise declared uncleared by Budican Customs “can be destroyed by the custodian.”⁷⁵ *BCA* interprets reasonable period of time as ten days; enough time to communicate a decision regarding return or re-consign.

[80] As notified in the email, these enforceable policies were available to Dale before their goods’ shipment. In addition, Budican authorities gave Spear Bars more than the stipulated ten days to re-consign or return the shipment. Only after the importer failed to exercise their option within ten calendar days, did Budican Customs Authority declare the shipment uncleared and order its immediate destruction.⁷⁶ When the goods were destroyed thirteen days after rejection, the Spear Bars importer had not yet responded.

⁷¹ *ibid*, Art. 10.8.2.

⁷² ABR, *Japan- Agricultural Products II*, [93].

⁷³ Case, [4.2], see *BCA* s 48.

⁷⁴ TFA, Art 10.8.2.

⁷⁵ Case, [4.2], see *BCA* s 48.

⁷⁶ Case, [4.3].

[81] The ample notice provided to Spear Bars gave them a reasonable period of time to respond. Therefore, this application is consistent with TFA Art. 10.8.2.

REQUEST FOR FINDINGS

1. Dale's bringing of the dispute to the DSB was premature. This challenge is inconsistent with the requirements of Art. 3.7 of the DSU for Members to determine whether a claim would be fruitful before bringing it.
2. The FIP is not a technical regulation within the meaning of Annex 1.1 to the TBT.
3. If the FIP is a technical regulation, it is consistent with Art. 2.1 of the TBT.
4. The FIP is consistent with Art 2.2 of the TBT. It fulfills a legitimate objective - to protect the health of the Budican people.
5. The Budican enquiry point did not fail to reply to Dale's request. It is consistent with Art. 10.1.1 of the TBT Agreement.
6. The FIP is consistent with Art. 20 of the TRIPS Agreement because it justifiably encumbers, by special requirements, the use of trademarks and front-of-pack nutrition labelling requirements in the course of trade.
7. The BCA's application of the FIP to Spear Bar's shipment is consistent with Art 10.8.2 of the TFA.