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BUDICA - MEASURES RELATING TO THE IMPORTATION AND MARKETING OF NUTRITION FOOD BARS

FOR THE 19TH EDITION OF THE JOHN H. JACKSON MOOT COURT COMPETITION

BENCH MEMORANDUM

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* This memorandum is designed to provide background information and guidance to those serving as panellists for the written submissions or the Regional or Final Oral Rounds. The memorandum highlights existing case law or theories on the relevant provisions as well as the expected arguments of each party. It is not meant to provide a definitive answer to any of the posed legal questions.

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CASES CITED IN THIS BENCH MEMORANDUM

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Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Australia – Tobacco Plain Packaging (Cuba)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS458/R, Add.1 and Suppl.1, adopted 27 August 2018, DSR 2018:VIII, p. 3925
Australia – Tobacco Plain Packaging (Dominican Republic)	Appellate Body Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS441/AB/R and Add.1, adopted 29 June 2020
Australia – Tobacco Plain Packaging (Dominican Republic)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS441/R, Add.1 and Suppl.1, adopted 29 June 2020, as upheld by Appellate Body Report WT/DS441/AB/R, DSR 2018:VIII, p. 3925
Australia – Tobacco Plain Packaging (Honduras)	Appellate Body Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and Add.1, adopted 29 June 2020
Australia – Tobacco Plain Packaging (Honduras)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/R, Add.1 and Suppl.1, adopted 29 June 2020, as upheld by Appellate Body Report WT/DS435/AB/R, DSR 2018:VIII, p. 3925
Australia – Tobacco Plain Packaging (Indonesia)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS467/R, Add.1 and Suppl.1, adopted 27 August 2018, DSR 2018:VIII, p. 3925
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China – Agricultural Producers	Panel Report, *China – Domestic Support for Agricultural Producers*, WT/DS511/R and Add.1, adopted 26 April 2019
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3

China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R*, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
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EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Hormones (Article 21.3(c))	Award of the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, p. 1833
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EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615

EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451
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EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
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US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R,* adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
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US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R / WT/DS386/R,* adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing Measures (China) (Article 21.3(c))	Award of the Arbitrator, *United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU*, WT/DS437/16, 9 October 2015, DSR 2015:XI, p. 5775
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Renewable Energy	Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R and Add.1, circulated to WTO Members 27 June 2019 [appealed by the United States 15 August 2019 – the Division suspended its work on 10 December 2019]
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815

US – Shrimp II (Viet Nam) (Article 21.3(c))	Award of the Arbitrator, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Arbitration under Article 21.3(c) of the DSU*, WT/DS429/12, 15 December 2015, DSR 2015:XI, p. 5811
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R*, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3

ABBREVIATIONS USED IN THIS BENCH MEMORANDUM

Abbreviation	Description
BMI	Body mass index
Budica	Federal Republic of Budica
Dale	Republic of Dale
Draft Decree	Draft Presidential Decree No. 457
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FAO	Food and Agriculture Organization of the United Nations
GATT 1994	General Agreement on Tariffs and Trade of 1994
HS	Harmonized Commodity Description and Coding System
NCDs	Non-communicable diseases
RAHO	Regional Azula Health Organization
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
STC	Specific Trade Concern
TBT Agreement	Agreement on Technical Barriers to Trade
TBT Committee	Committee on Technical Barriers to Trade
TFA	Agreement on Trade Facilitation
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

TIMELINE OF THE DISPUTE

Date	Event
November 2015	One of the leading producers of nutrition food bars in Budica launched the *Celtic Flavour Bars* (domestic product).
December 2018	*Wild Tropic–All Natural Bars* entered Budica's market (imported from Enge into Budica).
January 2019	Spear Bars Inc. registered the *Healthy Spear Bars* brand name and started marketing in Budica (imported from Dale into Budica).
1 August 2019	Budica published the Draft Presidential Decree No. 457 and notified it to the WTO under the TBT Agreement.

15 September 2019	Dale sent a communication regarding the Draft Presidential Decree No. 457 to the Budican enquiry point established under Article 10.1 of the TBT Agreement.
1 October 2019	Budica enacted and published in the Official Gazette the *Food Information Package* (formerly the Draft Presidential Decree No. 457).
2 October 2019	Dale sent a second communication concerning the *Food Information Package* to the Budican enquiry point established under Article 10.1 of the TBT Agreement.
16 October 2019	During the TBT Committee meeting, Dale raised an STC regarding the labelling requirements set forth in the *Food Information Package* and the lack of response from the Budican enquiry point to Dale's requests.
1 April 2020	The *Food Information Package* entered into force.
2 April 2020	A Dalean ship arrived at Budica's main port of entry carrying 10 containers filled with *Healthy Spear Bars* (imported from Dale into Budica).
3 April 2020	Budica's customs authority rejected the import of the cargo on the grounds of its failure to meet the labelling requirements set out in the *Food Information Package*. This decision was notified to Spear Bars Inc.'s representative, the importer, via e-mail.
13 April 2020	Budica's customs authority issued an administrative decision declaring Spear Bars Inc.'s merchandise as uncleared and ordering its destruction.
16 April 2020	Spear Bars Inc.'s merchandise was effectively destroyed.
20 April 2020	Spear Bars Inc. submitted an official request for the return of the rejected merchandise. The customs authority informed the importer about the decision adopted on 13 April and the subsequent destruction of the merchandise. Spear Bars Inc. immediately contested the actions undertaken by the Budican customs authority through an administrative appeal.
5 May 2020	Spear Bars Inc. challenged the *Food Information Package* before the Budican administrative court and requested its suspension through an interim measure.
14 August 2020	Dale submitted a request for the establishment of a panel to the DSB.
23 August 2020	The Budican administrative court admitted the lawsuit and granted the requested interim measure.
5 September 2020	The DSB established the panel.
15 September 2020	The panel was composed.

1 INTRODUCTION

1.1. The government of the Republic of Dale ("Dale") requested consultations with the government of the Federal Republic of Budica ("Budica"), calling into question the conformity of the *Food Information Package*, and the application thereof by the Budican authorities, with multilateral disciplines on technical regulations, intellectual property, and trade facilitation.

1.2. On 14 August 2020, after unsuccessful consultations, Dale submitted a request for the establishment of a panel to the Dispute Settlement Body ("DSB") pursuant to Articles 4.7 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade ("GATT 1994"), Article 14.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and Article 24.8 of the Agreement on Trade Facilitation ("TFA").

1.3. On 5 September 2020, the DSB established a panel, which was composed on 15 September 2020.

2 KEY ISSUES

2.1. The core question of the dispute is whether Budica's measures, purportedly adopted with the aim of combatting obesity, are incompatible with the World Trade Organization ("WTO") rules.

2.2. Dale argues that these measures affect the packaging and trademarks of certain processed food products by imposing labelling requirements and other regulations with respect to the nutritional contents and health benefits of said products.

2.3. The dispute at hand raises similar issues to those recently adjudicated in *Australia – Tobacco Plain Packaging* panels and Appellate Body reports,[1] but substantially departs from the tobacco discussion given the recognised complexity of obesity, its multiple causes, and the lack of a determinative scientific approach.

2.4. In particular, this dispute concerns the following issues:

2.5. Under the DSU:

a. Whether Dale's bringing of the dispute to the DSB challenges a measure "taken" by Budica within the meaning of the DSU.
b. Whether Dale's bringing of the dispute to the DSB is in breach of Article 3.7 of the DSU.

2.6. Under the TBT Agreement:

a. Whether the measures at issue constitute a technical regulation under Annex 1.1 of the TBT Agreement.
b. Whether the measures at issue are inconsistent with Article 2.1 of the TBT Agreement (national treatment and most favoured nation disciplines).
c. Whether the measures at issue are inconsistent with Article 2.2 of the TBT Agreement (unnecessary obstacles to international trade).
d. Whether the failure of the Budican enquiry point to reply to Dale's request dated 15 September 2019 is inconsistent with Article 10.1.1 of the TBT Agreement.

2.7. Under the TRIPS Agreement, the Case raises the issue of whether the measures are inconsistent with Article 20 of the TRIPS Agreement.

[1] The measures adopted by Australia imposing trademark restrictions and other plain-packaging requirements on tobacco products were analyzed by WTO panels and Appellate Body in: Panel Report, *Australia – Tobacco Plain Packaging (Cuba)*; Panel Report, *Australia – Tobacco Plain Packaging (Indonesia)*; Panel Report, *Australia – Tobacco Plain Packaging (Honduras)*; Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*; Panel Report, *Australia – Tobacco Plain Packaging (Dominican Republic)*; Appellate Body Report, *Australia – Tobacco Plain Packaging (Dominican Republic)* [for greater clarity, subsequent footnotes will only include references to the Panel Report, *Australia – Tobacco Plain Packaging (Honduras)* and the Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*].

2.8. Under the TFA, the Case raises the issue of whether the application of the *Food Information Package* by Budica's customs authority to Spear Bars Inc.' shipment is inconsistent with Article 10.8.2 of the TFA.

3 FACTUAL ASPECTS

3.1 FACTS OF THE DISPUTE

3.1. The parties to the dispute are Dale, acting as Complainant, and Budica, acting as Respondent. Both States are Members of the WTO, ratified the TFA, and are Members of the United Nations ("UN"), the World Health Organization ("WHO"), the Food and Agriculture Organization of the United Nations ("FAO"), and the Regional Azula Health Organization ("RAHO").

3.2. The Case pertains to adult and childhood obesity,[2] which is one of today's most urgent public health problems. The facts provide teams with data on the severity of this public health concern, including obesity-related deaths per year (2.8. million people around the globe);[3] steep increase in the obesity rate during the last decades;[4] costs incurred by health systems,[5] and correlations between obesity and non-communicable diseases ("NCDs"), such as diabetes, musculoskeletal disorders, cardiovascular diseases, and some cancers (e.g., endometrial, breast, and colon).[6] The provided data emphasises the gravity of childhood obesity worldwide.[7]

3.3. One of the key facts of the dispute is the lack of a single cause of obesity.[8] Even if the WHO has identified the energy imbalance between calories consumed and calories expended as the fundamental cause of obesity, other risk factors have also been associated with this disease.[9] These include physical inactivity, genetic predisposition, slow metabolism, behaviour, age, sex, environment, cultural traits, and socioeconomic status.[10] Most particularly relevant to this dispute is the identification of the consumption of too many saturated fats and sugar as a major contributing factor in obesity.[11]

3.4. The facts outline the recommendations provided by different organisations with regard to obesity. Among others, the recommendations promote the replacement of saturated fats with unsaturated fats (WHO);[12] the labelling of foods with a view to reducing the intake of total fats, sugar, and sodium (WHO and RAHO);[13] the implementation of nutrition education and counselling (RAHO),[14] and the increase in the intake of fresh and dehydrated fruits (RAHO).[15]

3.5. The obesity epidemic is particularly dire in Budica.[16] The country has had historically high rates of obesity and is currently enduring an increase in obesity rates, mainly affecting children.[17] According to Budica's Ministry of Public Health, obesity is linked with a decade-long shift in the population's consumption habits towards fast foods and packaged foods with high contents of saturated fats, sugar, and sodium, coupled with physical inactivity.[18]

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[2] Adult obesity is defined as excessive body fat accumulation and, more specifically, as an adult person having a Body Mass Index ("BMI") of greater than or equal to 30. Children having a BMI at the same level or higher than 95% of other children of their same age and sex are considered to be obese, Facts of the Case, para. 1.4 and footnote 7.

[3] Facts of the Case, para. 1.6.

[4] Facts of the Case, paras. 1.6 and 1.7.

[5] Facts of the Case, para. 1.12.

[6] Facts of the Case, para. 1.4.

[7] Facts of the Case, paras. 1.7 and 1.11.

[8] Facts of the Case, para. 1.5.

[9] Facts of the Case, para. 1.5.

[10] Facts of the Case, para. 1.5.

[11] Annex IV: Specific Trade Concern, para. 2.

[12] Facts of the Case, para. 1.9.

[13] Facts of the Case, paras. 1.9 and 1.10.

[14] Facts of the Case, para. 1.10.

[15] Facts of the Case, para. 1.10.

[16] Facts of the Case, paras. 1.12-1.15.

[17] Facts of the Case, paras. 1.13 and 1.15.

[18] Facts of the Case, para. 1.14.

3.6. To tackle this public health concern, Budica published and notified to the WTO the draft *Food Information Package,* which was subsequently adopted on 1 October 2019[19] (the *Food Information Package* entered into force on 1 April 2020).[20]

3.7. On 15 September 2019, Dale sent a communication to the Budican enquiry point established under Article 10.1 of the TBT Agreement concerning the draft *Food Information Package*.[21] In the absence of a reply from Budica, Dale followed up on its request on 2 October 2019.[22] To date, Dale has not received a reply to its enquiry.[23]

3.8. During the TBT Committee meeting held on 16 October 2019, Dale raised a Specific Trade Concern ("STC") regarding the labelling requirements outlined in the *Food Information Package*, claiming that these deviated from the relevant international standards and were deceptive, misleading, and a source of unjustified fear for consumers.[24]

3.9. The *Food Information Package* was designed to address the obesity epidemic, both in adults and children, by imposing front-of-pack nutrition labelling requirements and restricting marketing techniques.[25]

3.10. Front-of-pack nutrition labels were designed to assist consumers in understanding quantitative information regarding the content of sodium, added sugar, and saturated fats in products, including an indication of free, low, and high contents.[26] Marketing restrictions were formulated to prevent deceptive or misleading uses of adjectives related to health and healthy consumption habits in food products' packaging.[27]

3.11. The Budican market for nutrition food bars includes the *Celtic Flavour Bars*,[28] the *Wild Tropic–All Natural Bars*,[29] and the *Healthy Spears Bars.*[30] While the first two were positively affected by the *Food Information Package,* the latter one was adversely impacted by this regulation per Dale's allegations.[31]

3.12. *Celtic Flavour Bars*, produced in Budica, are classified under the subheading 19042014[32] of the Harmonized Commodity Description and Coding System ("HS") and are mainly made of oats, muesli, wheat, rice, and whey protein.[33] Each bar contains 4 gm/100 gm of added sugar (sucralose), 1.3 gm/100 gm of saturated fats, and 0.11 gm/100 gm of sodium.[34] Per the thresholds set out in the *Food Information Package,* these bars may be marked with a low sodium, sugars, and saturated fats label and may contain, in their packages, evocations of healthiness.[35]

3.13. *Wild Tropic–All Natural Bars*, imported from Enge, are classified under subheading HS 190421 and are prepared with sodium-free and gluten-free ingredients and vegan protein.[36] Each bar contains zero added sugars and sodium, 15 gm/100 gm of fructose attributed to dehydrated coconut, apple, and banana used in the bars, and 0.08 gm/100 gm of saturated fats.[37] Pursuant to the thresholds set

[19] Facts of the Case, paras. 3.1 and 3.5; Corrections and Clarifications No. 14 and 15.
[20] Corrections and Clarifications No. 15.
[21] Facts of the Case, para. 3.7.
[22] Facts of the Case, para. 3.7.
[23] Facts of the Case, para. 3.7.
[24] Facts of the Case, para. 3.8.
[25] Facts of the Case, paras. 3.2, 3.3, and 3.6.
[26] Facts of the Case, para. 3.3.
[27] Facts of the Case, para. 3.3.
[28] Facts of the Case, paras. 2.2-2.4.
[29] Facts of the Case, paras. 2.5-2.6.
[30] Facts of the Case, paras. 2.7-2.8.
[31] Facts of the Case, para. 5.6.
[32] Kindly note the HS is a six-digit international product nomenclature. Digits seven and eight are further subdivisions implemented by economies for greater clarity and are not relevant for the purpose of resolving this dispute, Corrections and Clarifications No. 8-12.
[33] Facts of the Case, para. 2.3.
[34] Facts of the Case, para. 2.3.
[35] Annex I: Labelling Requirements under Decree No. 457 and Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[36] Facts of the Case, para. 2.6.
[37] Facts of the Case, para. 2.6.

out in the *Food Information Package*, these bars may be marked with a free sodium, sugars, and saturated fats label and may contain, in their packages, evocations of healthiness.[38]

3.14. *Healthy Spears Bars*, imported from Dale, are classified under subheading HS 190420 and are mainly made of oats, muesli, rice, and whey protein.[39] Each bar contains 11 gm/100 gm of added sugar (sucralose), 2 gm/100 gm of fructose attributed to dehydrated apple and banana used in the bars, 5 gm/100 gm of saturated fats, and 0.5 gm/100 gm of sodium.[40] Following the thresholds set out in the *Food Information Package*, these bars shall be marked with a high sodium, sugars, and saturated fats label and shall not contain, in their packaging, evocations of healthiness.[41]

Table No. 1: *Budica's nutrition food bars market and labelling requirements under the Food Information Package.*

Bar	Sugar	Saturated Fats	Sodium	Label
Celtic Flavour Bars	4 gm/100 gm (sucralose)	1.3 gm/100 gm	0.11 gm/100 gm	Low
Wild Tropic – All Natural Bars	15 gm/100 gm (fructose)	0.08 gm/100 gm	0 gm/100 gm	Free
Healthy Spear Bars	11 gm / 100 gm (sucralose) 2 gm/100 gm (fructose)	5 gm/100 gm	0.5 gm/100 gm	High

3.15. Dale, which historically has not had high rates of obesity, decided to pursue a different approach to dealing with this public health concern.[42] When confronted with the rise of childhood obesity, Dale launched the *Get Fit* campaign.[43] This campaign was intended to reduce childhood obesity by increasing physical activity; improving cycling routes and discouraging motorised transport to schools; funding and organising national sports tournaments; investing in infrastructure for sports facilities and outdoor parks; offering sports scholarships; promoting active breaks, and adequately funding school gym classes at public schools.[44]

3.16. On 3 April 2020, Budica's customs authority rejected the importation of 10 containers filled with *Healthy Spear Bars* alleging the non-compliance of the cargo with the *Food Information Package*.[45] The authority immediately notified the rejection of the merchandise to the importer, Spear Bars Inc.'s representative in Budica.[46] The communication read as follows:

> (…) the importer shall re-consign or return the merchandise, directly or through a duly designated third party (…) failure to exercise this obligation within ten (10) calendar days will automatically, and without further notice, result in the declaration of the merchandise as uncleared goods in terms of Section 48 of the Budican Customs Act.[47]

3.17. Considering that the importer did not respond to the communication above, Budica's customs authority declared the merchandise as uncleared, via an administrative decision dated 13 April 2020.[48] Three days after the decision, the authority destroyed the merchandise.[49] Spear Bars Inc. questioned the destruction of the merchandise through an administrative appeal.[50]

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[38] Annex I: Labelling Requirements under Decree No. 457 and Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[39] Facts of the Case, para. 2.8.
[40] Facts of the Case, para. 2.8.
[41] Annex I: Labelling Requirements under Decree No. 457 and Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[42] Facts of the Case, paras. 1.17-1.20.
[43] Facts of the Case, para. 1.17.
[44] Facts of the Case, para. 1.17.
[45] Facts of the Case, para. 4.1.
[46] Facts of the Case, para. 4.2.
[47] Facts of the Case, para. 4.2; Corrections and Clarifications No. 3.
[48] Facts of the Case, para. 4.3; Corrections and Clarifications No. 4.
[49] Facts of the Case, para. 4.3.
[50] Facts of the Case, para. 4.5.

3.18. On 5 May 2020, Spear Bars Inc. challenged the *Food Information Package* alleging its non-conformity with Budica's *Consumer Protection Act* before the Budican administrative court and requested the suspension of the measure.[51] On 23 August 2020 (roughly four months after the entry into force of the measure), the tribunal granted the interim measure of suspending the implementation of the *Food Information Package* during the pendency of the litigation.[52] The court may issue a ruling in approximately one year and, if appealed, Budica's Supreme Administrative Court may take an additional year to issue a final decision.[53] Nonetheless, the tribunal could lift the suspension if it finds that the relevant underpinning risk of irreparable harm ceases to exist.[54]

3.2 MEASURES AT ISSUE

3.19. Dale challenged the *Food Information Package* questioning its conformity with the TBT Agreement and the TRIPS Agreement.[55]

3.20. The *Food Information Package* provides for Free-Content and Low-Content labels. Only products in compliance with the sodium, sugar, and saturated fats thresholds established therein may be sold in the national territory with said labels. Nonetheless, the use of these labels is not required to place packaged processed food products for sale on the Budican market (Articles 7 and 8).[56]

3.21. Further, the *Food Information Package* mandates the use of Health Warning High-Content labels for packaged processed food products having sodium, sugar, or saturated fats equal to or in excess of the thresholds established therein (Article 9).[57]

3.22. In addition to the front-of-pack labels, the *Food Information Package* prohibits the use of words, letters, numerals, pictures, shapes, colours, or any combination thereof, evoking healthiness associated with the nature, manufacturing process, characteristics, or qualities of a product on the package of processed food products containing sodium, sugar, or saturated fats equal to or in excess of the thresholds established therein (Article 15).[58] This includes, but is not limited to, the brand name of the product or associated logos.[59]

3.23. Dale also argued that the failure of the Budican enquiry point to respond to its queries, dated 15 September and 2 October 2019, is inconsistent with the TBT Agreement.[60]

3.24. Lastly, Dale questioned the conformity with the TFA of Spear Bars Inc. merchandise destruction by Budica's customs authority.

4 PRELIMINARY CONSIDERATIONS: WHETHER DALE HAS BROUGHT THE DISPUTE IN A MANNER CONSISTENT WITH THE DSU

4.1 RELEVANCE OF THE ISSUE

4.1. On 1 April 2020, the *Food Information Package* entered into force.[61]

4.2. On 5 May 2020, Spear Bars Inc. challenged the *Food Information Package* before the Budican administrative court and requested the court to suspend the application thereof.[62]

[51] Facts of the Case, para. 5.1.
[52] Facts of the Case, para. 5.2.
[53] Facts of the Case, para. 5.3.
[54] Corrections and Clarifications No. 26.
[55] Facts of the Case, para. 5.6.
[56] Facts of the Case, para. 3.6.
[57] Facts of the Case, para. 3.6.
[58] Facts of the Case, para. 3.6.
[59] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[60] Facts of the Case, para. 5.6.
[61] Corrections and Clarifications No. 15.
[62] Facts of the Case, paras. 5.1 and 5.2.

4.3. On 14 August 2020, Dale submitted a request for the establishment of a panel to the DSB. Among others, the request challenged the *Food Information Package.*[63]

4.4. On 23 August 2020, the Budican administrative court ordered, as an interim measure, the suspension of the application of the *Food Information Package* in its entirety for all domestic and imported packaged processed food products sold in the national territory.[64]

4.5. The interim measure was granted for the whole duration of the legal proceedings. The court may issue a ruling in approximately one year and, if appealed, Budica's Supreme Administrative Court may take an additional year to issue a final decision.[65] As the interim measure was adopted at the discretion of the tribunal to preserve the *status quo ante* during the litigation, the tribunal could lift the suspension if it finds that the relevant underpinning risk of irreparable harm ceases to exist.[66]

4.6. On 5 September 2020, the DSB established the panel, which was composed on 15 September 2020.[67]

4.7. Students are expected to raise arguments under Articles 3.3 and 3.7 of the DSU, as explained *below*. Students should not spend much time on this issue, and panellists are encouraged not to engage students into a prolonged discussion on this preliminary issue.

4.2 RELEVANT LEGAL STANDARD AND JURISPRUDENCE

4.8. WTO panels have the right to determine whether they have substantive jurisdiction to decide upon a matter brought before them.[68] The scope of the jurisdiction of the WTO dispute settlement concerns, among others, the question on the *measures* that can be subject to WTO dispute settlement.[69]

4.9. Correspondingly, the absence of a measure taken by a Member may bar the jurisdiction of WTO panels. For example, the panel in *China – Publications and Audiovisual Products* concluded that a "measure" identified by the complainant (a duopoly between two wholly Chinese State-owned enterprises in the film distribution market) was not attributable to actions or omissions taken by the government of the respondent and thus was not a measure subject to challenge in WTO dispute settlement.[70]

4.10. The DSU refers to the term "measure" in several provisions (*e.g.*, in Article 3.3), but does not elaborate on the types of measures that may be challenged before the WTO dispute settlement system. For instance, Article 3.3 of the DSU reads as follows:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member* is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. (emphasis added)

4.11. The panel in *US – Stainless Steel (Mexico)* considered that the terms "measures taken by another Member" in Article 3.3 of the DSU are to be interpreted broadly.[71] Thus, complainants have a certain degree of discretion in determining what are "measures taken by another Member" when crafting their requests for the establishment of a panel.

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[63] Facts of the Case, para. 5.5; Corrections and Clarifications No. 25 and 27.
[64] Facts of the Case, para. 5.2.
[65] Facts of the Case, para. 5.3.
[66] Corrections and Clarifications No. 26.
[67] Facts of the Case, para. 5.8.
[68] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45; Appellate Body Report, *US – 1916 Act*, footnote 30; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.
[69] Van den Bossche, P. & Zdouc, W., The Law and Policy of the WTO, ch. 3: (dispute settlement), (Cambridge, 4th ed. 2017), p. 169.
[70] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 129; Panel Report, *China – Publications and Audiovisual Products*, para. 7.1693; Panel Report, *EC – IT Products*, para. 7.1165.
[71] Panel Report, *US – Stainless Steel (Mexico),* para. 7.30.

4.12. In *EU - PET (Pakistan)*, the Appellate Body concluded that according to Article 3.3, a Member may initiate WTO dispute settlement proceedings whenever "it considers" that measures taken by another Member are impairing any benefits accruing to it.[72] It is ultimately up to the panel, however, to decide whether the identified measure falls within the definition in Article 3.3 of the DSU and whether, therefore, it has jurisdiction to hear the complaint.[73]

4.13. Prior cases involving Article 3.3 have focused on whether a measure exists in terms of the manner in which it was adopted (*e.g.*, being a practice or norm rather than a formal legal instrument[74]) and also whether the DSB retains jurisdiction over measures that have ceased to exist because they were repealed or ceased to have legal effect.[75]

4.14. The Case presents a slightly different issue – whether a panel has jurisdiction over a measure that is adopted, but its implementation is suspended. In essence, the question is whether the DSU contains an implicit "ripeness" requirement. In particular, the *Food Information Package* (i) was in full force and effect from 1 April 2020[76] to 23 August 2020,[77] having effects in the *past*; (ii) has not been withdrawn from Budica's legal system, but its application is *currently* suspended pursuant to an interim measure granted by a local court;[78] and (iii) may have effects in the *future*, depending on the decisions to be adopted in the litigation in course.[79]

4.15. Concerning Article 6.2 of the DSU (which may be useful as a context for interpreting Article 3.3), the Appellate Body in *EC – Chicken Cuts* stated that, as a general rule, the measures included in a panel's terms of reference must be measures that are *in existence at the time of the establishment of the panel*.[80] In *EC – Selected Customs Matters*, the Appellate Body explained that the "general rule" described in *EC – Chicken Cuts* is qualified by at least two exceptions: (i) where a measure enacted after the establishment of the panel amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure; and (ii) where "the legislative basis [of a measure] has expired, but [its] effects are alleged to be impairing the benefits accruing to the requesting Member."[81]

4.16. With regard to this scenario, the Appellate Body in *US – Upland Cotton* further clarified:

> Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement (…) The only temporal connotation contained in the ordinary meaning of the expression "at issue", as used in Article 6.2 of the DSU, is expressed by its present tense: measures must be "at issue"—or, putting it another way, "in dispute"—at the time the request is made. Certainly, nothing inherent in the term "at issue" sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired. The relevant context for Article 6.2 in this regard includes Articles 3.3 and 4.2 of the DSU. As we have concluded above, those provisions do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures. If the effect of such measures remains in dispute following consultations, the complaining party may, according to Article 4.7 of the DSU, request the establishment of a panel, and the text of Article 6.2 does not suggest that such measures could not be the subject of a panel request as "specific measures at issue.[82] (footnotes omitted)

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[72] Appellate Body Report, *EU - PET (Pakistan),* para. 5.42.
[73] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1693.
[74] Appellate Body Report, *US – Countervailing Measures on Certain EC Products,* paras. 129 and 151.
[75] Appellate Body Report, *US – Upland Cotton*, para. 271; Appellate Body Report, *China – Raw Materials,* para. 263.
[76] Corrections and Clarifications No. 15.
[77] Facts of the Case, para. 5.2.
[78] Facts of the Case, para. 5.2.
[79] Facts of the Case, para. 5.3; Corrections and Clarifications No. 26.
[80] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[81] Appellate Body Report, *EC – Selected Customs Matters*, para. 184. See also: Panel Report, *India – Iron and Steel Products*, paras. 7.23, 7.24, and 7.28.
[82] Appellate Body Report, *US – Upland Cotton,* paras. 262, 269, and 270.

4.17. A different question is whether the panel must make findings and recommendations on measures expired prior to the establishment of the panel. In principle, a panel is not precluded from making findings and recommendations with respect to expired measures. In *China – Agricultural Producers*, the panel assessed whether an expired measure affects the operation of the covered agreements, despite its termination.[83] It finally declined to make findings and recommendations on that measure.[84]

4.18. The panel in *EC – Approval and Marketing of Biotech Products*, when asked to refrain from ruling on measures which were no longer in force, reasoned that Article 3.3 does not prevent a panel from making findings on measures that are no longer impairing the rights and benefits of another Member.[85] That panel concluded that it was consistent with the function of the dispute settlement system for a panel to make findings on the WTO-consistency of a measure which has ceased to exist, especially if so requested by one of the parties.[86] Thus, the expiry of a measure does not necessarily preclude a panel from elaborating findings on said measure, but rather concerns the recommendations to be made by the panel.[87]

4.19. Concerning the challenge of measures with *suspended application*, this particular situation (suspension via interim measure) has not been assessed by WTO panels or the Appellate Body. Nonetheless, this scenario may be compared to the challenge of measures *as such*, independently from their application in specific instances, before the WTO dispute settlement system. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, when analysing if a non-mandatory measure could be challenged as such, pursuant to the DSU and the Antidumping Agreement, underscored that "instruments of a Member containing rules or norms could constitute a "measure", *irrespective of how or whether those rules or norms are applied in a particular instance*."[88] Accordingly, it could be argued that a "measure taken" by a Member under Article 3.3 of the DSU is any rule or norm brought before the dispute settlement system, irrespective of how or whether it is applied in a particular instance (*e.g.*, irrespective of whether its application has been suspended).

4.20. Concerning the challenge of measures which may have effects in the *future*, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* also concluded that "the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability *needed to conduct future trade*."[89] Thus, whether a challenged measure *is* or *will* be applied by the Member in breach could be irrelevant for the purposes of Article 3.3.

4.21. Apart from the issue on the scope of the jurisdiction, the Case poses another legal question which is whether the panel may decline to exercise its validly established jurisdiction over the *Food Information Package.*

4.22. In this regard, the Appellate Body has indicated that panels *are required* to address the issues that are put before them by the parties to the dispute "as a matter of due process, and the proper exercise of the judicial function."[90]

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[83] Panel Report, *China – Agricultural Producers*, para. 7.86.

[84] "The panel took into consideration "the timing of the expiry of a measure, whether a measure is included in the terms of reference, the possibility of reintroducing a measure, whether the effects of a measure continued to impair the benefits for a Member under a covered agreement," giving special weight to the question on whether the measure affected "the operation of the covered agreements, despite its termination" Panel Report, *China – Agricultural Producers*, para. 7.92.

[85] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1664.

[86] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1664; Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179; Appellate Body Report, *US – Upland Cotton,* para. 264.

[87] Panel Report, *US – Renewable Energy*, paras. 7.56-7.59; Panel Report, *Chile – Price Band System,* para. 7.124; Panel Report, *US – Poultry (China),* para. 7.56 and 7.57.

[88] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; *EU – Fatty Alcohols (Indonesia)*, para. 5.179; Appellate Body Report, *EU – PET (Pakistan)*, para. 5.42.

[89] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; *EU – Fatty Alcohols (Indonesia)*, para. 5.179; Appellate Body Report, *EU – PET (Pakistan)*, para. 5.42.

[90] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

4.23. Further, the Appellate Body in *Mexico – Taxes on Soft Drinks* argued that a panel would not be "in a position to choose freely whether or not to exercise its jurisdiction,"[91] as a decision to decline the exercise of validly established jurisdiction:

> (…) would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU.[92]

4.24. In the same report, the Appellate Body asserted that "we express no view as to whether there may be other circumstances in which *legal impediments* could exist that would preclude a panel from ruling on the merits of the claims that are before it."[93] Correspondingly, a relevant legal question would be which are those legal impediments allowing panels to refrain from ruling upon certain matters before them in cases where jurisdiction has been validly established.

4.25. Article 3.7, relevant for the Case, may eventually qualify as one of said legal impediments, allowing the panel to decline the exercise of its jurisdiction. Article 3.7 reads as follows:

> Before bringing a case, a Member shall exercise its judgement as to whether actions under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

4.26. Members, pursuant to the provisions of the DSU and of each of the covered agreements, have the right of recourse to WTO dispute settlement. This right is not unfettered, being limited by Articles 3.7 and 3.10 of the DSU. In terms of the Appellate Body, "the only express limitation referred to in Article 3.7 is that a Member shall exercise its judgement as to whether action under these procedures would be fruitful."[94] Following the same rationale, the Appellate Body has clarified:

> We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU.[95]

4.27. With respect to Article 3.7 of the DSU, the Appellate Body indicated that the phrase "a Member shall exercise its judgement as to whether action under these procedures would be fruitful" reflects the principle of good faith, preventing frivolous action under the DSU.[96] This phrase has been understood as mandating Members to be *self*-regulating, enjoying ample discretion in deciding whether said action would de "fruitful."[97] This implies that Members are expected to exercise their *own* judgements in making such a decision.[98]

4.28. Furthermore, when initiating a case under the DSU, Members enjoy the presumption that they duly exercised their judgement in assessing whether the action would be fruitful, as recognised by the Appellate Body:

> Given the "largely self-regulating" nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly

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[91] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.
[92] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.
[93] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 54.
[94] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 211.
[95] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312 (analyzing estoppel).
[96] Appellate Body Report, *Peru – Agricultural Products*, para. 5.18.
[97] Appellate Body Report, *EC – Bananas III*, para. 135; Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179; Panel Report, *Saudi Arabia – IPRs*, para. 7.19.
[98] Panel Report, *India – Autos*, para. 7.141.

> exercised its judgement as to whether recourse to that panel would be "fruitful".[99] (emphasis added)

4.29. The Appellate Body also pointed out that the first sentence of Article 3.7 of the DSU:

> (…) neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement. Therefore, the Appellate Body considered that the panel in that case was not obliged to consider this issue on its own motion. However, the Appellate Body's ruling does not indicate whether the presumption that a Member is acting in good faith and has duly exercised its judgement as to whether recourse to a panel would be fruitful is a *rebuttable presumption*.[100] (emphasis added)

4.30. The interpretation of Article 3.7 was recently discussed in *Saudi Arabia – IPRs.* Saudi Arabia requested the panel to decline making findings on the case, among other reasons, because these findings were to be meaningless "given the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures"[101] and thus Qatar failed to exercise sound judgement on whether an action would be fruitful.

4.31. This argument was disregarded by the panel, considering that:

> There is "little in the DSU that explicitly limits the rights of WTO Members to bring an action. The Appellate Body then added that Article 3.7 of the DSU states that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful", and that Article 3.10 thereof stipulates that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. Given the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the panel does not consider that Qatar failed to exercise its judgement within the meaning of Article 3.7 in bringing this case.[102]

4.3 APPLICATION OF THE LEGAL STANDARD

4.3.1 Arguments of Budica

4.32. Budica may submit two arguments in support of its position that the panel should not examine claims with respect to the *Food Information Package*. First, Budica may argue that the panel does not have jurisdiction over the *Food Information Package* as it is not a "measure taken by another Member," within the meaning of Article 3.3 of the DSU, owing to its suspension. In the alternative, Budica may argue that, even if the panel has jurisdiction over the *Food Information Package,* it may refrain from making findings and recommendations as Dale has failed to exercise its judgement as to whether the initiated action would be fruitful, as required under Article 3.7 of the DSU, since the measure is currently suspended.

4.33. Arguing these points on behalf of Budica will require significant argumentative efforts since relevant panel and Appellate Body reports do not directly support Budica's assertions. In particular, WTO adjudicators have interpreted the terms "measures taken by another Member" contained in Article 3.3 of the DSU *broadly* and have afforded *ample discretion* to Members under Article 3.7 concerning their "judgement as to whether actions under these procedures would be fruitful." Teams are encouraged to recognise this and explain why the panel should depart from previous jurisprudence.

4.34. Concerning the jurisdiction of the panel, when interpreting Article 3.3, Budica may emphasise the *context* of the terms "measures taken by another Member." For instance, Article 4.2 may guide the interpretation of the terms "measures taken by another Member." In this regard, Article 4.2 (Consultations) provides the obligation of undertaking consultations with regard to "measures *affecting* the operation of any covered agreement." The verb "to affect" is included in this Article in its present tense (not in its past tense -*e.g.*, affected). This may signal that the measures relevant for

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[99] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 72-74.
[100] Panel Report, *Peru – Agricultural Products*, para. 7.73.
[101] Panel Report, *Saudi Arabia – IPRs*, para. 7.19.
[102] Panel Report, *Saudi Arabia – IPRs*, para. 7.19.

the DSU are those which, in the present moment, are effectively impinging on the rights of Members under the covered agreements.

4.35. Article 3.7 may also guide the interpretation of Article 3.3. This Article provides that "the first objective of the dispute settlement mechanism is usually to secure the *withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements." Budica may assert that allowing the initiation of disputes concerning suspended measures would be contrary to the customary rule of interpretation mandating that one must give *meaning and effect* to all the terms of a treaty, avoiding redundancy or inutility.[103] If challenging suspended measures were to be allowed, the phrase "to secure the *withdrawal* of the measures concerned" would be rendered useless since the withdrawal of a suspended measure would lack any practical effect.

4.36. As an alternative argument, if the panel validly establishes its jurisdiction, Budica may refer to Article 3.7 and to *China – Agricultural Producers*. First, concerning Article 3.7, Budica may assert that, by initiating this action, Dale did not exercise its judgement as to whether it would be fruitful, within the meaning of Article 3.7 of the DSU, as the recommendations to be delivered by this panel would not have an impact on the dispute.

4.37. Teams may point out to the tension between the right of Members to initiate proceedings under the DSU and the ultimate purpose of the dispute settlement mechanism to secure a positive solution to disputes brought before the DSB in good faith. Teams may emphasise that the latter goal is a cornerstone principle of the system, guaranteeing the use of the DSU at the service of the whole Membership and preventing its use for frivolous purposes of individual Members.

4.38. As such, Budica may maintain that Dale is pursuing a frivolous action, *i.e.*, one which does not have any serious purpose or value for the dispute. Following the *rationale* behind the arguments set forth by Saudi Arabia in *Saudi Arabia – IPRs,* Budica may argue that whenever *ab initio* the recommendations of the panels would not have any practical use -for instance, because the measure at issue has been suspended- the action shall not be regarded as being "fruitful."

4.39. Second, Budica may argue that the panel should refrain from making findings and recommendations because the *Food Information Package* is not affecting the operation of a covered agreement. In this regard, the phrase "measures taken by another Member" in Article 3.3 of the DSU should not be read as including measures which are not *currently* affecting the operation of any covered agreement. This would be the case of the *Food Information Package* since its application was suspended by the Budican administrative court, and thus it currently has no effect on the operation WTO covered agreements. Budica can rely on the panel's decision in *China – Agricultural Producers*. In that dispute, the panel, enjoying validly established jurisdiction, refrained from making findings and recommendations concerning an expired measure on the basis that the measure ceased to *affect* the operation of the covered agreements.[104]

4.3.2 Arguments of Dale

4.40. Dale may contend that the panel has jurisdiction over the *Food Information Package* as it is a "measure taken by another Member," under Article 3.3, and that, in any case, the panel is bound to examine all measures presented for its consideration through action judged to be fruitful by the Respondent.

4.41. As to the jurisdiction of the panel, Dale may underscore the broad interpretation given to the terms "measures taken by another Member" in past reports, even considering measures which ceased to exist.[105] Teams may emphasise that the *Food Information Package* did not cease to exist. At the time of submitting the panel request (14 August 2020), the measure was in full force and effect and, at the time of the establishment of the panel (5 September 2020), the measure -even if temporarily suspended- existed in Budica's legal regime.

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[103] Appellate Body Report, *US – Gasoline*, p. 23. See also: Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12.

[104] Panel Report, *China – Agricultural Producers*, para. 7.86.

[105] Appellate Body Report, *US – Upland Cotton*, para. 271; Appellate Body Report, *China – Raw Materials,* para. 263.

4.42. Dale may draw the panel's attention to the fact that, even if the *Food Information Package* is currently suspended, it did have effects for a period of four months before the decision of the court (past effects)[106] and that the discussed suspension could be lifted at any moment if the relevant underpinning risk of irreparable harm ceases to exist (potential future effects).[107]

4.43. Regarding the past effects of the *Food Information Package*, Dale may argue that several reports have considered that Article 3.3 covers measures taken in the past. Also, Dale may maintain that, in the past, the measures at stake caused significant effects in the trading of nutrition food bars, in particular, in the form of specific wrong-doings against Spear Bars Inc.[108]

4.44. Regarding potential future effects of the *Food Information Package,* Dale may argue that the dispute settlement system is intended to protect existing trade and the security and predictability needed to conduct future trade. Therefore, since the challenged measure *may* be applied by Budica in breach of WTO rules, the panel has to rule on its WTO-consistency as to prevent the measure from taking effect.

4.45. Dale may also stress that the measure could be easily reintroduced in the future with the lifting of the granted interim measure, creating a "moving target" scenario as to shield the *Food Information Package* from scrutiny by the panel.[109] As a practical matter, teams should argue that if challenging suspended measures were to be prohibited, Members would be precluded from seeking the withdrawal of inconsistent measures pursuant to Article 3.7 of the DSU.

4.46. As to the possibility of declining the exercise of validly established jurisdiction over the *Food Information Package*, Dale may indicate that the panel is not "in a position to choose freely whether or not to exercise its jurisdiction,"[110] being bound by the relevant terms of reference.

4.47. Further, Dale may contend that the decision of whether action under the DSU is "fruitful" is reserved to each concerned Member. Thus, it may underscore the existence of a presumption regarding the sound exercise of judgement on behalf of Members who decide to bring a dispute under the DSU. Dale may as well elaborate on the fact that, since Article 3.7 reflects the principle of good faith, in proving that it did not exercise its judgement as to whether DSU action would be fruitful, Budica would require proof of the bad faith behind Dale's actions, meaning that a finding against them under Article 3.7 would be tantamount to a finding of bad faith -which is lacking in the Case.

4.4 QUESTIONS TO THE PARTIES

Budica	Dale
Prior cases involving Article 3.3 of the DSU have mainly focused on the analysis of measures which expired or ceased to exist. How is the suspension, via an interim measure, of the *Food Information Package* similar or different from the expiry of a measure? Why should we transpose the jurisprudence on Article 3.3 to this specific case?	Does the DSU refer, in any of its provisions, to the jurisdiction of panels? If there is no provision on this matter, which is the legal basis for the assumption of jurisdiction by panels?
If we decide that we do not have jurisdiction/or we decide to refrain from making findings or recommendations on the *Food Information Package* and, in a few months, Budica's local court decides to lift the interim measure, how would you reconcile this situation with the aim of the DSU of securing a positive solution to disputes amongst Members? Would this be a	How do the past effects of the measure impact on the decision on the jurisdiction over the *Food Information Package*? How does the risk of the reintroduction of the measure (via lifting the interim measure) -and its imminency- affect the decision on the jurisdiction over the *Food Information Package*?

[106] Corrections and Clarifications No. 15; Facts of the Case, para. 5.2.
[107] Facts of the Case, para. 5.3; Corrections and Clarifications No. 26.
[108] Annex III: Nutrition Food Bars Imports and Market Share; Facts of the Case, para. 4.4.
[109] Appellate Body Report, *Chile – Price Band System*, paras. 140-144.
[110] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.

"moving target" situation in which Budica intends to evade scrutiny by WTO panels?	
Are panels free to decline the exercise of their validly established jurisdiction over a measure included in the relevant terms of reference? If so, on which grounds? Could a panel decline to exercise its validly established jurisdiction on the grounds of the non-compliance by Complainant Members with Article 3.7 of the DSU?	Dale is challenging a measure that had effects in the past but is currently suspended. Is the measure affecting the operation of any covered agreement as of today? If it is not currently affecting the operation of covered agreements, how would you reconcile your claim with the prospective nature of the recommendations of WTO panels? How would our decision on the *Food Information Package* contribute to the security and predictability needed to conduct future trade?
Article 3.7 of the DSU, which provides that Members shall exercise their judgement as to whether action under these procedures would be fruitful, reflects the principle of good faith and the exercise of Members' sovereignty. Does this mean that a finding of a violation of Article 3.7 is a finding of bad faith on the part of the Complainant? Which is the standard of proof for bad faith findings?	When initiating a case under the DSU, Members enjoy the presumption that they duly exercised their judgement in assessing whether the action would be fruitful. Is this a rebuttable presumption? If answered in the affirmative, in which party does the burden of proof rests?

5 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

5.1 LEGAL ISSUES UNDER THE TBT AGREEMENT

5.1.1 Whether the *Food Information Package* constitutes a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement

5.1.1.1 Relevance of the issue

5.1. On 1 October 2019, Dale enacted the *Food Information Package*.[111] Even if this measure is likely to be considered as a technical regulation in terms of Annex 1.1 of the TBT Agreement, interesting arguments may arise regarding its legal characterization, in particular, due to the different nature of the labelling requirements found therein.

5.2. The *Food Information Package* contains three different types of front-of-pack nutrition labels: Free-Content, Low-Content, and Health Warning High-Content.

5.3. The Free-Content and Low-Content labels *may* only be included in the packaging of processed food products sold in the national territory if said products comply with the values indicated in the *Food Information Package* (Articles 7 and 8).[112]

5.4. The Health Warning High-Content label *shall* be included in the packaging of processed food products containing sodium, sugar, or saturated fats equal to, or in excess of, the values provided for in the *Food Information Package* (Article 9).[113]

5.5. The *Food Information Package* also includes an enforcement provision. The incorrect use of the Free-Content and Low-Content labels in processed packaged food products, disregarding the threshold values set forth in the *Food Information Package*, *may* result in the confiscation, destruction, or -in case of imports- re-consignation or return of the merchandise (Article 16.1).[114] The trader who incorrectly uses, or fails to use all together, the Health Warning High-Content label *shall* be subject to

[111] Facts of the Case, para. 3.5.
[112] Facts of the Case, para. 3.6.
[113] Facts of the Case, para. 3.6.
[114] Facts of the Case, para. 3.6; Corrections and Clarifications No. 1.

confiscation, destruction, or -in case of imports- re-consignation or return of the merchandise (Article 16.2).[115]

5.1.1.2 Relevant legal standard and jurisprudence

5.6. Annex 1.1 of the TBT Agreement defines a "technical regulation" as follows:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

5.7. The Appellate Body has interpreted the term "technical regulation" in *EC – Asbestos, EC – Sardines, EC – Seal Products,* and *US-Tuna II (Mexico)*, among others.[116]

5.8. The Appellate Body has established a three-tier test for determining whether a measure is a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement: (i) it must apply to an identifiable product or group of products; (ii) it must lay down (*i.e.*, set forth, stipulate, or provide) one or more characteristics of the product or their related processes and production methods, and (iii) compliance with it must be mandatory. These three cumulative elements are derived from the text of Annex 1.1 of the TBT Agreement.[117]

5.9. With regard to the first element, the Appellate Body in *EC – Asbestos* clarified that a technical regulation must apply to an *identifiable* product or group of products. The product or group of products do not need to be expressly identified in the measure, but the measure shall render them identifiable.[118]

5.10. The second element of the three-tier test is fulfilled when the document lays down (sets forth, stipulates, or provides)[119] one or more characteristics of the product.[120] In *EC – Asbestos*, the Appellate Body indicated that product characteristics include "not only features and qualities intrinsic to the product itself, but also related [extrinsic] 'characteristics', such as means of identification, the presentation and appearance of a product."[121] In *EC-Sardines*, the Appellate Body upheld the panel's finding that "labelling and naming requirements are essentially means of identification of a product and, as such, they come within the scope of the definition of technical regulation."[122] Further, in *US-COOL,* the panel clarified that a "measure that lays down a country of origin labelling requirement lays down one or more product characteristics."[123] Accordingly, labelling requirements are one example of *product characteristics* within the meaning of the first sentence of Annex 1.1.

5.11. The third element requires compliance with the technical regulation to be *mandatory*. The Appellate Body in *US – Tuna II (Mexico)* clarified that, under Annex 1.1 of the TBT Agreement, a labelling requirement could be considered mandatory even if it does *not* require the use of a particular label in order to place a product for sale on the market.[124] The Appellate Body held that a

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[115] Facts of the Case, para. 3.6; Corrections and Clarifications No. 1.

[116] Appellate Body Report, *EC – Asbestos*, paras. 66-70; Appellate Body Report, *EC – Sardines*, para. 176; Appellate Body Report, *EC – Seal Products*, paras. 5.8-5.15; Appellate Body Report, *US-Tuna II (Mexico)*, paras. 183-189.

[117] Appellate Body Report, *EC – Sardines*, para. 176.

[118] Appellate Body Report, *EC – Asbestos*, para. 70.

[119] Appellate Body Report, *EC – Asbestos*, para. 67; Appellate Body Report, *EC – Seal Products,* para. 5.10.

[120] Appellate Body Report, *EC – Seal Products,* para. 5.11.

[121] Appellate Body Report, *EC – Asbestos*, para. 67.

[122] Appellate Body Report, *EC – Sardines,* para. 188. See also: Appellate Body Report, *EC – Asbestos*, para. 67; Appellate Body Report, *EC – Seal Products*, para. 5.11.

[123] Panel Report, *US – COOL*, para. 7.214.

[124] "(…) In the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller" of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim" Appellate Body Report, *US– Tuna II (Mexico)*, para. 196.

determination of whether a particular measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case.[125]

5.12. In that particular case, the Appellate Body noted that the US measure at issue (i) was composed of legislative and regulatory acts which included administrative provisions; (ii) set out a single and legally mandated definition of a particular term (*in casu*, dolphin-safety) used to describe the relevant product and disallowed the use of other labels on those products that did not satisfy this definition; (iii) in doing so, prescribed in a broad and exhaustive manner the conditions that apply for using a particular term, regardless of the manner in which that statement was made; and, therefore (iv) covered the entire field of what that term meant in relation to the relevant products. The Appellate Body found, in light of those characteristics and circumstances, that the measure in question was a technical regulation within the meaning of Article 1.1 of the TBT Agreement.[126]

5.13. Accordingly, "the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a technical regulation."[127] In a separate opinion in *US – Tuna II (Mexico)*, one member of the panel reasoned that "[a] labelling scheme is *mandatory* when the use of a certain label is compulsory to access the market and *voluntary* when products can be marketed with or without the label."[128] In that panellist's view, simply providing a uniform definition of a particular marketing term (*i.e.*, "dolphin-safe") was insufficient to conclude that it was mandatory within the meaning of Article 1.1 of the TBT Agreement.[129]

5.14. In *US – Tuna II (Mexico)*, the Appellate Body considered that enforcement (such as sanctions in case of wrongful labelling) and surveillance mechanisms to guarantee compliance with the measure are also of significance in the determination of its mandatory nature.[130] It further clarified that:

> [I]t is true that "labelling requirements" in a standard or in a technical regulation may be subject to enforcement. However, the US measure not only sets out certain conditions for the use of a label, but, in addition, it enforces a prohibition against the use of any other label containing the terms "dolphin-safe" "dolphins", "porpoises", or "marine mammals" on a tuna product that does not comply with the requirements set out in the measure.[131]

5.1.1.3 Application of the legal standard

5.15. Regarding the first and second elements of the three-tier test, the measure at issue applies to an identifiable group of products (*i.e.*, packaged processed food products) and lays down one or more product characteristics (*i.e.*, labelling requirements).[132] These issues are relatively straightforward and, hence, should not raise contention among participating teams. It would be acceptable -and even expected- that Budica would concede these first two points and focus on the third element in its defence.

5.16. With regard to the third element, namely, the mandatory nature of the labelling requirements, Budica may wish to depart from the Appellate Body's findings in *US – Tuna II (Mexico)*[133] and argue in favour of a market access criterion as the basis for the mandatory/non-mandatory distinction. In this case, Budica would need to concede that the Health Warning High-Content label is mandatory as

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[125] Appellate Body Report, *US– Tuna II (Mexico*), para. 199.
[126] Appellate Body Report, *US– Tuna II (Mexico*), para. 199.
[127] Appellate Body Report, *US– Tuna II (Mexico*), para. 196.
[128] Appellate Body Report, *US– Tuna II (Mexico*), footnote 379.
[129] Panel Report, *US – Tuna II (Mexico),* paras. 7.146 and 7.188.
[130] Appellate Body Report, *US – Tuna II (Mexico)*, para. 194; Appellate Body Report, *EC – Asbestos*, paras. 72-74.
[131] Appellate Body Report, *US – Tuna II (Mexico)*, para. 195.
[132] Facts of the Case, para. 3.6.
[133] "The text of Annex 1.1 to the TBT Agreement does not use the words "market" or "territory". Nor does it indicate that a labelling requirement is "mandatory" only if there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1" Appellate Body Report, *US– Tuna II (Mexico)*, paras. 195 and 196.

its use is required to place on the market processed food products containing sodium, sugar, or saturated fats equal to, or in excess of, the values provided for in the *Food Information Package*.

5.17. Conversely, the mandatory nature of the Free-Content and Low-Content labels may be the most contentious issue in this claim.

5.1.1.3.1 Arguments of Dale

5.18. Drawing on the Appellate Body's finding in *US – Tuna II (Mexico)*, Dale may submit that the *Food Information Package* lays down a 'single definition' and 'legally mandated' of Free-Content and Low-Content (Articles 7.1 and 8.1) and prescribes in a 'broad and exhaustive' manner the conditions that apply for using the Free-Content and Low-Content labels, thereby covering the 'entire field' of what these terms mean in relation to the relevant products. In support of this argument, teams may refer to Articles 7.2 and 8.2 of the *Food Information Package*, which provide that only packaged processed foods complying with the threshold values established therein can be sold in the national territory with the Free-Content or Low-Content labels.

5.19. Dale may further argue that, following *US – Tuna II (Mexico)*, the mere fact that there is no requirement to use the Free-Content and Low-Content labels in order to place packaged food products for sale on the Budican market does not preclude a finding that the *Food Information Package* constitutes a technical regulation.

5.20. Further, Dale may point out to the enforcement mechanism contained in the *Food Information Package* (Article 16.1) as an important factor examined by the Appellate Body in *US – Tuna II (Mexico)* to characterise a measure as mandatory.[134] In case the merchandise is traded using the label Free-Content or Low-Content and disregarding the threshold values outlined in the *Food Information Package*, authorities may confiscate, destruct, or, in case of import, re-consign or return it.[135]

5.1.1.3.2 Arguments of Budica

5.21. Budica may argue that compliance with the labelling requirements is not *mandatory*, since the use of the Free-Content and Low Content labels is not required in order to place packaged processed food products for sale in the national market. In support of this claim, teams may draw attention to the term "may" in Articles 7.1 and 8.1 of the *Food Information Package*, which gives the possibility to place packaged food products for sale on the market with or without the appellation Free-Content or Low-Content, in contrast with Article 9 of the measure.

5.22. Teams will require significant argumentative efforts since this argument, *prima facie*, departs from the legal interpretation of the term 'mandatory' by the Appellate Body in *US – Tuna II (Mexico).* Nonetheless, in the light of *US – Stainless Steel (Mexico*), Budica may argue that Appellate Body reports are not binding precedent for subsequent panels and they may depart from its legal interpretation for *cogent* reasons.[136] Teams may rely on the reasoning of the one panellist's separate opinion referring to the market access criterion as the basis for the mandatory/non-mandatory distinction, and argue that the labelling requirements provided in Articles 7.1 and 8.1 of the *Food Information Package* are voluntary as the products can be marketed in Budica with or without the label.

5.23. Budica may also argue that, unlike the contested measure in *US – Tuna II (Mexico)*, the *Food Information Package* only sets out certain conditions for the use of the Free-Content and Low-Content labels on packaged food products sold on the domestic market. It does not disallow the use of other labels for *all* packaged food products and hence does not cover the 'entire field' of what the terms Free-Content and Low-Content mean in relation to the relevant products. Article 15 of the *Food Information Package* does restrict the use of certain terms (including light or low), but only for *some* packaged food products that meet the threshold values prescribed for the High-Content label.

5.24. Further, Budica may argue that the degree of enforceability of the *Food Information Package* differs depending on the type of labelling requirement. Whilst the non-compliance with the Health

[134] Appellate Body Report, *US – Tuna II (Mexico)*, para. 194.
[135] Facts of the Case, para. 3.6; Corrections and Clarifications No. 1.
[136] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 158.

Warning High-Content label *will* result in the confiscation, destruction, or -in case of imports- re-consignation or return of the merchandise (Article 16.2);[137] the non-compliance with the Free-Content or Low-Content labels *may* have said consequences (Article 16.1).[138] The term "may" in Article 16.1 of the *Food Information Package* indicates discretional power authorities may, or may not, exercise,[139] further supporting the voluntary nature of the measure. In addition, Budica may argue that the *Food Information Package* does not impose sanctions in the case of wrongful labelling, which was one of the features of the measure at issue in *US – Tuna II (Mexico)* considered by the Appellate Body.[140]

5.1.1.4 Questions to the parties

Dale	Budica
Is the panel legally required to follow previous Appellate Body jurisprudence on the meaning of "mandatory" in Annex 1 of the TBT Agreement?	May the panel depart from previous Appellate Body jurisprudence on the meaning of "mandatory" in Annex 1 of the TBT Agreement and, if so, on which grounds?
If we were to find that the Free-Content and Low Content labels are not mandatory, how should we characterize a measure that contains mandatory and non-mandatory labelling requirements under the TBT Agreement? Have previous WTO dispute settlement reports dealt with this same issue?	What is the legal value, if any, of a separate opinion?
Does the *Food Information Package* permit the use of other label referring to the free/low content of sodium, sugar, and saturated fats in processed food products?	If we were to adopt the market access criterion as the basis for distinguishing mandatory/non-mandatory labelling requirements, would Budica concede that the High-Content label is mandatory?
Should legal enforceability be a basis for drawing a distinction between mandatory and non-mandatory labelling requirements? How can a labelling requirement be properly implemented without a surveillance mechanism to ensure compliance with the stipulated conditions for the use of the label?	If we were to agree that the character of the Free-Content and Low-Content labels is voluntary, how should we characterize a measure that contains mandatory and non-mandatory labelling requirements? Have previous WTO dispute settlement reports dealt with this issue? Wouldn't the existence of the mandatory Health Warning High-Content label imply that the *Food Information Package*, as a whole, is mandatory?
Do the enforcement provisions in the *Food Information Package* provide for sanctions in the case of wrongful labelling?	Does the *Food Information Package* prohibit the use of other labels referring to the free/low content of sodium, sugar and saturated fats in processed food products?
	Why should the discretionary language in the enforcement provisions of the *Food Information Package* be taken into account when determining its mandatory or non-mandatory nature?

[137] Facts of the Case, para. 3.6; Corrections and Clarifications No. 1.
[138] Facts of the Case, para. 3.6; Corrections and Clarifications No. 1.
[139] Teams may use the terms "power to determine or exercise discretions given by statutes" as developed (in a different context) by the panel in *US – Section 301 Trade Act*. Panel Report, *US – Section 301 Trade Act,* para. 7.117.
[140] "Moreover, sanctions for offering for sale or export tuna products falsely labelled "dolphin-safe" may be assessed against any producer, importer, exporter, distributor or seller who is subject to the jurisdiction of the United States. Violators may also be prosecuted directly under the DPCIA provisions or under federal provisions establishing false statement or smuggling prohibitions or federal labelling standards" Appellate Body Report, *US – Tuna II (Mexico)*, footnote 409.

5.1.2 Whether the *Food Information Package* is in breach of Article 2.1 of the TBT Agreement (NT obligation)

5.1.2.1 Relevance of the issue

5.25. The *Food Information Package* affected the *Celtic Flavour Bars* (national product) and the *Healthy Spear Bars* (imported product) differently,[141] as follows:

Table No. 2: *Labelling requirements under the Food Information Package, as applied to Celtic Flavour Bars and Healthy Spear Bars.*

Registered Trademark	Labelling Requirement	Impact of the *Food Information Package*
Celtic Flavour Bars (domestic product)		• Inclusion of three Low-Content labels (sugar, saturated fats, and sodium)
~~**Healthy**~~ **Spear Bars** (imported from Dale)		• Inclusion of three Health Warning High-Content labels (sugar, saturated fats, and sodium) • Deletion of the term "healthy" from the trademark

5.26. The *Food Information Package*, as applied to *Celtic Flavour Bars*, permits the use of three Low-Content labels. This, due to the fact that their content of sodium, sugar, and saturated fats is within the threshold values provided in Article 8.1. The measure, as applied to *Healthy Spear Bars*, imposes three Health Warning High-Content labels and prohibits the use of the term "healthy" in the trademark. This, due to the fact that their content of sodium, sugar, and saturated fats is within the threshold values provided in Article 9 (label) and Article 15 ("healthy" restriction).

5.27. For the assessment of whether the domestic product, *Celtic Flavour Bars*, and the imported product from Dale, *Healthy Spear Bars*, are "like products" under Article 2.1 of the TBT Agreement, the following table may be useful guidance:

Table No. 3: *Celtic Flavour Bars and Healthy Spear Bars comparative chart.*

Feature	Celtic Flavour Bars (domestic product)	Healthy Spear Bars (imported from Dale)
Basic Features	They are mainly made of oats, muesli, wheat, rice, and whey protein and have a vivid yellow colour.	They are mainly made of oats, muesli, rice, whey protein, apple, and banana and have an amber colour.
Sugar Content	4 gm/100 gm (added sugar - sucralose).	11 gm/100 gm (added sugar - sucralose) and 2 gm/100 gm (fructose attributed to dehydrated apple and banana).
Saturated Fats Content	1.3 gm/100 gm.	5 gm/100 gm.

[141] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.

Sodium Content	0.11 gm /100 gm.	0.5 gm/100 gm.
End-Uses	To eat.	To eat.
Consumer Preferences	They are regularly consumed as snacks for long hours of work and study, especially for consumers seeking to meet their nutritional needs in short periods of time. They are marketed as meal replacement bars, and nutritional boost bars.	The majority of consumers use them as snacks or for recovery after exercise.
Tariff Classification	190420. 190420 14	190420.

5.1.2.2 Relevant legal standard and jurisprudence

5.28. Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

5.29. In *US – Clove Cigarettes* and *US –Tuna II (Mexico),* among others*,* the Appellate Body held that in order to establish an inconsistency with Article 2.1 of the TBT Agreement three elements must be demonstrated: (i) the measure at issue must constitute a "technical regulation" within the meaning of Annex 1.1; (ii) the imported and domestic products at issue must be "like products;" and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.[142]

5.30. First, the concept of "likeness" refers to the "nature and extent of a competitive relationship between and among products."[143] Thus, the likeness analysis, under Article 2.1, should be undertaken based on the traditional likeness criteria (physical characteristics, consumer tastes and habits, end-uses, and tariff classifications[144]), conducting a *holistic* assessment of said criteria. In terms of the Appellate Body:

> [W]e have concluded that the context provided by Article 2.1 itself, by other provisions of the TBT Agreement, by the TBT Agreement as a whole, and by Article III:4 of the GATT 1994, as well as the object and purpose of the TBT Agreement, support an interpretation of the concept of "likeness" in Article 2.1 that is based on the competitive relationship between and among the products.[145]

5.31. The Appellate Body, in the context of Article 2.1, noted that:

> [W]e consider that the regulatory concerns underlying a measure, such as the health risks associated with a given product, may be relevant to an analysis of the "likeness" criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the TBT Agreement, *to the extent they have an impact on the competitive relationship* between and among the products concerned.[146] (emphasis added)

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[142] Appellate Body Report, *US – Clove Cigarettes*, para. 87; Appellate Body Report, *US –Tuna II (Mexico)*, para. 202. See also: Panel Report, *US –COOL,* para. 7.219; Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444.

[143] Appellate Body Report, *US – Clove Cigarettes*, para. 119.

[144] Working Party Report, Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97, para. 18; Appellate Body Report, *EC – Asbestos*, para. 85.

[145] Appellate Body Report, *US – Clove Cigarettes*, para. 156.

[146] Appellate Body Report, *US – Clove Cigarettes*, para. 119.

5.32. Second, with regard to the "less favourable treatment" element, Article 2.1 of the TBT Agreement prohibits both *de jure* and *de facto* discrimination.[147] When examining a claim of violation under this provision, a panel must ascertain whether the technical regulation at issue has a detrimental impact on the competitive opportunities for imported products *vis-à-vis* domestic like products in the relevant market.[148] The assessment of the measure's impact does not need to be based upon "the actual effects of the contested measure in the market place," but more importantly upon the design, structure, and expected operation of the measure.[149]

5.33. Such a detrimental impact on the competitive conditions is not dispositive of less-favourable treatment under Article 2.1 in cases of *de facto* discrimination.[150] In such cases, the panel must "further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."[151] Further, the Appellate Body clarified that to examine whether the detrimental impact on the relationship of competition "stems" exclusively from a legitimate regulatory distinction, it is necessary to carefully examine the measure's design, architecture, revelling structure, operation, and application, and, particularly, whether the measure is *even-handed*.[152]

5.34. The criterium of the detrimental impact on the relationship of competition stemming exclusively from a legitimate regulatory distinction, derives from the sixth recital of the Preamble to the TBT Agreement, which recognises Members' right to adopt technical regulations to pursue legitimate objectives, so long as they do so in an even-handed manner.[153]

5.35. The even-handedness of a measure must be assessed in light of its policy objective (*e.g.*, public health). In *US – COOL (Article 21.5)* and *US – Tuna II (Article 21.5)* the Appellate Body drew a parallel with the 'rational connection' standard under the chapeau of Article XX of the GATT 1994 (*i.e.*, whether detrimental impact can be reconciled with, or is rationally related to, the policy objective pursued).[154] The Appellate Body utilized criteria of proportionality[155] and calibration[156] to analyse the even-handedness of a measure in light of the pursued policy objective. When a regulatory distinction is designed or applied in such a manner that constitutes arbitrary or unjustifiable discrimination, it is not

[147] Appellate Body Report, *US – Clove Cigarettes*, para. 175.

[148] Appellate Body Report, *US – Clove Cigarettes*, para. 176.

[149] Panel Report, *EC –Seal Products,* paras. 7.156 and 7.157; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

[150] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[151] Appellate Body Report, *US – Clove Cigarettes*, para. 182; Appellate Body Report, *EC –Seal Products,* para. 5.310.

[152] Appellate Body Report, *US – Clove Cigarettes*, para. 182. The Appellate Body has made a parallel between Article 2.1 and the Article XX of the GATT, finding some similarities, but also differences: "We recognize that there are important parallels between the analysis under Article 2.1 of the TBT Agreement and the chapeau of Article XX. In particular, we note that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade" are found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1 of the TBT Agreement. Moreover, both Article 2.1 and the chapeau of Article XX do not "operate to prohibit a priori any obstacle to international trade." Instead, as interpreted by the Appellate Body, Article 2.1 "permit[s] detrimental impacts on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions," while under the chapeau of Article XX, discrimination is permitted if it is not arbitrary or unjustifiable" Appellate Body Report, *EC –Seal Products*, para. 5.310 (footnotes omitted).

[153] Appellate Body Report, *US – Clove Cigarettes,* para. 95; Appellate Body Report, *EC –Seal Products,* para. 5.310; Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

[154] Appellate Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico),* para. 7.93; Appellate Body, *US – COOL (Article 21.5)*, para. 5.186.

[155] For instance, in *US – COOL*, the informational requirements imposed on upstream producers under the COOL measure were found to be "disproportionate" as compared to the level of information communicated to consumers through the mandatory retail labels. Appellate Body Report, *US – COOL*, para. 347.

[156] "We emphasize that the Appellate Body's use of the terms "even-handed" and "calibrated" did not constitute different legal tests, since the entire inquiry by the Appellate Body revolved around whether the United States had properly substantiated its argument that the original tuna measure was even-handed, and thus not inconsistent with Article 2.1, because it was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans" Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico),* para. 7.98.

even-handed. In that case, it will not be legitimate, and the resulting detrimental impact will amount to discrimination under Article 2.1 of the TBT Agreement.[157]

5.36. In this context, the Appellate Body has held that:

> [T]he concept of "even-handedness" is not a separate criterion in the assessment of the second step of the "treatment no less favourable" requirement under Article 2.1; rather, "even-handedness" is the central concept for determining whether the identified detrimental treatment stems exclusively from a legitimate regulatory distinction. In a situation where the detrimental impact caused by a technical regulation stems exclusively from a legitimate regulatory distinction, it must be concluded that such a technical regulation does not accord less favourable treatment to imported products and is therefore consistent with Article 2.1 of the TBT Agreement (…) While an examination of whether a technical regulation constitutes a means of arbitrary or unjustifiable discrimination and thus is not even-handed must be conducted in the light of the "particular circumstances of the case", it is likely that this assessment involves consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives, including by examining whether the requirements imposed by the measure are disproportionate in the light of the objectives pursued.[158]

5.1.2.3 Application of the legal standard

NOTE BY THE AUTHORS: *Teams are encouraged to focus this claim in discussing the thresholds provided in the Food Information Package for distinguishing foods with High-Contents and Low-Contents of sugar, saturated fats, and sodium.*

5.1.2.3.1 Arguments of Dale

5.37. As mentioned above, a violation of Article 2.1 requires the measure to be a technical regulation (Section 5.1.1), the *Celtic Flavour Bars* and *Healthy Spear Bars* to be "like products," and the treatment accorded to *Healthy Spear Bars* to be less favourable than that accorded to *Celtic Flavour Bars*, including the assessment of whether the measure had a detrimental impact on competitive opportunities and whether said detrimental impact stemmed exclusively from legitimate regulatory distinctions.

5.38. First, concerning the likeness analysis, Dale should analyse the nature and extent of the *competitive relationship* of both products by undertaking a holistic analysis of the likeness criteria, including the physical characteristics, consumer tastes and habits, end-uses, and tariff classifications (See para. 5.27).

5.39. Dale may argue that the *Celtic Flavour Bars* and the *Healthy Spear Bars* are like products in the Budican market because they have similar physical characteristics (both are composed by oats, rice, muesli, wheat, and whey protein and have similar colours -yellow and amber[159]) and similar consumer tastes and habits (consumed as snacks[160]). Dale may further argue that the end-uses (to eat) and HS classifications (HS190420[161]) of both products are the same, stressing that "[u]niform classification in tariff nomenclatures based on the Harmonized System was recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products."[162]

NOTE BY THE AUTHORS: *The tariff classification of the Celtic Flavour Bars is comprised by 8 digits (19042014), while the tariff classification of the Healthy Spear Bars is comprised by 6 digits (190420). While tariff classification can be relevant in determining "likeness,"[163] the tariff classification of the Healthy Spears Bars is not sufficiently detailed to provide helpful guidance of product similarity.*

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[157] Appellate Body Report, *US – Clove Cigarettes,* para. 215.
[158] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico),* paras. 7.96 and 7.97.
[159] Facts of the Case, paras. 2.3, 2.4, and 2.8.
[160] Facts of the Case, paras. 2.4 and 2.8.
[161] Facts of the Case, paras. 2.3 and 2.8; Corrections and Clarifications No. 12.
[162] Appellate Body, *Japan – Alcoholic Beverages II*, p. 22.
[163] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.

Therefore, students should not spend much time on this issue, and panellists are encouraged not to engage students into a prolonged discussion on the tariff classification criterium.

5.40. One fact that teams may include in their analysis is Annex III to the Case. This Annex shows that, after the adoption of the *Food Information Package*, the market share of *Healthy Spear Bars*, in terms of sales value, decreased by approximately 26%, while the market share of *Celtic Flavour Bars* in Budica's market increased by approximately 18% in April–September 2020, compared to the same period in 2019.[164] Since the prices of both products remained steady during 2019-2020,[165] the drop in *Healthy Spear Bars*'s market share reflects a fall in the number of sales. From this figure, teams may infer that consumers perceive both products as *substitutable* and, thus, that they are in a *competitive relationship*.

5.41. However, this is not a strong argument for Dale, because the increase of the sales of *Celtic Flavour Bars* and the decrease for *Healthy Spear Bars* may merely be the result of enhanced awareness of the health consequence of each product.

5.42. Second, regarding the less favourable treatment, Dale should argue that, by assessing the design, structure, and operation, the *Food Information Package* impacts on the competitive opportunities of *Healthy Spear Bars vis-à-vis Celtic Flavour Bars.* This, as the measure -as applied to *Healthy Spear Bars*- imposes a Health Warning High-Content label and prohibits the use of the term "healthy" (as well as other terms evoking healthiness) in its trademark; while it does not prohibit the use of said terms in *Celtic Flavour Bars* (if these terms were to be eventually included in the trademark) and further fosters the use of a Low-Content label on its package. This differentiated treatment may send the message to consumers that *Healthy Spear Bars* are unhealthy as compared to *Celtic Flavour Bars,* provoking unjustified fear in consumers[166] and, correspondingly, impacting on its competitive opportunities.

5.43. To further support the impact on the competitive opportunities of *Healthy Spear Bars*, Dale should argue that by September 2020 (after the entry into force of the *Food Information Package*) *Healthy Spear Bars* imports decreased by approximately 13%, compared to import levels in September 2019.[167] Annex III to the Case also shows that, after the entry into force of the *Food Information Package*, the market share of *Healthy Spear Bars* decreased by approximately 26%, as compared with the April–September period of 2019.[168]

5.44. Concerning the question on whether the above-mentioned detrimental impact stemmed from legitimate regulatory distinctions, Dale may argue that the distinction drawn between *Healthy Spear Bars* and *Celtic Flavour Bars* is not even-handed and, thus, that the identified detrimental impact arising from the measure did not stem from a *legitimate* regulatory distinction.

5.45. In this regard, Dale may elaborate on the nexus between the regulatory distinctions found in the *Food Information Package* between foods with High-Contents and Low-Contents of sugar, saturated fats, and sodium on the one hand, and the measure's policy objectives on the other hand, namely, to provide Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children, with a view to tackling the public health concerns of NCDs and obesity, as one of its major risk factors.[169]

5.46. Concerning this nexus, Dale should argue that the distinction at issue does not have a rational connection with the pursued objectives. First, there is no scientific evidence suggesting an *identifiable threshold* of nutrients above which the risk of developing NCDs exists.[170] Second, foods have intrinsic nutritional characteristics that cannot be categorised as "healthy" or "unhealthy" by a limited analysis

[164] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 30 and 31.
[165] Corrections and Clarifications No. 32.
[166] Facts of the Case, para. 3.8; Annex IV: Specific Trade Concern, para. 6.
[167] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 30.
[168] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 31.
[169] Facts of the Case, para. 3.6; Annex IV: Specific Trade Concern, para. 8.
[170] Annex IV: Specific Trade Concern, para. 6.

of nutritional content.[171] Third, the *Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997, p.3)* do not provide High-Content thresholds above which foods may be detrimental to health.[172]

5.47. Teams may further support the lack of even-handedness of the *Food Information Package* by pointing panellists to the fact that *only* those bars imported from Dale (and not locally produced) have been adversely affected as a result of the application of the challenged measure.[173]

5.1.2.3.2 Arguments of Budica

5.48. Without prejudice to its argument that the *Food Information Package* is not a technical regulation (Section 5.1.1), Budica should argue that the *Celtic Flavour Bars* and *Healthy Spear Bars* are not "like products," and that there is no less-favourable treatment.

5.49. First, with regard to the likeness analysis, Budica may contend that the *Celtic Flavour Bars* and the *Healthy Spear Bars* are not like products and, thus, are not in a *competitive relationship.* This, considering that their physical characteristics, consumer tastes and habits, and tariff classifications differ.

5.50. Referring to their physical characteristics, *Celtic Flavour Bars*, opposing to *Healthy Spear Bars*, do not contain apple and banana.[174] Also, while *Healthy Spear Bars* are amber coloured, *Celtic Flavour Bars* have a vivid yellow colour.[175] *Celtic Flavour Bars* have added sugar (sucralose - 4 gm/100 gm), while *Healthy Spear Bars* have added sugar (sucralose - 11 gm/100 gm) and sugar coming mainly from fruits (fructose - 2 gm/100 gm).[176] *Celtic Flavour Bars* contain 1.3 gm/100 gm of saturated fats and 0.11 gm/100 gm of sodium, while *Healthy Spear Bars* contain 5 gm/100 gm of saturated fats and 0.5 gm/100 gm of sodium.[177]

5.51. In supporting this argument, Budica may maintain that in *US –Clove Cigarettes,* the Appellate Body concluded that product characteristics laid down in a technical regulation are relevant in the determination of whether products are like within the meaning of Article 2.1.[178] Thus, the determination of specified High-Content and Low-Content threshold values of sugar, saturated fats, and sodium, as well as the differentiated trademark restrictions, in the *Food Information Package* strongly indicate that the products are not in a competitive relationship.

5.52. Regarding consumer tastes and habits, Budica may argue that consumers' perception of both bars is different. Regular consumers of *Celtic Flavour Bars* are willing to purchase these bars in order to perform the function of replacing meals and obtaining energy boosts, especially for long hours of work and study.[179] Conversely, the majority of consumers of *Healthy Spear Bars* are willing to purchase these bars in order to perform a different function, namely, snacking or recovering after exercise.[180]

5.53. Lastly, concerning tariff classifications, Budica may note that the HS code for *Healthy Spear Bars* is not sufficiently detailed to offer insights on product similarity.[181] To recall, *Celtic Flavour Bars* are classified under the eight-digit tariff classification 19042014 while *Healthy Spear Bars* are classified under the six-digit tariff classification 190420.

NOTE BY THE AUTHORS: *The tariff classification of the Celtic Flavour Bars is comprised by 8 digits (19042014), while the tariff classification of the Healthy Spear Bars is comprised by 6 digits (190420). While tariff classification can be relevant in determining "likeness,"[182] the tariff classification of the Healthy Spears Bars is not sufficiently detailed to provide helpful guidance of product similarity.*

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[171] Annex IV: Specific Trade Concern, para. 2.
[172] Annex IV: Specific Trade Concern, para. 3.
[173] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[174] Facts of the Case, paras. 2.3 and 2.8.
[175] Facts of the Case, paras. 2.4 and 2.8.
[176] Facts of the Case, paras. 2.3 and 2.8.
[177] Facts of the Case, paras. 2.3 and 2.8.
[178] Appellate Body Report, *US –Clove Cigarettes*, para. 97.
[179] Facts of the Case, para. 2.4.
[180] Facts of the Case, para. 2.8.
[181] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.
[182] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.

Therefore, students should not spend much time on this issue, and panellists are encouraged not to engage students into a prolonged discussion on the tariff classification criterium.

5.54. Second, regarding the less favourable treatment element, Budica should reject any suggestion that the *Food Information Package* has a detrimental impact on *Healthy Spear Bars*' imports. Budica may point to the fact that, despite the enactment of the *Food Information Package*, the import volume of *Healthy Spear Bars* remains robust - at a level above 200,000 units consistently for every month between September 2019 and September 2020.[183]

5.55. Assuming that detrimental impact indeed exists in terms of the drop of market share, Budica could argue that such detrimental impact stems exclusively from legitimate regulatory distinctions. As to the legitimate regulatory distinctions (healthy vs unhealthy thresholds of sugar, saturated fats, and sodium), teams should start by emphasizing on the major importance of the pursued objectives considering the gravity of the obesity epidemic in Budica.[184] In the light of these objectives (to provide Budicans with nutrient-related information and to tackle the public health concerns of NCDs and obesity), teams should argue that said distinction is not arbitrary or unjustifiable as there is in fact a *rational relationship* between the regulatory distinction and the pursued objectives and that, therefore, the detrimental impact stemmed from a *legitimate* regulatory distinction.

5.56. To support this assertion, teams should underscore that unhealthy diets (such as those containing high amounts of fats, sodium, and sugar) have been associated with obesity, which is one of the major risk factors for NCDs,[185] and that all thresholds contained in the *Food Information Package* correspond to the maximum amounts of sugar, saturated fats, and sodium per serving.[186] These thresholds result from arithmetically dividing the WHO, and RAHO recommended daily intake values by an estimated average of 5 meals per day.[187]

5.1.2.4 Questions to the parties

Dale	Budica
Concerning the likeness analysis, if the team relies on the sales data in Annex III: The increase of the sales of *Celtic Flavour Bars* and the decrease for *Healthy Spear Bars* following the introduction of the *Food Information Package* seems to suggest that consumers have changed their perception on the health consequences of the products. If this is the case, it seems to show that the consumers now perceive the two products differently because of their different characteristics, *i.e.,* health consequences. How can you reconcile this fact with your assertion that the products have similar characteristics?	Is there a requirement of even-handedness in the "less favourable treatment" test? If so, how do you reconcile the requirement with the fact that the *Food Information Package* predominantly affect imports from Dale?
Concerning the likeness analysis, if the team relies on Annex III to argue the products are *substitutable*: The Appellate Body cautioned on undue reliance on quantitative analyses of the competitive relationship. Would you please reconcile your quantitative argument with the relevant Appellate Body jurisprudence?	Which factual grounds explain the rational connection of the regulatory distinctions found in the *Food Information Package* between foods with High-Contents and Low-Contents of sugar, saturated fats, and sodium and the measure's policy objectives?
Concerning the likeness analysis, are product characteristics laid down in a technical regulation relevant in the determination of whether products are like within the meaning of Article 2.1?	Should the existence of scientific evidence concerning this connection be taken into account by this panel? Which other evidence may be relevant for the panel to determine the existence of said rational connection and on

[183] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 30.
[184] Facts of the Case, paras. 1.12-1.15.
[185] Facts of the Case, para. 1.5.
[186] Annex IV: Specific Trade Concern, para. 10.
[187] Annex IV: Specific Trade Concern, para. 10.

	what basis the panel must take this evidence into account?
How do you reconcile your assertion of detrimental impact with the fact that the import level of *Healthy Spear Bars* remained robust throughout 2020?	
Are you suggesting that a measure consistent with Article 2.1 of the TBT Agreement cannot cause *any* adverse impact on the competitive conditions?	

5.1.3 Whether the *Food Information Package* is in breach of Article 2.1 of the TBT Agreement (MFN obligation)

5.1.3.1 Relevance of the issue

5.57. The *Food Information Package* affected the *Wild Tropic-All Natural Bars* (imported from Enge) and the *Healthy Spear Bars* (imported from Dale) differently, as follows:

Table No. 4: *Labelling requirements under the Food Information Package, as applied to Wild Tropic-All Natural Bars and Healthy Spear Bars.*

Registered Trademark	Labelling Requirement	Impact of the *Food Information Package*
Wild Tropic-All Natural Bars (imported from Enge)		• Inclusion of three Free-Content labels (sugar, saturated fats, and sodium)
Healthy Spear Bars (imported from Dale)		• Inclusion of three Health Warning High-Content labels (sugar, saturated fats, and sodium) • Deletion of the term "healthy" from the trademark

5.58. The *Food Information Package*, as applied to *Wild Tropic-All Natural Bars*, permits the use of three Free-Content labels. This, due to the fact that their content of sodium, sugar, and saturated fats is within the thresholds provided in Article 7.1. The measure, as applied to *Healthy Spear Bars*, imposes three Health Warning High-Content labels and prohibits the use of the term "healthy" in the trademark. This, due to the fact that their content of sodium, sugar, and saturated fats is within the thresholds provided in Article 9.

5.59. For an assessment of whether *Wild Tropic-All Natural Bars* imported from Enge and *Healthy Spear Bars* imported from Dale are 'like products' under Article 2.1 of the TBT Agreement, the following table may be useful guidance:

Table No. 5: *Wild Tropic-All Natural Bars and Healthy Spear Bars comparative chart.*

Feature	Wild Tropic-All Natural Bars (imported from Enge)	Healthy Spear Bars (imported from Dale)

Basic Features	Rice, quinoa, vegan protein, coconut, apple, and banana and are brown and orange coloured.	They are mainly made of oats, muesli, rice, whey protein, apple, and banana and have an amber colour.
Sugar Content	0.0 gm/100 gm (added sugar) and 15 gm/100 gm (fructose attributed to dehydrated coconut, apple, and banana).	11 gm/100 gm (added sugar - sucralose) and 2 gm/100 gm (fructose attributed to dehydrated apple and banana).
Saturated Fats Content	0.08 gm/100 gm.	5 gm/100 gm.
Sodium Content	0.0 gm/100 gm.	0.5 gm/100 gm.
End-Uses	To eat.	To eat.
Consumer Preferences	They are typically used for extended study hours and working schedules.	The majority of consumers use them as snacks or for recovery after exercise.
Tariff Classification	190421.	190420.

5.1.3.2 Relevant legal standard and jurisprudence

5.60. Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

5.61. In *US – Clove Cigarettes, US –Tuna II (Mexico),* and *US –COOL*, the Appellate Body held that in order to establish an inconsistency with the most favoured nation obligation under Article 2.1 of the TBT Agreement three elements must be cumulatively demonstrated: (i) the measure at issue shall constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement; (ii) the imported products of different origins shall be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like products imported from other countries.[188] These elements have been explained above.

5.1.3.3 Application of the legal standard

NOTE BY THE AUTHORS: *Teams are encouraged to focus this claim in discussing the distinction provided in the Food Information Package between added sugar (sucralose) and sugar naturally found in fresh or dehydrated fruits.*

5.1.3.3.1 Arguments for Dale

5.62. As mentioned above, a violation of Article 2.1 requires the measure to be a technical regulation (Section 5.1.1), *Wild Tropic-All Natural Bars* and *Healthy Spear Bars* to be "like products," and the treatment accorded to *Healthy Spear Bars* to be less favourable than that accorded to *Wild Tropic-All Natural Bars*, including the assessment of whether the measure had a detrimental impact on competitive opportunities and whether said detrimental impact stemmed from a legitimate regulatory distinction.

5.63. First, concerning the likeness analysis, Dale should analyse the nature and extent of the *competitive relationship* of both products by undertaking a holistic analysis of the likeness criteria. Dale should underscore that both bars have similar physical characteristics (both are composed by rice and fruits, such as apple and banana, and have similar colours -brown/orange coloured and

[188] Appellate Body Report, *US – Clove Cigarettes*, para. 87; Appellate Body Report, *US –Tuna II (Mexico)*, para. 202; Appellate Body Report, *US –COOL,* para. 267.

amber[189]) and shared end-uses (*i.e.*, to eat). Dale should argue that the difference in tariff classifications is not dispositive of the question of likeness.[190]

5.64. Teams are encouraged to recognize the existence of differences in the physical characteristics and HS classifications of both bars but should underscore that the "likeness" is ultimately about the *competitive relationship* between the products concerned in the marketplace, which is determined by consumer tastes and habits.

5.65. In this regard, teams should point panellists to the fact that, after the adoption of the *Food Information Package*, the market share of *Healthy Spear Bars*, in terms of sales value, decreased by approximately 26%, while the market share of *Wild Tropic-All Natural Bars* in Budica's market increased by approximately 20% in April–September 2020, compared to the same period in 2019.[191] Since the prices of both products remained steady during 2019-2020,[192] the drop in *Healthy Spear Bars*' market share reflects a fall in the number of sales. Further, by September 2020, *Healthy Spear Bars*' imports into Budica decreased by approximately 13%, compared to import levels in September 2019, and *Wild Tropic-All Natural Bars*' imports increased by approximately 20%.[193] From these figures, teams may infer that consumers perceive both products as *substitutable* and, thus, that they are in a *competitive relationship,* being "like products."

5.66. However, this is not a strong argument for Dale, because the increase of the sales and imports of *Wild Tropic-All Natural Bars,* conflated with the decrease for *Healthy Spear Bars,* may merely be the result of enhanced awareness of the health consequence of each product.

5.67. Second, continuing with the less-favourable treatment, Dale should argue that, by assessing the design, structure, and operation, the *Food Information Package* impacts on the competitive opportunities of *Healthy Spear Bars vis-à-vis Wild Tropic-All Natural Bars.* This, as the measure -as applied to *Healthy Spear Bars*- imposes a Health Warning label and prohibits the use of the term "healthy" (as well as other terms evoking healthiness) in its trademark; while it does not prohibit the use of the term "all-natural" in *Wild Tropic-All Natural Bars*, which may potentially evoke healthiness, and further fosters the use of a Free-Content label on its package. This differentiated treatment may send the message to consumers that *Healthy Spear Bars* are unhealthy as compared to *Wild Tropic-All Natural Bars,* provoking unjustified fear in consumers and, correspondingly, impacting on its competitive opportunities.[194]

5.68. Besides the potential impacts of the measure, Dale should argue that the *Food Information Package* had *actual* detrimental impacts on the competitive opportunities of *Healthy Spear Bars.* This, considering that, by September 2020 (after the entry into force of the *Food Information Package*), *Healthy Spear Bars* imports decreased by approximately 13%, compared to import levels in September 2019.[195] Annex III to the Case also shows that, after the entry into force of the *Food Information Package*, the market share of *Healthy Spear Bars* decreased by approximately 26%, as compared with the April–September period of 2019.[196]

5.69. With regard to the question on whether the above-mentioned detrimental impact stemmed from a legitimate regulatory distinction, Dale should argue that the distinction drawn between *Healthy Spear Bars* and *Wild Tropic-All Natural Bars* is not even-handed and, thus, that the identified detrimental impact arising from the measure did not stem from a legitimate regulatory distinction.

5.70. Dale should elaborate on the nexus between, on the one hand, the regulatory distinction between added sugar (sucralose) and sugar naturally found in fresh or dehydrated fruits contained in Article 1 of the *Food Information Package*[197] and, on the other, the measure's policy objectives, namely, to provide Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children,

[189] Facts of the Case, paras. 2.6 and 2.8.
[190] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.
[191] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 30 and 31.
[192] Corrections and Clarifications No. 32.
[193] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 30.
[194] Facts of the Case, para. 3.8; Annex IV: Specific Trade Concern, para. 6.
[195] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 30.
[196] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 31.
[197] Facts of the Case, para. 3.6.

with a view to tackling the public health concerns of NCDs and obesity, as one of its major risk factors.[198]

5.71. Concerning this nexus, Dale should argue that the regulatory distinction at issue does not have a *rational connection* with the pursued objectives. Article 1 of the *Food Information Package* provides:

> Definitions (…) Sugar: monosaccharides and disaccharides added to foods (e.g., glucose, dextrose, fructose, sucrose, and maltose). For the purposes of this regulation, this *term excludes sugar naturally found in fresh or dehydrated fruits*. (emphasis added)

5.72. If sugar naturally found in fresh or dehydrated fruits were not to be excluded from the *Food Information Package, Wild Tropic-All Natural Bars* would potentially be required to include a Health Warning High-Sugar Content label and would be prohibited from using terms evoking healthiness (*i.e.*, all-natural) in its trademark (Articles 9 and 15). The latter, as *Wild Tropic-All Natural Bars* contain 15 gm/100 gm of fructose attributed to dehydrated coconut, apple, and banana,[199] having more sugar than *Healthy Spear Bars* (11 gm/100 gm of added sucralose and 2 gm/100 gm of fructose attributed to dehydrated apple and banana, for a total of 13 gm/100 gm of sugar[200]).

5.73. Dale should maintain that this distinction does not serve the purpose of informing consumers or preventing NCDs and obesity as the studies which have associated diets containing high amounts of sugar with obesity have *not* differentiated between added sugar and naturally occurring sugar (*e.g.*, fructose found in fruits).[201] Also, the differentiation between added and naturally occurring sugars has neither been introduced by the WHO[202] nor by Budica's Ministry of Public Health.[203] The latter studies, WHO recommendations, and Ministry of Public Health' declarations refer to the possible associations between "sugar" and -in some extent- obesity and NCDs, without further differentiating between the origins of said sugar (added or naturally occurring). Thus, Dale may conclude that the detrimental impact did not stem from a *legitimate* regulatory distinction.

5.74. Teams may further support the lack of even-handedness of the *Food Information Package* by pointing panellists to the fact that *only* those bars imported from Dale (and not from Enge) have been adversely affected as a result of the application of the challenged measure.[204]

5.1.3.3.2 Arguments for Budica

5.75. If the *Food Information Package* is to be considered a technical regulation (Section 5.1.1), Budica should argue that the *Wild Tropic-All Natural Bars* and *Healthy Spear Bars* are not "like products," and that the alleged less-favourable treatment accorded to *Healthy Spear Bars*, *vis-à-vis Wild Tropic-All Natural Bars*, did stem from legitimate regulatory distinctions.

5.76. First, with regard to the likeness analysis, teams should focus on the differentiated physical characteristics, consumer tastes and habits, and tariff classifications of both products (para. 5.59, *above*). In supporting this argument, Budica may maintain that in *US –Clove Cigarettes,* the Appellate Body concluded that product characteristics laid down in a technical regulation are relevant in the determination of whether products are like within the meaning of Article 2.1.[205] Thus, the distinction provided in the *Food Information Package* between added sugar (sucralose) and sugar naturally found in fresh or dehydrated fruits indicates that the products are not in a competitive relationship.

5.77. If Dale argues that both bars are "like products" considering that the figures in Annex III to the Case (import and market share data) provide a strong indication of their substitutability, being in a *competitive relationship*, Budica may contest that these figures may merely be the result of enhanced awareness of the health consequence of each product.

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[198] Facts of the Case, para. 3.6; Annex IV: Specific Trade Concern, para. 8.
[199] Facts of the Case, para. 2.6.
[200] Facts of the Case, para. 2.8.
[201] Facts of the Case, para. 1.5.
[202] Facts of the Case, paras. 1.9 and 1.11.
[203] Facts of the Case, para. 1.14.
[204] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[205] Appellate Body Report, *US –Clove Cigarettes*, para. 97.

5.78. Second, regarding the less favourable treatment element, Budica should reject any suggestion that the *Food Information Package* has a detrimental impact on *Healthy Spear Bars*' imports as, despite the enactment of the *Food Information Package*, the import volume of *Healthy Spear Bars* remains robust - at a level above 200,000 units consistently for every month between September 2019 and September 2020.[206]

5.79. As to the legitimate regulatory distinction (added sugar (sucralose) vs naturally occurring sugar), teams should emphasize the major importance of the pursued objectives.[207] In the light of these objectives (to provide Budicans with nutrient-related information and to tackle the public health concerns of NCDs and obesity), teams should argue that said distinction is not arbitrary or unjustifiable as there is in fact a *rational relationship* between the regulatory distinction and the pursued objectives and that, therefore, the detrimental impact stemmed from a *legitimate* regulatory distinction.

5.80. To support this argument, teams should point panellists to the fact that the RAHO published the *2018–2019 Obesity Action Plan* recommending measures such as promoting the intake of fresh and dehydrated fruits and vegetables and reducing the intake of added sugar.[208] Thus, teams should underscore that the regulatory distinction between added sugar (sucralose) and naturally occurring sugar (such as sugar found in fresh and dehydrated foods) serves the purpose of preventing obesity and, correspondingly, NCDs because -per RAHO's recommendations- Members should discourage the intake of added sugar (*e.g.*, contained in *Healthy Spear Bars*) and encourage the intake of fresh and dehydrated fruits (*e.g.*, contained in *Wild Tropic-All Natural Bars*). If Budica were to include naturally occurring sugar in the *Food Information Package*, it would be discouraging the consumption of RAHO recommended foods for combating obesity.

5.1.3.4 Questions to the parties

Dale	Budica
Concerning the likeness analysis, if the team relies on the sales data in Annex III: The increase of the sales of *Wild Tropic-All Natural Bars* and the decrease for *Healthy Spear Bars* following the introduction of the *Food Information Package* seems to suggest that consumers have changed their perception on the health consequences of the products. If this is the case, it seems to show that the consumers now perceive the two products differently because of their different characteristics, *i.e.,* health consequences. How can you reconcile this fact with your assertion that the products have similar characteristics?	Is there a requirement of even-handedness in the "less favourable treatment" test? If so, how do you reconcile the requirement with the fact that the *Food Information Package* predominantly affect imports from Dale?
Concerning the likeness analysis, if the team relies on Annex III to argue the products are *substitutable*: The Appellate Body cautioned on undue reliance on quantitative analyses of the competitive relationship. Would you please reconcile your quantitative argument with the relevant Appellate Body jurisprudence?	Which factual grounds explain the rational connection of the regulatory distinction found in the *Food Information Package* between added sugar (sucralose) and sugar naturally found in fresh or dehydrated fruits and the measure's policy objectives?
Concerning the likeness analysis, are product characteristics laid down in a technical regulation relevant in the determination of whether products are like within the meaning of Article 2.1?	Should the existence of scientific evidence concerning this connection be taken into account by this panel? Which other evidence may be relevant for the panel to determine the existence of said rational connection and on what basis the panel must take this evidence into account?
How do you reconcile your assertion of detrimental impact with the fact that the import	

[206] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 15 and 30.
[207] Facts of the Case, paras. 1.12-1.15.
[208] Facts of the Case, para. 1.10.

level of *Healthy Spear Bars* remained robust throughout 2020?	

5.1.4 Whether the *Food Information Package* is in breach of Article 2.2 of the TBT Agreement

5.1.4.1 Relevance of the issue

5.81. The facts of the Case account for the severity of the obesity epidemic both in Budica and in the world, currently affecting adults and children.[209] This has been a longstanding public health issue in Budica,[210] but it is a fairly novel one in Dale.[211]

5.82. Desiring to tackle this issue, Budica enacted the *Food Information Package*.[212] Adopting a different approach, Dale launched the *Get Fit* campaign, mainly focusing on childhood obesity.[213] The campaign included measures such as improving cycling routes and discouraging motorised transport to schools; funding and organising national sports tournaments; investing in infrastructure for sports facilities and outdoor parks; offering sports scholarships; promoting active breaks, and adequately funding school gym classes at public schools.[214] The WHO and the RAHO have also recommended media campaigns, counselling, and nutritional education. [215]

5.83. Broadly speaking, while Budica's approach to the obesity epidemic focuses on promoting (healthy) *consumption habits*, Dale's approach to this matter is essentially centred on promoting increased *physical activity*.

5.1.4.2 Relevant legal standard and jurisprudence

5.84. Article 2.2 of the TBT Agreement reads as follows:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose*,* technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the *prevention of deceptive practices*; *protection of human health or safety*, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products (emphasis added).

5.85. Article 2.2 of the TBT Agreement sets out a four-tier test of consistency, namely, "(i) whether the measure at issue is a technical regulation under Annex 1.1; (ii) whether the measure at issue is trade-restrictive; (iii) whether the measure at issue fulfils a legitimate objective; and (iv) whether the measure at issue is not more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[216]

5.86. **Concerning the first element of the four-tier consistency test**, whether the measure at issue is a technical regulation under Annex 1.1, please refer to the analysis contained in Section 5.1.1, *above*.

5.87. **Concerning the second element of the four-tier consistency test**, whether the measure at issue is trade-restrictive, Article 2.2 does not proscribe trade-restrictive measures. It stipulates that "technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective." It also refers to "unnecessary obstacles" to trade and, therefore, allows for *some* degree

[209] Facts of the Case, paras. 1.4-1.15.
[210] Facts of the Case, paras. 1.12-1.15.
[211] Facts of the Case, paras. 1.16-1.20.
[212] Facts of the Case, para. 3.5.
[213] Facts of the Case, paras. 1.17-1.20.
[214] Facts of the Case, paras. 1.17-1.20.
[215] Facts of the Case, paras. 1.9 and 1.10.
[216] Van den Bossche, P. & Zdouc, W., The Law and Policy of the WTO, ch. 3: (dispute settlement), (Cambridge, 4th ed. 2017), p. 913.

of trade-restrictiveness. Thus, the provision is concerned with restrictions on *international* trade that exceed what is necessary for the achievement of a legitimate objective.[217]

5.88. The Appellate Body has relied on the jurisprudence on Article XI of the GATT 1994 to interpret the term "trade-restrictive."[218] Accordingly, a technical regulation is trade-restrictive within the meaning of Article 2.2 when it has limiting effects on *international* trade (import/export).[219] In this regard, the Appellate Body has held:

> We recall that the legal standard under Article 2.2 requires a panel to determine the extent to which a technical regulation has a limiting effect on *international trade*. Where a measure modifies the conditions of competition in the market, a panel must be satisfied that such modification *will have a limiting effect on trade* in order to conclude that the measure is trade-restrictive. Such a limiting effect on trade may be self-evident in cases of de jure discriminatory measures. However, a non-discriminatory modification of conditions of competition in a market may have both trade-enhancing and trade-reducing effects on trade, such that a panel could not necessarily anticipate whether the measure will have a limiting effect on trade based exclusively on its design and structure. If a panel's examination of a subset of the evidence (such as the design and structure of the measure) leaves it unable to determine whether the measure will have a *limiting effect on trade*, the panel must proceed to examine all additional arguments and evidence. In any event, even if a panel considers a subset of the evidence (such as the design and structure of the measure) sufficient to determine the trade restrictiveness of the measure, the panel is not precluded from examining additional arguments and evidence for purposes of defining the degree of trade restrictiveness.[220]

5.89. **Concerning the third element of the four-tier consistency test**, whether the measure at issue fulfils a legitimate objective, the Appellate Body jurisprudence has addressed: "(i) how to establish the objective pursued by the measure at issue;[221] (ii) which objectives are "legitimate objectives" within the meaning of Article 2.2;[222] (iii) when a measure "fulfils" a legitimate objective;[223] and (iv) how to establish whether, and if so, to what extent, the measure at issue fulfils the legitimate objective pursued.[224]"[225]

5.90. As to the establishment of the pursued objective, even if panels may rely on Members' characterization of a measure, they are allowed to independently and objectively, based on the evidence provided in the case, establish which are those objectives.[226] A legitimate objective refers to "an aim or target that is lawful, justifiable or proper."[227] Article 2.2 provides examples of legitimate objectives, such as the prevention of deceptive practices and the protection of human health or safety.[228]

5.91. A technical regulation is considered to fulfil a legitimate objective if it *actually* contributes to its achievement. A panel must thus assess the degree of contribution actually achieved by the measure at issue, and not the contribution that is intended to be achieved. This may be discerned from the design, structure, and operation of a technical regulation, as well as from evidence relating to its application. As held by the Appellate Body:

> A panel adjudicating a claim under Article 2.2 of the TBT Agreement must seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, *actually* contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design,

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[217] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[218] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[219] Appellate Body Report, *US – COOL*, para. 375; Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[220] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 6.406.
[221] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.
[222] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.
[223] Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.
[224] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317.
[225] Van den Bossche, P. & Zdouc, W., The Law and Policy of the WTO, ch. 3: (dispute settlement), (Cambridge, 4th ed. 2017), p. 914.
[226] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.
[227] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.
[228] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

> structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. As in other situations, such as, for instance, when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective *actually* achieved by the measure at issue.[229]

5.92. In this regard, the panel in *Australia Tobacco Plain Packaging* analysed the contribution by assessing whether the measure was *apt* to contribute to the legitimate objective:

> Overall, we find that the complainants have not demonstrated that the TPP measures *are not apt to make a contribution* to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. Rather, we find that the evidence before us, taken in its totality, supports the view that the TPP measures, in combination with other tobacco-control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.[230] (emphasis added)

5.93. **The fourth element of the four-tier consistency test**, whether the measure at issue is not more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, comprises the assessment of whether the *restrictions* on international trade exceed what is *necessary* to achieve the degree of contribution that the technical regulation at issue makes to the achievement of the pursued legitimate objective.[231] It is not the measure at issue, but the trade-restrictiveness of the measure, which is assessed for necessity.

5.94. The Appellate Body has underscored that this element requires the *weighing and balancing*[232] of the following factors:

> (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade-restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.[233]

5.95. In this comparative analysis, panels should consider in particular: (i) whether the alternative measure proposed by the complainant is less-trade restrictive than the measure at issue; (ii) whether it would make an equivalent (not identical[234]) contribution to the pursued objective, taking account of the risks non-fulfilment would create; and (iii) whether it is reasonably available for the respondent.[235]

5.96. Article 2.2 does not oblige the complainant to provide detailed information on how the respondent would implement a proposed alternative in practice "or precise and comprehensive estimates of the cost that such implementation would entail."[236] Thus:

> [o]nce a complainant has established *prima facie* that the proposed alternative is reasonably available to the respondent, it would be a charge for the respondent to adduce specific evidence showing that associated costs would be prohibitive, or those technical

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[229] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317.
[230] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.1025.
[231] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[232] Appellate Body Report, *US – Tuna II (Mexico)*, footnote 643.
[233] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.
[234] Appellate Body Report*, US – COOL*, para. 5.215; Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 6.496.
[235] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.
[236] Appellate Body Report, *Russia – Railway Equipment*, para. 5.189.

> difficulties would be so substantial that implementation of such an alternative would entail an undue burden for the Member in question.[237]

5.97. **Lastly, Article 2.5 of the TBT Agreement** is linked to Article 2.2 and provides:

> A Member preparing, adopted or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. *Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade*. (emphasis added)

5.98. The second sentence of Article 2.5 establishes a *rebuttable presumption* of consistency with Article 2.2 for "those technical regulations that are prepared, adopted, or applied for one of the legitimate objectives explicitly mentioned in Article 2.2, and that are *in accordance with* relevant international standards."[238] (emphasis added)

5.99. Article 2.4 of the TBT Agreement requires Members to use relevant international standards (where these exist or their completion is imminent) as *a basis* for their technical regulations. In contrast, Article 2.5 provides for the presumption of consistency with Article 2.2 whenever a technical regulation at issue is *in accordance with* relevant international standards. The term "in accordance with" imposes a closer connection, or a higher degree of correspondence, between the measure at issue and the relevant international standard, than that provided for in Article 2.4.[239] In the context of the SPS Agreement, the Appellate Body has clarified:

> A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure (…) [A]n SPS measure that conforms to an international standard (…) would *embody the international standard completely* and, for all practical purposes, converts it into a municipal standard."[240] (emphasis added)

5.100. Notwithstanding the differences between Article 2.4 and Article 2.5, the panel in *Australia Tobacco Plain Packaging* held that the interpretation of the term "relevant international standard," as incorporated in Article 2.4, shall guide the interpretation of the term "relevant international standard" in Article 2.5.[241] As such, in an Article 2.5 analysis panels will consider whether the document at issue: (i) is a standard; (ii) is international, and (iii) is relevant.

5.101. Codex standards have been regarded by previous WTO dispute settlement reports as "international standards."[242] In terms of Annex 1 to the TBT Agreement, a standard is a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

5.102. The international character of a standard mainly derives from the *entity* approving said standard. Such standard must be approved by an international standardizing body (a body that has recognized activities in standardization) whose membership is open to the relevant bodies of at least all WTO Members.[243] With regard to the relevance of an international standard, the Appellate Body held in *EC-Sardines*:

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[237] Appellate Body Report, *Russia – Railway Equipment*, para. 5.189.
[238] Panel Report, *US – Clove Cigarettes*, para. 7.447.
[239] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.274.
[240] Appellate Body Report, *EC – Hormones,* paras. 163 and 170.
[241] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.270.
[242] Panel Report, *EC – Sardines*, para. 7.139; Appellate Body Report, *EC – Sardines*, para. 227.
[243] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 357-359.

> Having determined that Codex Stan 94 is an international standard, the analysis turns to whether Codex Stan 94 is a 'relevant' international standard in respect of the EC Regulation. We note that the ordinary meaning of the term 'relevant' is 'bearing upon or relating to the matter in hand; pertinent'. Based on the ordinary meaning, Codex Stan 94 *must bear upon, relate to or be pertinent to* the EC Regulation for it to be a relevant international standard.[244] (emphasis added)

5.1.4.3 Application of the legal standard

5.103. Considering that Article 2.2 is lengthy, teams and panellists are encouraged to focus on the following issues: (i) whether the *Food Information Package* fulfils a legitimate objective and, in particular, whether the measure actually contributes or is apt to contributing to the pursued objective; (ii) whether the *Food Information Package* is not more trade-restrictive than necessary to fulfil the legitimate objective, emphasizing on the reasonably available alternative measures; and (iii) whether Budica enjoys the rebuttable presumption of consistency with Article 2.2, enshrined in Article 2.5, focusing on whether the *Food Information Package* is in accordance with the relevant Codex standards.

5.1.4.3.1 Arguments for Dale

5.104. Dale is expected to argue that the *Food Information Package* created unnecessary obstacles to international trade, in breach of Article 2.2 of the TBT Agreement.

5.105. **First**, on the existence of a technical regulation, Dale should argue that the *Food Information Package* is a technical regulation under Annex 1.1 (Section 5.1.1.3.1, *above*).

5.106. **Second**, on whether the *Food Information Package* is trade-restrictive, Dale can demonstrate trade restrictiveness based on qualitative and/or quantitative arguments and evidence, including evidence relating to the characteristics of the challenged measure, as revealed by its design and operation.[245]

5.107. In this regard, the *Food Information Package,* as applied to *Healthy Spear Bars*, imposes Health Warning High-Content labels and prohibits the use of terms evoking healthiness in their package (*i.e.*, healthy) (Articles 9 and 15).[246] The latter may adversely impact on the competitive opportunities of *Healthy Spear Bars* provoking unjustified fear in consumers by misleading them into assuming that diseases, such as obesity, are only caused by the consumption of Dalean Bars.[247] Considering that *Healthy Spear Bars* are not locally produced, being exclusively imported from Dale,[248] this adverse impact on their competitive opportunities may, correspondingly, impact on the imports of *Healthy Spear Bars* into Budica. Dale may further support this argument by referring to the trade and market share data in Annex III to the Case to show that, after the adoption of the *Food Information Package*, the import and market shares of *Healthy Spear Bars* decreased.[249]

5.108. **Third**, on whether the *Food Information Package* fulfils a legitimate objective, Dale may concede that the *Food Information Packages* pursues the objective of providing Budicans with nutrient-related information and tackling the public health concerns of NCDs and obesity (Preamble).[250] Also, teams should recognize that both of these objectives are legitimate as they are explicitly listed in Article 2.2 (*i.e.*, prevention of deceptive practices and protection of human health).[251] In fact, Dale

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[244] Panel Report, *EC – Sardines*, para. 768; Appellate Body Report, *EC – Sardines*, paras. 228-233.
[245] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.1076.
[246] Facts of the Case, para. 3.6; Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[247] Annex IV: Specific Trade Concern, para. 6.
[248] Facts of the Case, paras. 2.7 and 2.8.
[249] "By September 2020, *Healthy Spear Bars* imports decreased by approximately 13% compared to import levels in September 2019 (…) After the adoption of the *Food Information Package*, the market share of *Healthy Spear Bars* decreased by approximately 26% (…) as compared with the April–September period of 2019" Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 30 and 31.
[250] Facts of the Case, para. 3.6.
[251] Annex IV: Specific Trade Concern, para. 1.

has explicitly recognized the right of WTO Members to implement measures for the legitimate purposes of providing consumer information and protecting human health.[252]

5.109. Concerning the *fulfilment* of the identified legitimate objectives, Dale may emphasize the need to assess the contribution *actually* achieved by the measure at issue, and not the intended contribution. On the one hand, it may argue that the *Food Information Package* does not contribute to preventing deceptive practices as – to the contrary- it misleads consumers into assuming that diseases, such as obesity, are only caused by the consumption of food products with specific nutritional contents.[253]

5.110. On the other hand, Dale may emphasize that the *Food Information Package* can only contribute to a limited extent to the achievement of protecting human health. In this regard, Dale may point to the fact that the underlying causes of obesity have not been fully identified and, thus, that unhealthy diets are not the sole risk factor of this disease.[254] Thus, from the design and structure of the *Food Information Package*, the contribution of the labels is negligible as they *only* regulate upon one (*i.e.*, unhealthy diets) of myriad risk factors of obesity and NCDs (*e.g.*, physical inactivity, slow metabolism, genetic predisposition, behaviour, age, sex, environment, culture, and socioeconomic status).[255] Dale may further support this argument with the declarations of the Ministry of Public Health of Budica, who publicly associated obesity with, not only dietary patterns but also physical inactivity (which is not addressed by the *Food Information Package*).[256]

5.111. Dale may also support the negligible contribution of the *Food Information Package* toward the achievement of the pursued objectives with the assertions of McKindle & Partners, a consultancy firm, which questioned the effects of food labelling on obesity rates considering that the effects of these measures are often limited to the demand for particular brands and do not impact the overall demand for products.[257] Teams may also underscore that the facts of the Case do not provide information on the actual contribution of the *Food Information Package* to the achievement of the pursued objectives and that panellists should analyse "the contribution to the legitimate objective *actually achieved* by the measure at issue, not the contribution that is intended to be achieved."[258]

5.112. **Fourth**, on whether the *Food Information Package* is more trade-restrictive than necessary to fulfil the legitimate objectives, teams should undertake a *weighing and balancing* exercise. In undertaking this analysis, teams should confront the non-existent, or at best negligible, contribution of the *Food Information Package* (paras. 5.109-5.111, *above*) with the high degree of restrictiveness of the measure (paras. 5.106 and 5.107, *above*), taking account of the gravity of consequences that would arise from non-fulfilment of the objectives pursued by the *Food Information Package*. As a result of the *weighing and balancing,* teams should conclude that the restrictions on international trade exceed what is necessary to achieve the degree of contribution that the *Food Information Package* makes to the achievement of the pursued legitimate objective.

5.113. Further, Dale should propose *alternative measures* that are less trade-restrictive, make an equivalent contribution to the pursued objectives (*i.e.*, prevention of deceptive practices and protection of human health), and are reasonably available to Budica, as part of its *prima facie* case that the *Food Information Package* is more trade-restrictive than necessary.

5.114. Teams may propose measures aimed at nutrition-related education and physical activity promotion. Concerning nutrition-related education, Dale may propose implementing *media campaigns* and *counselling* on the consumption of sugar, saturated fats, and sodium, which could be less-trade restrictive as these measures do not impose additional burdens on imported products. Dale may maintain that these measures could make an equivalent contribution to the objective of preventing deceptive practices by informing consumers on the effects of dietary patterns in the development of NCDs and obesity, emphasizing that these measures have been recommended by both the WHO and the RAHO.[259] As for the reasonable availability of these measures, Dale may assert that these are not

[252] Annex IV: Specific Trade Concern, para. 1.
[253] Annex IV: Specific Trade Concern, para. 6; Facts of the Case, paras. 3.8 and 5.1.
[254] Facts of the Case, para. 1.5.
[255] Facts of the Case, para. 1.5.
[256] Facts of the Case, para. 1.14.
[257] Facts of the Case, para. 1.20.
[258] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317.
[259] Facts of the Case, paras. 1.9 and 1.10.

theoretical and do not impose an undue burden, prohibitive costs, or substantial technical difficulties for Budica. Also, teams may underscore that Article 2.2 does not oblige the Complainant to provide detailed information on how the Respondent would implement a proposed alternative in practice.

5.115. Concerning physical activity, Dale may propose improving cycling routes and discouraging motorised transport to schools; funding and organising national sports tournaments; investing in infrastructure for sports facilities and outdoor parks; offering sports scholarships; promoting active breaks, and adequately funding school gym classes at public schools.[260] These alternatives could be less-trade restrictive as they do not impose additional burdens for imported products and could make an equivalent contribution to the objective of protecting human health as *physical inactivity* has also been regarded as a fundamental cause of obesity.[261] In this regard, Dale may underscore that the low obesity rates in its territory have been linked, among others, to the cultural traits of its population, which highly values physical activity and sports.[262] As for the reasonable availability of these measures, Dale may assert that these are not theoretical and do not impose an undue burden, prohibitive costs, or substantial technical difficulties for Budica, considering that these have been already implemented by Dale in the framework of the *Get Fit* campaign.[263] Also, teams may underscore that Article 2.2 does not oblige the Complainant to provide detailed information on how the Respondent would implement a proposed alternative in practice.

5.116. All of these measures may be individually, or as a whole, be proposed alternatives to the labelling scheme contained in the *Food Information Package*.

5.117. **Lastly**, Dale should argue that Budica does not enjoy the rebuttable presumption of conformity with Article 2.2 provided for in Article 2.5, second sentence, of the TBT Agreement. In light of *EC – Sardines*, Dale may wish to concede that the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims* and the Codex Alimentarius *Guidelines on Nutrition Labelling* are relevant international standards.

5.118. However, Dale should argue that the *Food Information Package* is not *in accordance with* said relevant international standards. Teams may emphasize that the term "in accordance with" imposes a high degree of correspondence between the measure at issue and the relevant international standard. They may, first, argue that the *Food Information Package* deviated from, and goes beyond, the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims* as it provides a Health Warning and a High-Content claim which is not contained in that standard (*i.e.*, the latter only provides for Low-Content and Free-Content claims).[264]

5.119. Dale may also argue that the *Food Information Package* is contrary to the *Codex Alimentarius Guidelines on Nutrition Labelling*. This standard provides that:

> [I]nformation should not lead consumers to believe that there is *exact quantitative knowledge* of what individuals should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product (…) nutrition labelling should not deliberately imply that a food which carries such labelling has necessarily *any nutritional advantage over a food which is not so labelled*.[265]

5.120. Conversely, the *Food Information Package* leads consumers into believing that foods labelled as Free-Content and Low-Content are to be eaten in order to maintain health and have a nutritional advantage over those not having such labels or labelled with the Health Warning High-Content label. Teams may further point to the fact that, even if the Free-Content and Low-Content labels are not accompanied by a "healthy" claim, the design of the labels may evoke healthiness as it contains the figure of a heart, as well as attractive colours (*i.e.,* green and yellow), which may be potentially associated with health.[266]

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[260] Facts of the Case, para. 1.17.
[261] Facts of the Case, paras. 1.5 and 1.11.
[262] Facts of the Case, para. 1.16.
[263] Facts of the Case, para. 1.16.
[264] Facts of the Case, para. 3.8; Annex IV: Specific Trade Concern, para. 3.
[265] Annex IV: Specific Trade Concern, para. 5.
[266] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.

5.1.4.3.2 Arguments for Budica

5.121. As a defence, Budica should argue that the *Food Information Package* does not create unnecessary obstacles to international trade. It should also seek to establish a presumption of consistency with Article 2.2 under Article 2.5.

5.122. **First**, on the existence of a technical regulation, Budica may reiterate that the *Food Information* is not a technical regulation within the meaning of Annex 1.1 of the TBT Agreement (Section 5.1.1.3.2, *above*). However, teams should not devote time to re-litigate this point at this stage.

5.123. **Second**, on whether the *Food Information Package* is trade-restrictive, Budica may concede that, when analysing the design and operation of the measure, it may potentially have a limiting effect on international trade of *Healthy Spear Bars* between Budica and Dale.[267] Nonetheless, as to the actual effects of the measure on international trade, Budica may question the *causal link* between the enactment of the *Food Information Package* and the slight (13%) reduction of *Healthy Spear Bars* imports into Budica during 2020,[268] absent facts in the Case pointing to the existence of said causal link.

5.124. **Third**, on whether the *Food Information Package* fulfils a legitimate objective, Budica should underscore that, pursuant to its Preamble, the *Food Information Package* seeks to provide Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children, with a view to tackling the public health concerns of NCDs and obesity, as one of its major risk factors.[269] Budica should emphasize that these objectives are explicitly listed in Article 2.2 (*i.e.*, prevention of deceptive practices and protection of human health), being legitimate for the purposes of the TBT Agreement.

5.125. Concerning the *fulfilment* of the identified legitimate objectives, Budica should argue that the *Food Information Package* is *apt* to make a material contribution to the achievement of these objectives. Teams may underscore that this requirement can be demonstrated either by evidence that the measure has already resulted in a material contribution or, more importantly, by evidence that the measure is *apt* to produce a material contribution.[270]

5.126. On the one hand, the labels provided in the *Food Information Package* contribute to the prevention of deceptive practices considering that, pursuant to the RAHO *2017 Obesity: Front of Pack Labelling and Consumer Behaviour* survey, 92.9% of surveyed consumers declared that they usually do not understand nutritional facts information printed on packaged food products.[271] Thus, the measure at issue is apt to contribute to the prevention of deceptive practices by assisting consumers in understanding quantitative information regarding the content of sodium, added sugar, and saturated fats in products.[272]

5.127. On the other hand, Budica may argue that food labels are apt to contribute to the prevention of obesity by reducing the intake of energy-dense foods, since they have a considerable impact on consumer choices. According to a RAHO survey, 48.1% of the surveyed consumers affirmed they examined the presence of the labelling when buying, of which 79.1% indicated that the label influenced their purchasing decisions.[273]

5.128. To further support its position, Budica may indicate that the WHO has considered the energy imbalance between calories consumed and calories expended as a *fundamental* cause of obesity.[274] Accordingly, the *Food Information Package,* which is directed toward the regulation of the intake of certain energy-dense foods, is apt to contribute to the reduction of obesity as it pertains to one of its fundamental causes. Also, Budica may underscore that the WHO has noted that the lack of information

[267] Facts of the Case, para. 3.6; Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[268] Annex III: Nutrition Food Bars Imports and Market Shares; Corrections and Clarifications No. 30 and 31.
[269] Facts of the Case, para. 3.6; Annex IV: Specific Trade Concern, para. 8.
[270] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* paras. 7.1025, 7.1026, and 7.1034.
[271] Annex IV: Specific Trade Concern, para. 16.
[272] Facts of the Case, para. 3.3.
[273] Annex IV: Specific Trade Concern, para. 16; Corrections and Clarifications No. 39.
[274] Facts of the Case, para. 1.5.

about sound approaches to nutrition is a cause of childhood obesity, together with the aggressive marketing of energy-dense foods.[275] Thus, the *Food Information Package* labelling requirements are apt to contribute to the reduction of childhood obesity by directly addressing its causes, namely, the lack of information and aggressive marketing. Further, teams may outline that labelling requirements have been recommended by the WHO and the RAHO as an adequate measure to prevent obesity,[276] from which teams may infer a strong correlation between food labels and obesity prevention.

5.129. **Fourth**, on whether the *Food Information Package* is more trade-restrictive than necessary to fulfil the legitimate objectives, Budica should undertake a *weighing and balancing* exercise. In undertaking this analysis, teams should confront the material contribution that the *Food Information Package* is apt to make (paras. 5.125-5.128, *above*) with the (unclear) degree of restrictiveness of the measure (paras. 5.123, *above*), taking account of the gravity of consequences that would arise from non-fulfilment of the objectives pursued by the *Food Information Package*. As for the latter, Budica may point to the figures provided in the Case concerning the gravity of obesity, *e.g.*, yearly deaths of at least 2.8 million people around the globe,[277] NCDs as the main cause of death in Budica,[278] and obesity linked to 5 out of every 10 NCD-related deaths in Budica.[279] As a result of the *weighing and balancing,* teams should conclude that the restrictions on international trade do not exceed what is necessary to achieve the degree of contribution that the *Food Information Package* makes to the achievement of the pursued legitimate objective.

5.130. Depending on whether Dale proposes alternative measures to the *Food Information Package* and on the specific proposals to be made, Budica should contend that these proposals are either more trade-restrictive, do not accomplish an equivalent degree of contribution to the pursued objectives, or are not reasonably available to Budica.

5.131. Concerning the proposed alternatives such as media campaigns, counselling, and physical activity promotion, Budica may concede that these are, in fact, less trade-restrictive as they do not impose additional burdens for imported products. Nonetheless, Budica may argue that these do not accomplish an equivalent degree of contribution grounded on the fact that, in the drafting process of the *Food Information Package*, other alternatives, such as the promotion of physical activity, were assessed and disregarded due to the lack of sufficient data concerning their effectiveness.[280] Further, Budica may emphasize that all the proposed alternatives would imply budgetary spending from the State, not being reasonably available for Budica which is a developing country, contrary to Dale (developed).[281]

5.132. **In addition**, Budica should argue that the *Food Information Package* enjoys the presumption of conformity with Article 2.2 provided for in Article 2.5. Teams should not spend much time on the question of whether the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims* and the *Codex Alimentarius Guidelines on Nutrition Labelling* are relevant international standards. The contentious issue is whether the *Food Information Package* is "in accordance with" said international standards.

5.133. Budica may, first, argue that Codex Alimentarius Guidelines are voluntary and, hence, do not have a binding effect on national food legislation.[282] As for the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims*, Budica may argue that the *Food Information Package* conforms with the standard as it embodies all elements provided therein. In particular, the *Food Information Package* incorporates completely the Free-Content and Low-Content claims enshrined in the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims.*[283] With respect to the Health Warning High-Content label, teams may point to the fact that, pursuant to the same Guidelines, claims

[275] Facts of the Case, para. 1.5.
[276] Facts of the Case, paras. 1.9-1.10.
[277] Facts of the Case, para. 1.6.
[278] Facts of the Case, para. 1.12.
[279] Facts of the Case, para. 1.13. See also: Facts of the Case, paras. 1.12-1.15.
[280] Annex IV: Specific Trade Concern, para. 14.
[281] Facts of the Case, para. 1.1.
[282] Annex IV: Specific Trade Concern, para. 9.
[283] Annex IV: Specific Trade Concern, para. 3.

should be consistent with national nutrition and health policies and, accordingly, do not prevent the adoption of regulations containing higher levels of consumer and health protection.[284]

5.134. As for the *Codex Alimentarius Guidelines on Nutrition Labelling*, Budica may argue that this standard only pertains to claims relating to the *healthiness* of products, and is silent on the possibility of communicating which foods may be regarded as *unhealthy*. Thus, Budica may underscore that the Health Warning High-Content label is not under the purview of these Guidelines, as it does not lead consumers into believing that these foods should be eaten in order to maintain health nor implies that such foods have a nutritional advantage.

5.135. Concerning the Free-Content and Low-Content labels, Budica may argue that these are designed 'to convey an understanding' of the quantity of sugar, saturated fats, and sodium contained in processed food products and do not imply that those products have necessarily a nutritional advantage over products which are not so labelled. Accordingly, the *Food Information Package* should be regarded as in full conformity with the *Codex Alimentarius Guidelines on Nutrition Labelling.*

5.1.4.4 Questions to the parties

Dale	Budica
How does the design, structure, and operation of the *Food Information Package* reveal the existence of limiting effects on international trade (import/export)? Is a modification on the competitive opportunities of *Healthy Spear Bars* sufficient to establish that the *Food Information Package* restricts international trade?	Which is the standard of proof for establishing that the *Food Information Package* fulfils the pursued legitimate objectives? Does the panel require proof of an actual material contribution or should it be satisfied with evidence indicating that the measure is apt to make such a material contribution? Which facts of the Case may support the contribution of the *Food Information Package* to the objective of preventing deceptive practices? And with the objective of protecting human health?
How would a finding on violation of Article 2.2 (necessity) affect your claim on the violation of Article 20 of the TRIPS Agreement (unjustifiability)? Would the panel be entitled to refrain from making findings on Article 20 of the TRIPS Agreement as a matter of judicial economy?	Why wouldn't nutritional education have an equivalent contribution to the objective of preventing deceptive practices than that of the labels contained in the *Food Information Package*?
If a team were to propose taxation measures as an alternative to the *Food Information Package*, how are taxation measures less trade-restrictive than the labelling requirements provided in the *Food Information Package*?	In *Australia - Tobacco Plain Packaging*, the panel emphasized that the operation of the challenged measure, including its contribution to Australia's objective, had to be assessed in the broader context of other tobacco control measures maintained by Australia, as this could inform and affect the manner in which the measure was applied and operated.[285] The WHO and the RAHO have recommended several actions in the fight against obesity and NCDs (including labels, but also the promotion of physical activity, nutritional education, and so forth). Budica only implemented one of these recommended actions, namely, the implementation of a labelling scheme. How does the fact that Budica only implemented one of the recommended actions affects the analysis of whether the *Food Information Package* is in conformity with Article 2.2? How would the findings in *Australia - Tobacco Plain Packaging* affect your position?

[284] Annex IV: Specific Trade Concern, para. 9.
[285] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.1391.

Whether, in assessing the limiting effect on international trade, the relevant effects are the effects on trade with all WTO Members (including Enge, whose imports increased after the entry into force of the *Food Information Package*), or just the complainant (Dale, whose imports decreased after the entry into force of the *Food Information Package*)?[286]	Do the threshold values underlying the Free-Content and Low-Content labels imply that there is an "exact quantitative knowledge of what individuals should eat in order to maintain health," contrary to the *Codex Alimentarius Guidelines on Nutrition Labelling?*
How could Dale determine the existence of a causal link between the enactment of the *Food Information Package* and the reduction of *Healthy Spear Bars* imports into Budica during 2020, absent facts in the Case pointing to the existence of said causal link?	The *Food Information Package* does incorporate the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims* insofar as the Free-Content and Low-Content claims are concerned but goes beyond these Guidelines by including an additional claim (Health Warning High-Content label). Can the *Food Information Package* still be regarded to be "in accordance" with the relevant Codex Guidelines if it regulates matters which those Guidelines are silent upon?

5.1.5 Whether the failure of the Budican enquiry point to reply to Dale's request is inconsistent with Article 10.1.1 of the TBT Agreement

5.1.5.1 Relevance of the issue

5.136. On 15 September 2019, Dale sent a communication to the Budican enquiry point established under Article 10.1 of the TBT Agreement concerning the *Food Information Package.*[287] In the absence of a reply from Budica, Dale followed up on its request on 2 October 2019.[288] The Budican enquiry point acknowledged the receipt of Dale's request dated 15 September 2019.[289]

5.137. During the TBT Committee meeting held on 16 October 2019, Dale raised an STC regarding, among others, the lack of response from the Budican enquiry point.[290]

5.138. With respect to Dale's comment regarding the lack of reply from the enquiry point, Budica noted that the enquiry point received a large number of requests from different WTO Members regarding the Draft Presidential Decree No. 457 ("Draft Decree"), which slowed down their processing.[291] In particular, the Budican enquiry point received roughly 50 requests from different WTO Members regarding the Draft Decree. To date, the enquiry point has responded, in writing, to 32 requests.[292]

5.1.5.2 Relevant legal standard and jurisprudence

5.139. Article 10.1 of the TBT Agreement concerns enquiries regarding technical regulations. In particular, Article 10.1 provides that:

> 10.1. Each Member shall ensure that *an enquiry point exists which is able to answer all* reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:
>
> 10.1.1 Any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce

[286] The argument that it should be the impact of the measure on trade with all WTO Members was raised by Australia in the *Plain Packaging* dispute but rejected by the panel. However, the panel found that that, by reducing the use of tobacco products, the challenged measure reduced the volume (not value) of tobacco product imports from *all sources*. Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* paras. 7.1085 and 7.1255.

[287] Facts of the Case, para. 3.7.

[288] Facts of the Case, para. 3.7.

[289] Corrections and Clarifications No. 38.

[290] Facts of the Case, para. 3.8.

[291] Annex IV: Specific Trade Concern, para. 17.

[292] Corrections and Clarifications No. 37.

> a technical regulation, or by regional standardising bodies of which such bodies are members or participants. (emphasis added)

5.140. The Committee on Technical Barriers to Trade ("TBT Committee") Decision G/TBT/1/Rev.10,[293] may be used as a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT,[294] for the interpretation of Article 10.1. In the relevant part, the Decision provides:

> Establishment of Enquiry Points (…) (b) In 2009, in order to improve implementation of provisions related to the work of Enquiry Points, the Committee agreed: (i) to stress the importance of *operational capacity* of Enquiry Points, especially with respect to the provision of answers to enquiries and the promotion of a dialogue. (emphasis added)

5.141. In *Korea – Radionuclides*, the Appellate Body assessed a similar obligation in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). The introductory clause of Annex B(3) of the SPS Agreement provides that: "Each Member shall ensure that one enquiry point exists *which is responsible for the provision of answers* to all reasonable questions from interested Members as well as for the provision of relevant documents." (emphasis added)

5.142. In that dispute, the Appellate Body considered that a single failure of an enquiry point to respond to a request would not "in and of itself (…) automatically result in an inconsistency" with Annex B(3) to the SPS Agreement.[295] The Appellate Body considered that the assessment under Annex B(3) requires an examination of all the relevant factors, including:

> [T]he total number of questions received by the enquiry point and the proportion of and the extent to which questions were answered, the nature and scope of the information sought and received, and whether the enquiry point repeatedly failed to respond.[296]

5.143. Given the similar language used in Article 10.1 of the TBT Agreement, the jurisprudence of *Korea – Radionuclides* relating to Annex B (3) of the SPS Agreement provides useful guidance in this Case.

5.1.5.3 Application of the legal standard

5.1.5.3.1 Arguments of Dale

5.144. Dale should argue that the lack of response from the Budican enquiry point breaches Article 10.1.1 of the TBT Agreement. Teams should elaborate on the scope of the obligation contained in Article 10.1.1. This Article mandates Members to "ensure that an enquiry point exists which is *able* to answer all reasonable enquiries." Teams may interpret that the phrase "able to answer" qualifies the term "exists" and, thus, that the existence "on paper" of an enquiry point is not sufficient to meet the obligation set forth in Article 10.1.1.

5.145. Dale may also underscore the difference in the language of Article 10.1.1 of the TBT Agreement ("an enquiry point exists which *is able to answer* all reasonable enquiries") and Annex B(3) to the SPS Agreement ("one enquiry point exists *which is responsible for the provision of answers* to all reasonable questions") and argue that the qualifier "able to answer" suggests that the obligation under Article 10.1.1 of the TBT Agreement is more rigorous than the one in Annex B(3) to the SPS Agreement. Thus, Dale could argue that the findings in *Korea – Radionuclides* should not be automatically transposed to the interpretation of Article 10.1.1.

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[293] Committee on Technical Barriers to Trade, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade (G/TBT/1/Rev.10), 9 June 2011.

[294] In *US – Tuna II (Mexico)*, the Appellate Body considered that the TBT Committee's Decision on Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement can be considered as a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT Appellate Body Report, *US – Tuna II (Mexico)*, para. 371 and 372.

[295] Appellate Body Report, *Korea – Radionuclides,* para. 5.211.

[296] Appellate Body Report, *Korea – Radionuclides,* paras. 5.211 and 5.216.

5.146. Dale may further point out that the TBT Committee Decision G/TBT/1/Rev.10 gives special importance to the *operational capacity* of enquiry points with respect to the provision of answers to enquiries.

5.147. Dale may assert that Budica has not ensured the sufficient *operational capacity* of its enquiry point to respond to *all* presented enquiries. In this regard, the Budican enquiry point has not been able to answer Dale's requests, dated 15 September and 2 October 2019, as well as more than 16 other requests from other WTO Members.[297] The latter may signal a lack of operational capacity and ability to respond to all presented requests of the Budican enquiry point, in breach of Article 10.1.1. Moreover, Dale could argue that, even if the panel in this dispute were to follow the Appellate Body's findings in *Korea – Radionuclides,* it should still rule in Dale's favour because, unlike in *Korea – Radionuclides*, the Budican enquiry point failed to respond to two requests from Dale.[298]

5.1.5.3.2 Arguments of Budica

5.148. Budica should argue that the current absence of a response to Dale's enquires shall not be equated to a violation of Article 10.1.1. Concerning the scope of the obligation contained in Article 10.1.1, Budica could note that, in interpreting provisions of the covered agreements, panels shall not add terms which are not present in them.[299] In this regard, teams may point out that Article 10.1.1 does not contain an obligation to respond to all presented enquiries, but rather the obligation to ensure that an enquiry point *exists* which is *able* to answer all reasonable enquiries.

5.149. Budica should underscore that, from the facts of the Case, there is evidence on the capacity of its enquiry point to respond to presented requests. Budica could emphasise that, to date, the enquiry point has responded more than half of the presented requests concerning the Draft Decree (32 out of roughly 50)[300] and that, thus, its enquiry point is, in principle, *able* to respond to all presented enquiries.

5.150. Budica may refer to the jurisprudence in *Korea – Radionuclides* to argue that the failure to respond to one single request in and of itself would not automatically result in an inconsistency with the obligation provided for in Article 10.1.1. Budica could argue that the repeated requests from Dale should count as a single request because the request of 2 October was a follow-up on the request of 15 September. Correspondingly, Budica may argue that the panel should assess, among others, the scope and nature of the information sought, how many requests had been received in total over a period of time, the proportion of questions that had been answered, and whether the enquiry point repeatedly failed to respond.

5.151. In this regard, Budica may argue that the enquiry point received a large number of requests from different WTO Members regarding the Draft Decree, which slowed down their processing.[301] Budica can point to the fact it has received 50 requests from different WTO Members and has responded to 32.[302] Budica should point to the specific information sought by Dale – it relates to clarifications on definitions and application, which may involve careful deliberation before replying.[303]

5.1.5.4 Questions to the parties

Dale	Budica

[297] Corrections and Clarifications No. 37.
[298] According to the Appellate Body, a single failure of an enquiry point to respond in and of itself would not automatically result in an inconsistency with Annex B(3). Appellate Body Report, *Korea – Radionuclides,* para. 5.216.
[299] Appellate Body Report, *India — Quantitative Restrictions*, para. 94.
[300] Corrections and Clarifications No. 37.
[301] Annex IV: Specific Trade Concern, para. 14.
[302] Corrections and Clarifications No. 37.
[303] Facts of the Case, para. 3.7.

What is the obligation for WTO Members under Article 10.1.1 of the TBT Agreement? Is it the obligation to create an enquiry point? Does the obligation extend to the operational capacity of the existing enquiry points? Does this provision also contain the obligation for WTO Member enquiry points to answer *all* presented reasonable queries?	What is the obligation for WTO Members under Article 10.1.1 of the TBT Agreement? Is it the obligation to create an enquiry point? Does the obligation extend to the operational capacity of the existing enquiry points? Does this provision also contain the obligation for WTO Member enquiry points to answer *all* presented reasonable queries?
What is the legal nature of the TBT Committee Decision G/TBT/1/Rev.10 under the VCLT? Have past reports elaborated on the legal nature of TBT Committee Decisions? How have panels and the Appellate Body dealt with this issue? Do you agree with the Appellate Body's finding in *US – Tuna II* that a TBT Committee decision could constitute a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT?	Is the obligation contained in Annex B(3) of the SPS Agreement different from/similar to the one contained in Article 10.1.1 of the TBT Agreement? Accordingly, can the panel transpose the interpretation provided by the Appellate Body in *Korea – Radionuclides* to the interpretation of Article 10.1.1 of the TBT Agreement? How would this affect/benefit your position?
In assessing the compliance with Article 10.1.1 of the TBT Agreement, should this panel evaluate factors such as the scope and nature of the information sought, how many requests had been received in total over a period of time, the proportion of questions that had been answered, and whether the enquiry point repeatedly failed to respond?	In assessing the compliance with Article 10.1.1 of the TBT Agreement, should this panel evaluate factors such as the scope and nature of the information sought, how many requests had been received in total over a period of time, the proportion of questions that had been answered, and whether the enquiry point repeatedly failed to respond?

5.2 LEGAL ISSUES UNDER THE TRIPS AGREEMENT: WHETHER THE MEASURE AT ISSUE IS INCONSISTENT WITH ARTICLE 20 OF THE TRIPS AGREEMENT

5.2.1 Relevance of the issue

5.152. In January 2019, Spear Bars Inc. registered the trademark *Healthy Spear Bars* in Budica.[304]

5.153. In 2020, Article 15 of the *Food Information Package* prohibited the use of words, letters, numerals, pictures, shapes, colours, or any combination thereof evoking healthiness on the package of processed food products and Article 9 of the same regulation imposed certain front-of-pack nutrition labelling requirements for products with high content of sodium, sugar, and saturated fats.[305]

5.154. Pursuant to these requirements, Spear Bars Inc. was prohibited from using the term "healthy" and was mandated to put Health Warning High-Content labels on the packaging of *Healthy Spear Bars*.

5.2.2 Relevant legal standard and jurisprudence

5.155. Article 20 of the TRIPS Agreement provides:

> The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

5.156. Panel and Appellate Body reports in the recently adjudicated *Australia – Tobacco Plain Packaging* dispute interpreted the relevant terms of Article 20 of the TRIPS Agreement.[306] The following elements shall be established in order to find a violation of the core obligation contained in

[304] Facts of the Case, para. 2.8.
[305] Facts of the Case, para. 3.6.
[306] Panel Report, *Australia – Tobacco Plain Packaging (Honduras)*; Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras).*

the first sentence of Article 20: (i) the existence of special requirements; (ii) that such special requirements encumber the use of a trademark in the course of trade, and (iii) that they do so unjustifiably.[307]

5.157. First, the term "special requirements" refers to:

> (…) 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. This may include a requirement not to do something, *in particular a prohibition on using a trademark* (…). (emphasis added)[308]

5.158. The term "such as," contained in Article 20, indicates that the list of special requirements that follows is merely illustrative. Thus, the term such as "does not imply that other types of requirements, including a requirement amounting to *a prohibition on use*, would be precluded from falling within the scope of Article 20"[309] (emphasis added).

5.159. Second, the term "encumber" defines the situations in which special requirements fall under the scope of Article 20, meaning that the application of Article 20 is limited to special requirements which *restrict or impede* the use of a trademark.[310] The imposed encumbrances may vary as to their degree of restrictiveness and may thus:

> "range from limited encumbrances, such as those resulting from the specific types of requirements mentioned in the first and second sentences of Article 20, to more extensive encumbrances, such as a prohibition on the use of a trademark in certain situation."[311]

5.160. Third, the terms "in the course of trade" are not, on their face, limited to trade in the sense of buying and selling, but more broadly cover the process relating to commercial activities. They may include some commercial activities taking place after retail, and are not limited to those activities which culminate or terminate at the point of sale.[312]

5.161. Fourth, regarding the term "use," Article 20 of the TRIPS Agreement regulates the imposition of special requirements when a trademark owner is *using* its trademark in the course of trade. Said use "is not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings."[313]

5.162. In the scenario where a trademark is being used in the course of trade, Article 20 protects such use from being unjustifiably encumbered by special requirements but does not grant positive rights to use the trademark.[314] The fact that Article 20 presupposes that the use of a trademark may be encumbered "justifiably" further indicates that there is no positive right of use of a trademark by its owner, nor is there an obligation of Members to protect such positive right.[315]

5.163. Fifth, as to the term "unjustifiable," the Appellate Body has defined it as something not justifiable or indefensible:

> The antonym of the term "unjustifiable" is "justifiable", a word that denotes the existence of a "good reason" for something or refers to something that is "able to be shown to be right or reasonable; defensible." The various meanings attributed to the concept of justifiability thus indicate that it connotes something that is fair and capable of being reasonably explained. By contrast, something is "unjustifiable" when there is no fair reason for it and when it cannot be reasonably explained. [316]

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[307] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2156.
[308] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2231.
[309] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2226.
[310] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* paras. 7.2234-7.2235.
[311] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2239.
[312] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* paras. 7.2261, 7.2263, and 7.2264.
[313] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2286.
[314] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.610.
[315] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.642.
[316] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.645.

5.164. The term "unjustifiably" in Article 20 of the TRIPS Agreement reflects the degree of regulatory autonomy that Members enjoy in imposing encumbrances on the use of trademarks through special requirements, departing from the necessity test: "a consideration of whether the use of a trademark has not been "unjustifiably" encumbered should not be equated with the necessity test within the meaning of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement."[317]

5.165. Thus, the reference to the notion of justifiability, rather than necessity, in Article 20 suggests that:

> [T]he degree of connection between the encumbrance on the use of a trademark imposed and the objective pursued, reflected through the term "unjustifiably," is *lower* than it would have been had a term conveying the notion of "necessity" been used in this provision.[318]

5.166. Furthermore, it must be noted that challenged measures cannot be *per se* unjustifiable. Instead, measures shall be assessed on a case-by-case basis in light of the particular circumstances of the case and under the applicable standard of review.[319] The relevant unjustifiability test is comprised of the following elements:

> (a) the nature and extent of encumbrances resulting from special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade;
>
> (b) the reasons for the imposition of special requirements;
>
> (c) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.[320]

5.167. As to whether alternative measures should be considered when conducting a legal analysis under Article 20, the Appellate Body stated that:

> [S]uch an examination *is not a necessary inquiry* under Article 20. In our view, given the degree of regulatory autonomy provided to Members under Article 20 through the use of the term "unjustifiably", an analysis of alternative measures *is not required* in each and every case, and does not provide decisive guidance in determining whether the encumbrances in question are imposed "unjustifiably."[321] (emphasis added)

5.2.3 Application of the legal standard

5.168. In the Case, the following elements of Article 20 are less contentious: (i) whether the measure imposes "special requirements," (ii) whether the special requirements result in an "encumbrance," and (iii) whether the trademark is used in the "course of trade." Panellists may wish to ask teams to skip these elements of the analysis and to proceed directly to the issues of "justifiability of encumbrances" and of "use" of the trademark.

5.169. First, Annex I and Articles 9 and 15 of the *Food Information Package* impose "special requirements" by: (i) prohibiting the use of particular terms and references in the trademark (prohibition to do something) and (ii) limiting the space for the use of the trademark in the packaging with the inclusion of labels (additional burden on the trademark owner).

5.170. Second, Annex I and Articles 9 and 15 of the *Food Information Package* result in "encumbrances" on the use of the trademark since both, trademark restrictions and labelling requirements, restrict or impede the use of the trademark in the course of trade. The following table shows how the appearance of Spear Bars Inc.'s trademark changed after the introduction of the *Food Information Package*. First, the use of the adjective "healthy" was prohibited (Article 15 of the *Food*

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[317] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.647.
[318] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.647.
[319] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* paras. 7.2431, 7.2441 and 7.2442.
[320] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.651.
[321] Appellate Body Report, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.695.

Information Package). Second, the available space for the trademark *Healthy Spear Bars* was reduced (Annex I and Article 9 of the *Food Information Package*):

Table No. 6: *Food Information Package impact on Healthy Spear Bars.*

Bars packaging before the entry into force of the *Food Information Package*	**Bars packaging after the entry into force of the *Food Information Package***
	

5.171. Third, the encumbrances resulting from the *Food Information Package* are imposed on the use of a trademark "in the course of trade," as Annex I and Articles 9 and 15 apply to products ready to be offered to consumers in the activities of buying and selling.

5.172. In the Case, the main contentious elements to be debated in the application of Article 20 are: (i) whether the trademark is being "used," and (ii) whether the measures are "justifiable."

5.2.3.1 Arguments of Dale

5.173. With regard to the unjustifiability test, teams should be wary of the difference between the *unjustifiability* test and the *necessity* test, considering the threshold imposed by the former is significantly higher. Dale may argue the following.

5.174. First, as to the "nature and extent of the encumbrance" resulting from the special requirements, Dale may argue that the encumbrance is highly burdensome since Spear Bars Inc. can only include the term "Spear Bars" on its products and is obliged to remove the term "healthy."[322] Thus, Spear Bars Inc. cannot use its trademark in the form in which it was registered. Dale could argue that the *Food Information Package* has removed the possibility for Spear Bars Inc. to extract value from all terms present in its registered trademark and reduced the possibility to differentiate or distinguish its products from other products in the market.

5.175. In addition, Dale may argue that the labelling requirements under Article 9 aggravate the encumbrance, as the labels occupy space on the product's packaging that used to be occupied by the trademark, reducing its size and, therefore, its influence on consumers' decisions.[323] Consequently, Dale may submit that the effect of the encumbrance posed by the measures is akin to that of a complete prohibition of the trademark, understood as an extensive encumbrance.

5.176. In order to support this argument, Dale may consider using market share data, before and after the measure, demonstrating that the market share of Spear Bars reduced after the introduction of the *Food Information Package*.[324] In addition, the economic data on import volumes could be used as an indication of the lost ability of Spear Bars Inc. to extract economic value from the registered trademark.[325]

5.177. Second, concerning the "reasons for the imposition of special requirements," Dale may choose to concede that the reasons for the adoption of the *Food Information Package* were "to provide

[322] Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[323] Annex I: Labelling Requirements under Decree No. 457; Annex II: Application of the Labelling Requirements under Decree No. 457 to Nutrition Food Bars.
[324] Annex III: Nutrition Food Bars Imports and Market Shares.
[325] Annex III: Nutrition Food Bars Imports and Market Shares.

Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children."[326]

5.178. Third, regarding the "demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances," Dale may underscore that the panel in *Australia – Tobacco Plain Packaging (Honduras)* considered that if the special requirements "are capable of contributing, and do in fact contribute," to the pursued objective this suggests "that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks."[327]

5.179. Thus, Dale may underscore that the *Food Information Package* is not capable of contributing to Budica's alleged public policy objectives. In this regard, Dale may argue the lack of scientific evidence suggesting an identifiable threshold for sugar, saturated fats, and sodium above which a risk of developing an NCD exists.[328]

5.180. Teams may further argue that obesity is a complex disease caused by a variety of factors, and not only by the consumption of certain foods, such as physical inactivity, increased relative costs of exercising, genetic predisposition, calories consumed and calories expended, slow metabolism decreases in the relative costs of food; and decreases in the time available for the preparation of food, accompanied by an increase in the demand for fast food. Dale may point to other factors, such as behaviour, age, sex, environment, culture, and socioeconomic status of an individual, which may also affect the incidence of obesity.[329]

5.181. Also, Dale may stress that the effects of trademark restrictions on obesity rates are at best negligible, questionable, and are often limited to the demand for particular brands and do not impact the overall demand for a product.[330]

5.182. Lastly, if Budica asserts that Article 20 is not applicable because the trademark is not being "used" as registered, Dale may argue that the use of the encumbered trademark by its owner is not necessary to trigger the application of Article 20. The latter, as this would result in the exclusion of far-reaching restrictions (prohibition on use) from Article 20, being contrary to the purpose of said provision. Dale may assert that prohibitive encumbrances were regarded as included in terms of Article 20 in the recently adjudicated *Australia – Tobacco Plain Packaging* dispute.

5.2.3.2 Arguments of Budica

5.183. With regard to the term "use," Budica may assert that the obligations enshrined in Article 20 are triggered by the use of a trademark, meaning that if a trademark is not being used (as registered), Article 20 does not apply. Therefore, as Spear Bars Inc. is not currently using its registered trademark (*Healthy Spear Bars*), but rather a different mark (*Spear Bars*), obligations contained under Article 20 are not triggered, and Dale has raised a claim under a wrong provision. If Budica were to pursue this line of reasoning, it would have to explain why the panel would have to depart from the findings of the panel in *Australia – Tobacco Plain Packaging* that the special requirements under Article 20 include a prohibition on the use of a trademark.[331]

5.184. In the alternative, Budica may put forward the following defence concerning the unjustifiability test.

5.185. First, as to the "nature and extent of the encumbrance" resulting from the special requirements under Articles 9 and 15 of the *Food Information Package*, Budica may submit that the encumbrance is not far-reaching because it provides for reasonable limitations on the use of the trademark. Budica may argue that the measure has no effect on the capabilities of the trademark to differentiate *Spear Bars* from its competitors in the market, and does not impede or undermine the owner's ability to

[326] Facts of the Case, para. 3.6.
[327] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2592.
[328] Annex IV: Specific Trade Concern, para. 2.
[329] Facts of the Case, para. 1.5.
[330] Facts of the Case, para. 1.20.
[331] Panel Report, *Australia – Tobacco Plain Packaging (Honduras),* para. 7.2239.

extract the economic value from the trademark, considering that *Spear Bars* are still being sold in Budica.[332]

5.186. If Dale were to allege that the market share and import volumes of *Spear Bars* reduced after the introduction of the *Food Information Package*, proving a high degree of restrictiveness of the measure, Budica may contest the following.

5.187. On the one hand, Budica may underscore the lack of factual evidence demonstrating a causal link between the enactment of the *Food Information Package* and the reduction of market share and import volumes.[333] In this regard, Budica may point to the fact that both may be affected by other factors. To support this assertion, teams should refer to the figures in Annex III to the Case. These figures show that import volumes, first, did not have considerable fluctuations *after* the entry into force of the measure and, second, have been volatile since the *entry* of *Spear Bars* into Budica's market, presenting drops in August 2019 and December 2019 (months in which the measure was not yet in force).[334] On the other hand, Spear Bar Inc.'s import volumes in April 2020 (entry into force of the *Food Information Package*), as well as in the following months, exceeded those of *Wild Tropic-All Natural Bars*,[335] evidencing its maintained capability of extracting value from its trademark.

5.188. Second*,* concerning the reasons for which the special requirements were applied, Budica may argue that pursuant to the preamble to the *Food Information Package* the purpose of the measure is to provide Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children, with a view to tackling the public health concerns of NCDs and obesity, as one of its major risk factors.[336]

5.189. Third*,* as to whether these reasons provide sufficient support for the resulting encumbrances on the use of the trademark in the course of trade, Budica may clarify that the test under Article 20 of the TRIPS Agreement substantially differs from the necessity test of the GATT 1994 and the TBT Agreement. Thus, Budica may contend that the panel should not analyse whether the *Food Information Package* was necessary for achieving the pursued aim, but rather whether the reasons for the imposition of the special requirements provided sufficient support for the resulting encumbrance.

5.190. Against this backdrop, Budica may argue that the reasons for the special requirements in Articles 9 and 15 of the *Food Information Package* (protecting human health) sufficiently support the resulting encumbrance, which does not equate to an absolute prohibition on the use of the registered trademark. Budica may underline that the rationale for the special requirements is to prevent consumption habits from shifting towards the increased preference for fast foods and packaged foods with high contents of saturated fats, sugar, and sodium, which has been linked to the rise in obesity rates,[337] which is one of the major risk factors for NCDs.[338]

5.191. As to the importance of the pursued objective, Budica may highlight that in the year 2018 NCDs were the main cause of death in the territory, having yearly health system costs amounting to 5% of Budica's gross domestic product.[339] When these reasons are weighed against the encumbrances on the use of Spear Bars Inc.'s trademark, one may conclude that they sufficiently support the resulting encumbrance.

5.2.4 Questions to the parties

Dale	Budica
How does the restriction on the use of trademarks, imposed by Article 15 of the *Food Information Package*, similar to or different from the measures on trademarks analysed by	How does the restriction on the use of trademarks, imposed by Article 15 of the *Food Information Package*, similar to or different from the measures on trademarks analysed by panels and the

[332] Annex III: Nutrition Food Bars Imports and Market Shares.
[333] Annex III: Nutrition Food Bars Imports and Market Shares.
[334] Annex III: Nutrition Food Bars Imports and Market Shares.
[335] Annex III: Nutrition Food Bars Imports and Market Shares.
[336] Facts of the Case, para. 3.6.
[337] Facts of the Case, para. 1.14.
[338] Facts of the Case, para. 3.6.
[339] Facts of the Case, para. 1.12.

panels and the Appellate Body in the recently adjudicated *Australia – Tobacco Plain Packaging* dispute?	Appellate Body in the recently adjudicated *Australia – Tobacco Plain Packaging* dispute?
Is the trademark *Healthy Spear Bars* being used at all even if the use of one of its distinctive elements (*i.e.*, the term "healthy") has been prohibited by Article 15 of the *Food Information Package*? From the plain reading of Article 20, we note that the "use" of a trademark triggers the obligations enshrined in said Article. In the Case, Spear Bars Inc. is not currently using its registered trademark (*Healthy Spear Bars*), but rather a different mark (*Spear Bars*). Does this mean that Article 20 cannot be applied to the Case at hand? How do you reconcile your position with the fact that the *Appellate Body in Australia – Tobacco Plain Packaging* ruled on a measure amounting to a prohibition on use?	The panel and the Appellate Body in *Australia – Tobacco Plain Packaging* stated that there is no need for an examination of alternative measures when assessing the justifiability of an encumbrance under Article 20. In which cases -if any- is such examination warranted? Is it of any relevance for the justifiability test that Dale enacted a less trade-restrictive regulation (Get Fit Campaign) with the same policy objective of the *Food Information Package*?
How does the degree of restrictiveness of the *Food Information Package* (highly restrictive or slightly restrictive) affect the unjustifiability test to be undertaken by this panel?	Are the special requirements imposed by the *Food Information Package* capable of contributing, or actually contribute, to the pursued objective? Which facts of the Case may support this contribution? In what extent does this potential or actual contribution affect the analysis of the panel on the justifiability of the *Food Information Package*? If the contribution of the measure is in fact an element of the justifiability test, is the Respondent required to prove that the measure may potentially contribute or has contributed to achieving the pursued objective?

5.3 LEGAL ISSUES UNDER THE TFA: WHETHER THE ACTIONS OF BUDICA'S CUSTOMS AUTHORITY ARE INCONSISTENT WITH ARTICLE 10.8.2 OF THE TFA

5.3.1 Relevance of the issue

NOTE BY THE AUTHORS: *This set of facts was inspired by the tragedy which occurred in Beirut on 4 August 2020. Per the available information to date, the tragedy concerned the obligations of importers and authorities in respect of merchandise stored in ports. We send our sincere condolences to the victims and invite teams to use all legal tools, creativity, and skills in constructing this novel point of law.*

5.192. On 3 April 2020, Budica's customs authority rejected the importation of 10 containers filled with *Healthy Spear Bars* alleging the non-compliance of the cargo with the *Food Information Package.* The authority immediately notified the rejection of the merchandise to the importer, Spear Bars Inc.'s representative in Budica. The communication read as follows:

> (…) the importer shall re-consign or return the merchandise, directly or through a duly designated third party (…) failure to exercise this obligation within ten (10) calendar days will automatically, and without further notice, result in the declaration of the merchandise as uncleared goods in terms of Section 48 of the Budican Customs Act.[340]

[340] Facts of the Case, para. 4.2; Corrections and Clarifications No. 3.

5.193. Section 48 of the Budican Customs Act vests Budica's customs authority with the power to destroy goods declared as uncleared.

5.194. Considering Spear Bars Inc. did not timely respond to the communication above, Budica's customs authority declared the merchandise as *uncleared* and ordered its immediate destruction, via an administrative decision dated 13 April 2020.[341] Three days after the decision, the merchandise was destroyed.[342] Spear Bars Inc. filed an administrative appeal contesting the actions of the Budican customs authority.[343]

5.195. Ten days passed between the rejection of the import and the issuance of an administrative decision ordering its destruction and 13 days passed between the rejection of the import and the effective destruction of the merchandise. The legal question teams should address is whether this amount of time is "a reasonable period of time" within the meaning of Article 10.8.2 of the TFA.

5.3.2 Relevant legal standard and jurisprudence

5.196. Article 10.8 of the TFA provides the following:

> Formalities connected with importation, exportation and transit (…) 8. Rejected Goods:
>
> 8.1 Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter.
>
> 8.2 When such an option under paragraph 8.1 is given, and the importer fails to exercise it within a *reasonable period of time*, the competent authority may take a different course of action to deal with such non-compliant goods. (emphasis added)

5.197. Under Article 10.8.1 of the TFA, WTO Members are required to allow the importer to re-consign or return the merchandise to the exporter or to another person who has been designated by the exporter if the import of goods is rejected due to their failure to meet prescribed TBT requirements. The expression "shall, subject to and consistent with its laws and regulations" indicates an obligation rather than a mere encouragement,[344] which is, in any case, conditional upon consistency with national laws and regulations of the Member concerned.

5.198. Pursuant to Article 10.8.2 of the TFA, if the importer does not return or re-consign the rejected goods to the exporter within a *reasonable period of time*, the competent authority is vested with the power to undertake a different course of action. Accordingly, after the expiry of a *reasonable period of time*, the concerned Member may take actions to dispose of the goods in accordance with its national laws and regulations.

5.199. Article 10.8.2 of the TFA does not specify what is a *reasonable period of time*, leaving the term open to interpretation. Also, the provision does not indicate which should be the treatment of rejected goods if these are not returned or re-consigned within such *reasonable period of time.* Furthermore, the text is silent as to whether the exporting Member should accept the goods rejected by the competent authorities of the importing Member.

5.200. Teams are expected to develop an interpretation of Article 10.8.2 of the TFA based upon the rules contained in the Vienna Convention on the Law of Treaties ("VCLT") and on the interpretation of similar terms (as enshrined in other WTO agreements) in DSB adopted reports.

5.201. First, Articles 31, 32, and 33 of the VCLT reflect customary international law. Article 3.2 of the DSU indicates that the WTO dispute settlement shall serve to clarify the WTO agreements "in

[341] Facts of the Case, para. 4.3; Corrections and Clarifications No. 4.
[342] Facts of the Case, para. 4.3.
[343] Facts of the Case, para. 4.5.
[344] See Panel Report, *EC – Sardines,* para. 7.110.

accordance with customary rules of interpretation of public international law." This allows teams to interpret TFA terms in accordance with the rules of Articles 31, 32, and 33 of the VCLT.

5.202. Second, concerning the interpretation of similar terms of other WTO agreements in DSB adopted reports, teams shall bear in mind they should not automatically transpose the interpretation of other covered agreements into the interpretation of TFA terms. When applying the general rule of interpretation set forth in Article 31 of the VCLT,[345] the Appellate Body has emphasised that, when interpreting the ordinary meaning of terms in light of their *context*, one should first analyse their "immediate context" (*e.g.*, Article 10.8.2), other provisions of the relevant agreement (*e.g.*, preamble to the TFA), and the agreement as a whole (*e.g.*, TFA).[346] Furthermore, both panels and the Appellate Body have relied on the interpretation of similar terms in WTO agreements to guide their analysis of the relevant terms in the agreement at issue.[347]

5.203. Students may rely on provisions of other WTO agreements that use the term "reasonable period of time" or a similar term to interpret Article 10.8.2 of the TFA. The term "reasonable period of time" is found in Articles 21 (Surveillance of implementation of Recommendations and Rulings), 22 (Compensation and Suspension of Concessions), and 23 (Strengthening of the Multilateral System) of the DSU. In addition, Article 1.6 of the Agreement on Import Licensing Procedures provides that "[a]pplicants shall be allowed a reasonable period for the submission of licence applications." It further specifies that "[w]here there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period."

5.204. Similar terms are also found in Articles 2.9.4 (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies) and 5.6.4 of the TBT Agreement (Procedures for Assessment of Conformity by Central Government Bodies); Article 5.7 (Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection) of the SPS Agreement; Article 2.2.1 (Determination of Dumping) of the Antidumping Agreement; Articles V:1 (Economic Integration) and VI:3 (Domestic Regulation) of the GATS; and Articles 31.b (Other Use Without Authorisation of the Right Holder), 53.2 (Security of Equivalent Assurance), and 62.2 (Acquisition and Maintenance of Intellectual Property Rights and Related *Inter-Partes* Procedures) of the TRIPS Agreement.

5.205. When interpreting the term "reasonable period of time," as enshrined in the SPS Agreement, the Appellate Body has held that "what constitutes a "reasonable period of time" has to be established on a case-by-case basis and depends on the specific circumstances of each case."[348] When interpreting the same term, as enshrined in Article 21.3(c) of the DSU, the Arbitrator in *EC – Hormones (Article 21.3(c))* concluded that "it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB," preferably not exceeding the provided term of 15 months set out in the Article.[349]

5.206. The transposition by the teams of the available interpretations of the term "reasonable period of time," will require a significant argumentative effort since the term has been interpreted in substantially different contexts and matters. For instance, a "reasonable period of time" for a Member

[345] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[346] Appellate Body Report, *US – Clove Cigarettes*, para. 108 [interpreting the ordinary meaning of terms in Article 2.1 of the TBT Agreement in light of their context].

[347] For instance, the panel in *Saudi Arabia – IPRs* interpreted Article 73(b)(iii) of the TRIPS Agreement using the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the panel of *Russia – Traffic in Transit.* The latter, in view of the identical content of both provisions and the agreement with the analysis set forth in *Russia – Traffic in Transit* expressed by the parties and third parties to the dispute, Panel Report, *Saudi Arabia – IPRs*, paras. 7.230-7.231 and 7.4.3.1. See also: Appellate Body Report, *US – Gambling*, para. 291 and Appellate Body Report, *Argentina – Financial Services*, paras. 6.202-6.203.

[348] Appellate Body Report, *Japan – Agricultural Products II*, para 93; Appellate Body Report, *Russia – Pigs (EU)*, paras. 5.81-5.86; Appellate Body Report, *Korea – Radionuclides*, para. 5.107.

[349] Award of the Arbitrator*, EC – Hormones (Article 21.3(c))*, para. 26. Concerning Article 21.3(c) of the DSU, the Arbitrators in *Ukraine – Ammonium Nitrate (Article 21.3(c))* considered that the implementing Member "bore the overall burden of proving that the period of time requested for implementation constituted a reasonable period of time, Award of the Arbitrator, *Ukraine – Ammonium Nitrate (Article 21.3(c))*, paras. 3.42-3.46. See also: Award of the Arbitrator, *US – Shrimp II (Viet Nam) (Article 21.3(c)),* para. 3.4; Award of the Arbitrator, *US – Countervailing Measures (China) (Article 21.3(c))*, paras. 3.1-3.6.

to bring a measure into conformity with its WTO rights and obligations (Article 21.3(c) of the DSU) is substantially different from a "reasonable period of time" to be granted to an importer for the exercise of a right (Article 10.8.2 of the TFA).

5.3.3 Application of the legal standard

5.3.3.1 Arguments of Dale

5.207. Dale will argue that Budica did not provide to the importer a "reasonable period of time" for the re-consignment or return of the merchandise, in breach of Article 10.8.2. of the TFA.

5.208. Dale may assert that Article 10.8.1 provides a *prerequisite* for the exercise of the power granted to Members by Article 10.8.2. Thus, *only* when the importer is *allowed* to *exercise* the option of re-consignment or return under Article 10.8.1, is the competent authority allowed to "take a different course of action to deal with such non-compliant goods." Notably, Article 10.8.1 states that a Member "shall" allow the importer to re-consign or to return the rejected goods.

5.209. The terms "allow" and "exercise," should be read in conjunction with the phrase the "option (…) given [to the importer]." Dale could argue that the "option (…) given" by the competent authority should not be impossible to exercise by the importer, but rather shall provide a *real* opportunity, allowing the importer to proceed with the re-consignment or return of the merchandise. However, if this line of argumentation is developed, Budica could point out that Dale's panel request includes only a claim of violation of Article 10.8.2 of the TFA. Therefore, Dale can rely on Article 10.8.1 as context for interpreting Article 10.8.2 and should refrain from suggesting that Budica also acted inconsistently with Article 10.8.1.

5.210. Dale could also argue that the timeframe of 10 days provided for re-consignment or return of 10 containers filled with merchandise is virtually impossible to observe. The re-consignment of the merchandise would have implied that, within 10 days, Spear Bars Inc. had to re-label each of the food bars in all 10 containers in order to comply with the *Food Information Package*. The return of the merchandise would have implied that, within 10 days, Spear Bars Inc. was mandated to coordinate, contract, and pay for the shipment of 10 containers back to Dale. Furthermore, Dale may argue that, considering that the distance between the main ports of Dale and Budica is 1.959 nautical miles - which, at a vessel speed of 13 knots, is 6 days and 7 hours apart – both options would be impossible to exercise.[350]

5.211. Dale could also point out that, under Article 1.6 of the Import Licensing Agreement, a reasonable period of time for submitting a licence application is at least 21 days. Dale could argue that, if a reasonable period of time for submitting a licence application is at least 21 days, a reasonable period of time for re-consigning or returning a merchandise should be at least equally long. Dale could elaborate on the difference between a licence application process, which, according to Article 1.6 of the Import Licensing Agreement, "shall be as simple as possible," and a more demanding process of re-consigning or returning goods.

5.212. Based on this, Dale could argue that Budica acted inconsistently with Article 10.8.2 of the TFA by providing to Spear Bars Inc. a timeframe for re-consignment or return which was impossible to comply with. Accordingly, as the importer could not exercise the right to re-consignment or return under Article 10.8.1 (relevant context of Article 10.8.2), Budican authorities were not enabled to "take a different course of action to deal with such non-compliant goods" within the meaning of Article 10.8.2.

5.213. Dale may also use the doctrine of *abus de droit*, which prohibits the abusive exercise of Members' rights and mandates their exercise in good faith (*e.g.*, in a reasonable manner).[351] Based upon this principle, Dale may assert that Budica *abusively* exercised its right to "take a different course

[350] Corrections and Clarifications No. 7.

[351] The Appellate Body in *US – Shrimp* stated: "(…) the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be pursuant to the general principle of international law exercised bona fide, that is to say, reasonably. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting," Appellate Body Report, *US – Shrimp*, para. 158.

of action to deal with such non-compliant goods" because it did not provide the importer with a *real* option of re-consigning or returning such goods, and granted, instead, a period of time which rendered this option impracticable.

5.3.3.2 Arguments of Budica

5.214. Budica may argue that Members do not have an obligation to grant a reasonable period of time for the re-consignation or return of merchandise under Article 10.8.2 of the TFA. In this regard, Budica may stress that the term "reasonable period of time" qualifies the phrase "importer fails to exercise [the re-consignation or return]" and does not qualify Members' obligation to allow the re-consignment or return of goods referred to in Article 10.8.1 of the TFA.

5.215. Thus, while Members are mandated to *allow* the re-consignment or return of rejected merchandise (without further qualifications), importers have to exercise these options within a "reasonable period of time" in order to avoid potential destruction of goods. Thus, Budica may argue that, absent Article 10.8.2, the right to re-consign or return would exist indefinitely.

5.216. In the alternative, Budica may also contend that the amount of time provided was "reasonable," within the meaning of Article 10.8.2 of the TFA, considering the ample leeway granted to Members by this provision and the inherent dynamism of trade.

5.217. First*,* concerning the ample leeway, Article 10.8.2 of the TFA does not establish a fixed period of time (*e.g.*, 10 days), but rather indicates that a *reasonable* period of time is to be given to the importer to return or re-consign goods. The absence of a fixed period of time signals that the Members' intention was to permit the importing Member to establish the reasonable period of time on a case-by-case basis and depending on the specific circumstances. This view may be supported by the explanation of the term "reasonable period of time," as enshrined in the SPS Agreement, provided by the Appellate Body in *Japan – Agricultural Products II*, *Russia – Pigs (EU)*, and *Korea – Radionuclides.*[352]

5.218. The absence of a specified timeframe in Article 10.8.2 may also indicate the intention of Members to accord leeway for Members to determine the "reasonable period of time" pursuant to their domestic legislation, such as Section 48 of the Budican Customs Act, which states that:

> (…) if merchandise imported into the customs territory is not cleared for consumption, warehoused, or transhipped within 10 days from the date of unloading thereof at a port or is declared as uncleared by the Budican Customs Authority, such goods can be destroyed or disposed of by the custodian.[353]

5.219. Budica may further note that, as a company selling its merchandise to Budica, Spear Bars Inc. is expected to be aware of the relevant Budican legislation.

5.220. Teams may try to support this position with the interpretation of the term "reasonable period of time" in Article 21.3(c) DSU, which "should be the shortest period possible *within the legal system of the Member.*"[354] However, teams should be wary that this interpretation has been developed by Arbitrators in the context of determining a reasonable period of time to comply with the DSB decisions. Teams should be able to explain how the Arbitrators' interpretation of Article 21.3(c) of the DSU is relevant for interpreting Article 10.8.2 of the TFA.

5.221. Second*,* concerning the inherent dynamism of trade, relying on Article 31 of the VCLT, Budica may underscore that the *ordinary meaning* of the term "reasonable" is "acceptable and appropriate in a particular situation,"[355] "showing reason or sound judgment," or "not extreme, immoderate, or excessive."[356]

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[352] Appellate Body Report, *Japan – Agricultural Products II*, para 93; Appellate Body Report, *Russia – Pigs (EU)*, paras. 5.81-5.86; Appellate Body Report, *Korea – Radionuclides*, para. 5.107.
[353] Facts of the Case, footnote 16.
[354] Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26.
[355] Oxford Dictionary Online.
[356] Collings Dictionary Online.

5.222. Budica also may refer to the *immediate context* of this term reflected, *inter alia*, in the *preamble* to the TFA, which indicates: "Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 *with a view to further expediting the movement, release and clearance of goods* (…)."

5.223. From the above, Budica may conclude that the period of 10 days was reasonable in the particular context of trade and that it did not lack "reason or sound judgement" nor was "extreme"[357] considering that the imposition of a longer period of time would be contrary to the *immediate context* of the provision (expediting the movement, release and clearance of goods) and, generally, to the *object and purpose* of the TFA (delivering faster trade).

5.224. Lastly, as a potential defence to Dale's arguments concerning the distance and time between Dale and Budica's territories (1.959 nautical miles and 6 days and 7 hours), Budica could argue that Dale, theoretically, could have contacted a vessel that was already in Budica in an effort to comply with the local legislation.

5.3.4 Questions to the parties

Dale	Budica
Is the term "reasonable period of time" -or similar terms- used in other WTO agreements? Is the interpretation of this term under other WTO agreements by panels and the Appellate Body relevant for interpreting Article 10.8.2 of the TFA? Why should we transpose the interpretation of the term "reasonable period of time" contained in other WTO agreements to the interpretation of the TFA?	Is the term "reasonable period of time" -or similar terms- used in other WTO agreements? Is the interpretation of this term under other WTO agreements by panels and the Appellate Body relevant for interpreting Article 10.8.2 of the TFA? Why should we transpose the interpretation of the term "reasonable period of time" contained in other WTO agreements to the interpretation of the TFA?
Article 1.6 of the Import Licensing Agreement provides that "a reasonable period of time" for submitting a licence application should be at least 21 days. Can the timeframe stipulated in the Import Licensing Agreement guide the panel's interpretation of Article 10.8.2 of the TFA? Are a preparation of an import licensing application, on the one hand, and re-consignation or return of merchandise, on the other hand, comparable? Could it be that one of those procedures necessitates more/less time than the other?	Article 1.6 of the Import Licensing Agreement provides that "a reasonable period of time" for submitting a licence application should be at least 21 days. Can the timeframe stipulated in the Import Licensing Agreement guide the panel's interpretation of Article 10.8.2 of the TFA? Are a preparation of an import licensing application, on the one hand, and re-consignation or return of merchandise, on the other hand, comparable? Could it be that one of those procedures necessitates more/less time than the other?
Does the term "reasonable period of time" contained in Article 10.8.2 qualify the obligation of WTO *Members* provided in Article 10.8.1 or the obligation of *importers* exercising their right to re-consignation or return?	In interpreting the term "reasonable period of time" in Article 10.8.2 of the TFA, can the panel be guided by the interpretation developed by Arbitrators in the context of proceedings under Article 21.3(c) of the DSU? Why?
	Article 10.8.2 reads that if "the importer fails to exercise [the re-consignment or return] within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods." Article 10.8.2 thus states that it is for the importer to re-consign or return the goods within a reasonable period of time. In light of this, is there an obligation for the

[357] Collings Dictionary Online.

	importing Member to determine a reasonable period of time for re-consignment or return? If no, does it mean that it is for the importer alone to decide on the time for re-consignment or return? What would be the practical implications of such an interpretation?
	Does a Member allow the re-consignment or return of merchandise, in terms of Article 10.8 of the TFA, if it grants a period of time which renders these options impracticable?

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