

JHJMCC 2020-2021

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Team: 054

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

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

Dale

*(Complainant)*

**vs**

Budica

*(Respondent)*

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**SUBMISSION OF THE COMPLAINANT**

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**LIST OF REFERENCES****I. CONVENTIONS AND TREATIES**

<b>Abbreviation</b>	<b>Long form</b>
DSU	Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.Y.S 401, 33 I.L.M. 1226 (1994).
HS Convention	International Convention on the Harmonized Commodity Description and Coding System, 1 January 1988, U.N.T.S. 1503.
TBT	Agreement on Technical Barriers to Trade (‘TBT Agreement’ or ‘TBT’), Annex 1A to Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, 1868 U.N.T.S. 120.
TFA	Protocol amending the Marrakesh Agreement establishing the World Trade Organization (Agreement on Trade Facilitation’), 27 November 2014, U.N.T.S. A-31874.

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 119.
VCLT	United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331.

## II. CASES

### A. Appellate Body Reports

Short title	Long form
<i>Australia - TPP</i>	Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R, adopted 29 June 2020.
<i>Brazil - Retreaded Tyres</i>	Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007.
<i>Canada - Periodicals</i>	Canada - Certain Measures Concerning Periodicals, WWT/DS31/AB/R, adopted 30 July 1997.
<i>EC - Asbestos</i>	European Communities - Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/AB/R, adopted 5 April 2001.
<i>EC - Bananas III</i>	European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997.
<i>EC - Sardines</i>	European Communities - Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002.

## GENERAL SECTION

## DALE (COMPLAINANT)

<i>EC - Seal Products</i>	European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R; WT/DS401/AB/R, adopted 22 May 2004.
<i>EU - Fatty Alcohols (Indonesia)</i>	European Union - Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia, WT/DS442/AB/R, adopted 29 September 2017.
<i>EU - PET (Pakistan)</i>	European Union - Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan, WT/DS486/AB/R, adopted 25 May 2018.
<i>Korea - Radionuclides</i>	Korea - Import Bans, and Testing and Certification Requirements for Radionuclides, WT/DS495/AB/R, adopted 26 April 2019.
<i>Mexico - Corn Syrup (Article 21.5 - US)</i>	Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, WT/DS132/AB/RW, adopted 21 November 2001.
<i>Peru - Agricultural Products</i>	Peru - Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, adopted 31 July 2015.
<i>US - Clove Cigarettes</i>	United States - Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, adopted 24 April 2012.
<i>US - COOL</i>	United States - Certain Country Origin Labelling (COOL) Requirements, WT/DS384/AB/R, adopted 23 July 2012.
<i>US - Corrosion-Resistant Steel Sunset Review</i>	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.
<i>US - Hot-Rolled Steel</i>	United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001.

<i>US - Tuna II (Mexico)</i>	United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012.
<i>US - Upland Cotton</i>	United States - Subsidies on Upland Cotton, WT/DS267/AB/R, adopted 21 March 2005.
<i>US - Zeroing</i>	United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/RW, adopted 31 August 2009.

**B. Panel Reports of the WTO**

<b>Short title</b>	<b>Long form</b>
<i>Australia - TPP</i>	Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/R, adopted 29 June 2020.
<i>Colombia - Ports of Entry</i>	Colombia - Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, adopted 20 May 2009.
<i>EC - Asbestos</i>	European Communities - Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/R, adopted 5 April 2001.
<i>EC - IT Products</i>	European Communities and its Members States - Tariff Treatment of Certain information Technology Products, WT/DS375/R; WT/DS376/R; WT/DS377/R, adopted 21 September 2010.
<i>EC - Trademarks and Geographical Indications</i>	European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/R, adopted 20 April 2005.
<i>Mexico - Corn Syrup</i>	Mexico - Anti-Dumping Investigation of the High-Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R, adopted 13 January 1999.

<i>Saudi Arabia - Intellectual Property Rights</i>	Saudi Arabia - Measures concerning the Protection of Intellectual Property Rights, WT/DS567/R, adopted 16 June 2020.
<i>US - Clove Cigarettes</i>	United States - Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R, adopted 24 April 2012.
<i>US - COOL</i>	United States - Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R; WT/DS386/R, adopted 23 July 2012.
<i>US - Section 301 Trade Act</i>	United States - Sections 301-310 of the Trade Act 1974, WT/DS152/R, adopted 27 January 2000.
<i>US - Shrimp II (Viet Nam)</i>	United States - Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/R, adopted 22 April 2015.
<i>US - Tuna II (Mexico)</i>	United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted 13 June 2012.

### C. GATT Panel Reports

Short title	Long form
<i>US - Superfund</i>	United States - Taxes on Petroleum and Certain Imported Substances, L/6175 - 34S/136, adopted 17 June 1987.

### III. ARTICLES AND CONTRIBUTIONS

Abbreviation	Long form
Armella (2019).	Armella, S. (2019). WTO Agreement on Trade Facilitation (TFA): General Rules on Simplification, Harmonization and Modernization of Administrative Procedures. <i>Global Trade and Customs Journal</i> , 14(6), 281-286.



Caballero (2019).	Caballero, B. (2019). "Humans against Obesity: Who will win?". <i>Advances in Nutrition (Adv Nutr)</i> 10, 4-9.
Eeckhout (1997).	Eeckhout, P.V. (1997). The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems. <i>Common Market Law Review</i> , 34, 11-58.
Handbook on Dispute Settlement (2004).	WTO Secretariat, <i>A Handbook on the WTO Dispute Settlement System</i> (1st ed. Cambridge University Press 2004).
Handbook on Dispute Settlement (2017).	WTO Secretariat, <i>A Handbook on the WTO Dispute Settlement System</i> (2nd ed. Cambridge University Press 2017).
Jackson (1992).	Jackson, J. (1992). Status of Treaties in Domestic Legal Systems: A Policy Analysis. <i>American Journal of International Law</i> , 86(2), 310-340. doi:10.2307/2203236.
Marceau (2013).	Marceau, G. (2013). The New Jurisprudence in US – Clove Cigarettes, US – Tuna II and US – COOL. <i>Asian Journal of WTO and International Health Law and Policy (AJWH)</i> , 8(1), 1-39.
Panizzon (2006).	Panizzon, M. (2006). Good faith in the jurisprudence of the WTO: the protection of legitimate expectations, good faith interpretation, and fair dispute settlement. <i>Hart</i> .
Shangguan, S. <i>et al</i> (2018).	Shangguan, S. <i>et al</i> (2018). Meta-Analysis of Food Labelling Effects on Consumer Diet Behaviors and Industry Practices. <i>American Journal of Preventive Medicine</i> , 56(2), 300-314.
Van den Bossche & Zdouc (2013).	Van den Bossche, Peter, and Werner Zdouc. (2013). <i>The Law and Policy of the World Trade Organization: Text, Cases and Materials</i> . 3rd ed. Cambridge: Cambridge University Press.

## IV. OTHER MATERIALS

Abbreviation	Long form
Fortune (2020).	“Protein Bar Market Size, Share & COVID-19 Impact Analysis, By Source (Plant-Based and Animal-Based), By Type (Sports Nutritional Bars, Meal-Replacement Bar, and Others), By Distribution Channel, and Regional Forecast, 2020-2027.” Fortune Business Insights. Fortune. Accessed 26 October 2020. <a href="https://www.fortunebusinessinsights.com/industry-reports/protein-bar-market-100805">https://www.fortunebusinessinsights.com/industry-reports/protein-bar-market-100805</a> .
Gearing (2015).	Gearing, Mary. "Natural and Added Sugars: Two Sides of the Same Coin" Harvard University Blog, accessed January 4, 2021. <a href="http://sitn.hms.harvard.edu/flash/2015/natural-and-added-sugars-two-sides-of-the-same-coin/">http://sitn.hms.harvard.edu/flash/2015/natural-and-added-sugars-two-sides-of-the-same-coin/</a> .
G/TBT/1/Rev.10.	Committee on Technical Barriers to Trade, G/TBT/1/Rev.10.
International Trade Centre (2020).	"Getting Down to Business: Making the Most of the WTO Trade Facilitation Agreement," International Trade Centre, accessed January 4, 2021. <a href="https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Getting%20Down%20to%20Business_WTO%20Technical%20Notes_Low-res.pdf">https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Getting%20Down%20to%20Business_WTO%20Technical%20Notes_Low-res.pdf</a> .
Merriam-Webster Dictionary.	Merriam-Webster Dictionary Online. Accessed 28 December 2020. <a href="http://www.merriam-webster.com/dictionary">www.merriam-webster.com/dictionary</a> .
Shoup (2019).	Shoup, Mary Ellen. "Study: What kind of impact does food labeling have on consumption?" Food Navigator USA accessed January 4, 2021.

	<a href="https://www.foodnavigator-usa.com/Article/2019/01/14/Study-What-kind-ofimpact-does-food-labeling-have-on-consumption#">https://www.foodnavigator-usa.com/Article/2019/01/14/Study-What-kind-ofimpact-does-food-labeling-have-on-consumption#</a> .
UNCTD (2011).	UNCTD. Technical Notes on Trade Facilitation Measures, 2011.
WHO Best Buys (2020).	World Health Organization. "Best Buys' and other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases (2013-2020)." Accessed January 4, 2020. <a href="https://www.who.int/ncds/management/WHO_Appendix_BestBuys.pdf">https://www.who.int/ncds/management/WHO_Appendix_BestBuys.pdf</a> .
WTO TBT Enquiry Point Guide (2018).	WTO Trade and Environment Division, WTO TBT ENQUIRY POINT GUIDE: Making Transparency Work < <a href="http://www.wto.org/english/tratop_e/tbt_e/tbt_enquiry_point_guide_e.pdf">www.wto.org/english/tratop_e/tbt_e/tbt_enquiry_point_guide_e.pdf</a> > accessed 28 December 2020.

**LIST OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Long form</b>
AB	Appellate Body
ABR	Appellate Body Report
Art. / Arts.	Article / Articles
BAC	Budican Administrative Court
BCA	Budican Customs Authority
DS	Dispute Settlement
DSU	Dispute Settlement Understanding
DSP	Dispute Settlement Proceedings
DSB	Dispute Settlement Body
FIP	Food Information Package Decree (457)
LFT	Less Favorable Treatment
MTS	Multilateral Trading System
PR	Panel Report
TBT	Agreement on Technical Barriers to Trade
TFA	Agreement on Trade Facilitation
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

**SUMMARY OF PLEADINGS****I. Dale's request for the establishment of the Panel is in accordance with Art. 3.7 of the DSU**

- The FIP can be claimed before the DSB because its suspension by the BAC does not limit Dale's right to do so.
- The WTO DSB has mandatory and exclusive jurisdiction over the matter at hand. It is thus the only available body that can rule a breach of the provisions of the covered Agreements.

**II. The FIP constitutes a technical regulation within the meaning of TBT Annex 1.1**

- The FIP lays down characteristics on the products by means of labelling requirements and prohibitions on the use of trademarks. The FIP conveys the criteria that products must meet in order to use the *Free-*, *Low-* and *High-Content* labels, as well as the restriction on the use of trademarks relating to health.
- The labelling requirements are imposed in a mandatory fashion since the FIP is an enforceable and binding instrument that imposes sanctions and uses prescriptive language. More importantly, the application of the sanctions mandated in the FIP have proven their *de facto* mandatory character.

**III. The FIP is inconsistent with TBT Art. 2.1**

- *Celtic Flavour Bars* and *Healthy Spear Bars* are like products because they share similar nature and quality, consumers taste and habits, end-uses, and HS coding.
- The FIP modifies the conditions of competition in detriment of *Healthy Spear Bars*. It creates incentives that discourage the importation of *Healthy Spear Bars* and impairs the ability to promote the product.
- The FIP does not stem from a legitimate regulatory distinction because it is arbitrary and unjustifiable. The FIP is not calibrated to fulfil its objective and is not applied in an even-handed manner.

**IV. The FIP is inconsistent with TBT Art. 2.2**

- The FIP pursues an illegitimate objective due to the illegitimate means by which it is pursued.
- The FIP is more trade restrictive than necessary. This is due to the high trade restrictiveness of the measure, the non-substantial degree of contribution made by the FIP

to address consumer misinformation and public health, and the uncertainty of the nature of the risks and gravity of consequences that would arise from non-fulfilment.

- There are less restrictive, readily available alternative measures that contribute similarly to the objectives pursued by the FIP.

**V. The FIP is inconsistent with TRIPS Art. 20**

- The FIP sets special requirements in two ways: (i) the prohibition of trademarks that evoke healthiness on processed food products that contain certain amounts of nutritional values, and (ii) the inclusion of a *High-Content* label to said product.
- The FIP encumbers the use of the *Healthy Spear Bars* trademark in the course of trade because it prohibits the use of the word ‘*healthy*’.
- The encumbrance is unjustifiable because the reasons for the imposition of the special requirements do not support the resulting encumbrances.

**VI. The FIP, as applied by the BCA, is inconsistent with TFA Art. 10.8.2**

- The time given to Spear Bars Inc. to exercise the option to reconsign the April 2, 2020 cargo was not reasonable.
- The decision to destroy the merchandise was contrary to Budica’s national laws.
- The conduct of the BCA was contrary to the principles of the TFA.

**VII. The absence of response from Budica’s enquiry point to Dale’s request is inconsistent with TBT Art. 10.1.1**

- Dale’s request to Budica’s enquiry point was reasonable and Budica acknowledged receiving it. However, the enquiry point failed to provide an answer even though more than a year has passed since the request was made.
- A failure to give a response to a Members’ request before an enquiry point at all is a contravention of the obligation set in TBT Art. 10.1.1.
- By ignoring Dale’s request, Budica has foregone its transparency obligations under the TBT, as well as the importance of enquiry points for communication in international trade.

**STATEMENT OF FACTS**

1. Dale, Budica and Enge are members of the WTO. The three states are also members of the UN, the WHO, the FAO, and the RAHO.
2. Budica has a world-renowned food bar industry and a strong market for this product. Budica's leading national producer of bars is *Celtic Flavour Bars*. However, imported nutritional bars play a leading role in the market. *Wild Tropic – All Natural Bars* (from Enge) and *Healthy Spear Bars* (from Dale) are the primary competitors of *Celtic Flavour Bars* with a market share of 37% and 34% respectively, as of September 2019.
3. On October 1, 2019 Budica enacted the FIP. It was allegedly enacted to address the growing obesity epidemic in Budica. It included labelling requirements accompanied with health warnings that applied to packaged processed food products that exceeded certain thresholds of added sugars, saturated fats and sodium. It also included restrictions on the use of trademarks evoking healthiness on products with certain contents of those components. *Healthy Spear Bars* has been specially affected by these provisions. Since the enactment of the FIP its import volumes to Budica have decreased by 13% and its market share by 26%.
4. On September 15, 2019, Dale sent a communication to the Budican enquiry point established under TBT Art. 10.1.1. Dale sought to clarify the definitions of “added sugar” and “saturated fats” in Art. 1 as well as certain aspects of the application of FIP Art. 15. In the absence of a reply from Budica, Dale followed up on its request on October 2, 2019. To date, Dale has not received a reply to its enquiry.
5. Spear Bars Inc. is a Dalean enterprise that produces *Healthy Spear Bars*, a nutritional bar. On April 3, 2019, the BCA rejected a cargo of *Healthy Spear Bars* based on inconsistency with the FIP. Spear Bars Inc. was notified of this decision and was given 10 days to respond. The consequences that would arise out of non-response were not communicated. On April 13, 2019, Budican authorities decided to destroy the cargo. As a consequence of this decision, the FIP is currently suspended pending a ruling of BAC.
6. Dale decided to initiate WTO dispute settlement consultations against Budica. After unsuccessful consultations, Dale requested the establishment of a Panel to the DSB.

**IDENTIFICATION OF THE MEASURES AT ISSUE**

Measure 1: The Presidential Decree 457: Food Information Package Decree (the “FIP”).

Measure 2: The absence of response from Budica’s enquiry point to Dale’s request, dated September 15, 2019.

**LEGAL PLEADINGS****I. DALE’S REQUEST FOR THE ESTABLISHMENT OF THE PANEL IS IN ACCORDANCE WITH DSU ART. 3.7**

DSU Art. 3.7 requires the complaining party to exercise a self-judgment analysis on whether a claim brought before the DSB would be ‘fruitful’. According to Art. 3.7, Members enjoy a “broad discretion in deciding whether to bring a case against another Member”<sup>1</sup> and are expected to self-regulate in deciding about the fruitfulness of any such action<sup>2</sup>. Given the largely self-regulating nature of Art. 3.7 first sentence, it is *presumed* that the decision to bring a case before the DSB is done in good faith<sup>3</sup>. Therefore, the burden of proof shifts to the respondent party. To demonstrate a violation of DSU Art. 3.7, Budica must demonstrate that Dale erred in self-judging the fruitfulness for engaging in DSP<sup>4</sup>. Hence, unless Budica proves that Dale breached Art. 3.7, the Panel should not analyze Dale’s self-judgment exercise<sup>5</sup>.

In any case, should the Panel examine Dale’s exercise of judgment under Art. 3.7 obligations, it must determine if it “frivolously set in motion the procedures contemplated in the DSU”<sup>6</sup>. It is Dale’s submission that it did not frivolously started this dispute since (A) the FIP is a measure that can be claimed before the DSB and, (B) WTO DSB has mandatory and exclusive jurisdiction over the matter at hand.

**A. The FIP is a measure that can be claimed before the DSB**

According to DSU Art. 3.3, disputes arise when a Member considers that benefits accrued under covered agreements are being impaired by measures taken by another Member<sup>7</sup>. A measure is “any act or omission attributable to a WTO Member”<sup>8</sup> and does not have formal

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<sup>1</sup> ABR, *EC - Bananas III*, [135].

<sup>2</sup> *Id.*

<sup>3</sup> ABR, *Mexico - Corn Syrup*, [74].

<sup>4</sup> *Id.* See also ABR, *Peru - Agricultural Products*, [5.28]; Panizzon (2006), [317].

<sup>5</sup> *Id.*

<sup>6</sup> ABR, *Peru - Agricultural Products*, [5.18].

<sup>7</sup> See also ABR, *US - Upland Cotton*, [264]; Van Den Bossche & Zdouc (2013), 373.

<sup>8</sup> ABR, *US - Corrosion - Resistant Steel*, [81].



restrictions<sup>9</sup>. Accordingly, the very existence of a mandatory measure triggers the complainant's right to bring a dispute before the DSB<sup>10</sup>. Limiting such right frustrates current trade, prevents the predictability of future trade<sup>11</sup>, and results in an interpretation contrary to DSU provisions.

DSU Art. 6.2 states that measures have no temporal limitations to be claimed before the DSB<sup>12</sup>. The DSB and WTO Panels have previously analyzed measures whose legislative basis had expired, that were not yet in force or had been enacted after the establishment of a Panel<sup>13</sup>. Dale sees no reason for this Panel to consider that measures whose effects are suspended cannot be claimed before the DSB.

Furthermore, Dale rose its claim after exercising a self-judgment analysis that led to the conclusion that its benefits were being impaired by the FIP. However, Budica contested Dale's panel request arguing that the measure had not yet taken effect, nor would it due to the BAC's decision<sup>14</sup>. Contrary to what Budica implies, the FIP entered into force and took effect on April 1<sup>st</sup>, 2020<sup>15</sup>. It was then suspended by an interim measure on August 23<sup>rd</sup>, 2020<sup>16</sup>. This interim measure may be lifted anytime if the BAC considers that risk of irreparable harm ceases to exist<sup>17</sup>.

The FIP's suspension should not limit Dale's right to claim the measure before the DSB. Four reasons support this view: *first*, the FIP is an enacted decree<sup>18</sup> that requires no further legislative action to be in force<sup>19</sup>; *second*, the FIP had effects before being suspended<sup>20</sup>; *third*, the FIP's re-entry into force depends solely in an unforeseeable decision of a Budican court<sup>21</sup>; and, *fourth*, such decision can further the application of the FIP in the future. Thus, the FIP is a measure that can be challenged before the DSB. A contrary ruling would create rights and obligations not contained in the WTO agreements, contrary to DSU Arts. 3.5 and 19.2. This frustrates the security and predictability of the trading system, as established in DSU Art. 3.2.

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<sup>9</sup> PR, *Saudi Arabia – Intellectual Property Rights*, [7.49].

<sup>10</sup> ABR, *US – Corrosion – Resistant Steel Sunset Review*, [82]. See also PR, *US – Superfund*, [5.2.2].

<sup>11</sup> PR, *US – Superfund*, [5.2.2].

<sup>12</sup> ABR, *US – Zeroing*, [121].

<sup>13</sup> ABR, *US – Zeroing*, [121]; ABR, *US – Upland Cotton*, [269]; PR, *EC – IT Products*, [7.140]; PR, *Colombia – Ports of Entry*, [7.54]. See also Handbook on Dispute Settlement (2004), 42.

<sup>14</sup> Case, [5.7].

<sup>15</sup> *Id.*, [3.6].

<sup>16</sup> Case, [5.2].

<sup>17</sup> Corrections and Clarifications, [26].

<sup>18</sup> Case, [3.5].

<sup>19</sup> Corrections and Clarifications, [22].

<sup>20</sup> Case, [4.1].

<sup>21</sup> ABR, *US – Corrosion – Resistant Steel Sunset Review*, [81].

**B. WTO DSB has mandatory and exclusive jurisdiction over the matter at hand**

The WTO DS system has *mandatory and exclusive jurisdiction*<sup>22</sup>. As per Art. 3.2 of the DSU, bringing a claim before the WTO's DSB is a right and obligation of WTO Members<sup>23</sup>. Its primary objective is to safeguard the negotiated rights and obligations enshrined in the WTO covered agreements<sup>24</sup>. DSU Art. 2.1 provides that the WTO DSB is the exclusive forum for Members to resolve alleged inconsistencies with WTO provisions. Accordingly, Members' domestic courts do not bear recognized authority to judge the consistency of measures with WTO covered agreements<sup>25</sup>. Should they do so, security and predictability of the WTO's DS system would be seriously impaired<sup>26</sup>. WTO agreements do not specify the effect and executability that their provisions have within domestic legal systems<sup>27</sup>.

In the case at hand, Dale legitimately exercised its right and obligation to resort to the DSB<sup>28</sup>. Budica might argue that the procedure cannot be fruitful since the matter is being studied, *in primis*, by the BAC. This defense should be rejected. First, Spear Bars Inc. challenged the measure alleging a breach of Budica's Consumer Protection Act<sup>29</sup>, which is a Budican internal provision. Second, upon this challenge, the BAC granted an interim measure to suspend the application of the FIP given that inconsistency with *domestic laws* could cause irreparable harm<sup>30</sup>. Since Dale brought a dispute challenging consistency of the FIP with WTO covered agreements, the WTO DSB is the only body with exclusive jurisdiction over the matter at hand.

In conclusion, Dale's actions are in accordance with the DSU Art. 3.7.

**II. THE FIP CONSTITUTES A TECHNICAL REGULATION WITHIN THE MEANING OF TBT ANNEX 1.1**

A measure is a technical regulation within the meaning of TBT Annex 1.1 if it meets the following criteria: it applies to an identifiable product or group of products, it lays down characteristics of the product, and compliance with product characteristics is mandatory<sup>31</sup>. Dale argues that the FIP is a technical regulation since it (A) applies to packaged processed

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<sup>22</sup> Handbook on Dispute Settlement (2017).

<sup>23</sup> ABR, *US - Corrosion-Resistant Steel Sunset Review*, [89].

<sup>24</sup> *Id.*

<sup>25</sup> PR, *US - Shrimp II (Viet Nam)*, [7.308].

<sup>26</sup> PR, *US - Section 301 Trade Act*, [7.75]. *See also* DSU, art 3(2); Jackson (1992); Eeckhout (1997), 57-58.

<sup>27</sup> Jackson (1992).

<sup>28</sup> Case, [5.5].

<sup>29</sup> *Id.*, [5.1].

<sup>30</sup> Corrections and Clarifications, [23]. *See also* Case, [5.2].

<sup>31</sup> ABR, *EC-Asbestos*, [66-70]; ABR, *EC - Seal Products* [5.1]; ABR, *EC - Sardines* [176]; PR, *US - Clove Cigarettes* [7.24].

food products, it (B) lays down labelling requirements and prohibits trademarks in a (C) mandatory fashion.

**A. The FIP applies to packaged processed food products**

A technical regulation must identify the product or group of products it covers to determine its scope. The products must be identifiable in the document at issue, so it is clear what the characteristics therein refer to<sup>32</sup>. FIP Art. 2 states that it is applicable to packaged processed food products sold in Budican territory, both from domestic and imported origin<sup>33</sup>. Hence, the FIP applies to an identifiable group of products, namely packaged processed food products.

**C. The FIP lays down product characteristics for packaged processed food products**

A measure lays down product characteristics as it sets forth, *inter alia*, a product's composition, size, shape, symbols or labelling requirements<sup>34</sup>. The measure may prescribe that a product *must* or *must not* possess certain characteristics<sup>35</sup>. Moreover, the characteristics do not only refer to intrinsic qualities to the product, but also to means of identification and appearance<sup>36</sup>. Dale submits that the FIP lays down product characteristics by setting labelling requirements and prohibitions on the use of symbols in the products' packaging.

Labelling requirements convey criteria to adopt specific labels<sup>37</sup>. What is more, the label on a product is a product characteristic on its own<sup>38</sup>. FIP Arts. 7, 8 and 9 establish the conditions under which *Free-*, *Low-* and *High-Content* labels may or must be used, respectively. Packaged processed food products must meet the established content thresholds from Arts. 7 and 8 to use the *Free-* and *Low-Content* labels. Similarly, if the products exceed the thresholds in Art. 9, they must use the *High-Content* label. Thus, they lay down product characteristics as they establish labelling requirements.

On the other hand, Art. 15 lays down product characteristics as it prescribes that products that exceed the established thresholds *must not* make use of trademarks evoking healthiness. This constitutes a product characteristic since the prohibition is related to the symbols and phrases that may or may not be present in a product's packaging<sup>39</sup>.

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<sup>32</sup> PR, *EC – Asbestos*, [8.38].

<sup>33</sup> Case, [3.6].

<sup>34</sup> PR, *Australia – TPP*, [7.149].

<sup>35</sup> *Id.*

<sup>36</sup> ABR, *EC-Asbestos*, [67].

<sup>37</sup> PR, *US – Tuna*, [7.76].

<sup>38</sup> PR, *EC – Trademarks and Geographical Indications*, [7.449].

<sup>39</sup> PR, *Australia – TPP*, [7.145].

Therefore, the FIP lays down product characteristics by setting forth labelling requirements and prohibitions on the use of trademarks evoking healthiness.

#### **D. Compliance with the product's characteristics is mandatory**

A measure must regulate the characteristics of identifiable products in a binding or compulsory fashion to be considered mandatory<sup>40</sup>. Elements that could indicate mandatoriness in a measure are: i) enforceability and binding nature under a Member's law; ii) sanctions to non-compliance; iii) an enforcement mechanism; and iv) prescriptive language<sup>41</sup>. Nonetheless, this analysis should not only take formal aspects into account, but also the *effect* of the measure<sup>42</sup>. That is to say that a measure could be *de facto* mandatory, even if its text suggests otherwise. Dale submits that the FIP is mandatory since it possesses the elements recently mentioned and its effects have proven its mandatory character.

The FIP is a binding measure under Budican law as it is an enacted Presidential Decree<sup>43</sup>. It is enforceable through Art. 16, which poses sanctions to non-compliance with Arts. 7, 8 and 9. As for Art. 15, it imposes a categorical prohibition by forbidding trademarks relating to health, which suggests mandatoriness<sup>44</sup>. This is strengthened by prescriptive language, which indicates a mandatory character as well<sup>45</sup>. Arts. 7 and 8 include terms such as 'may' in a restrictive context<sup>46</sup>, which has been interpreted as indicating a mandatory character<sup>47</sup>. Arts. 9 and 15 use the word 'shall', which indicates an obligation, especially in a legal context<sup>48</sup>.

Yet, adopting a merely formalistic interpretation to determine whether a measure is mandatory would allow members to evade the provisions of the TBT by using voluntary wording in a mandatory measure<sup>49</sup>. The analysis must be accompanied by a consideration of the effects of the measure to determine if it is *de facto* mandatory<sup>50</sup>. In this case, Dale's non-compliance with the provisions of the FIP led to the consequences mandated in Budican law<sup>51</sup>, therefore confirming the mandatory character of the language used and the measure as a whole. On April 3, 2020 the BCA rejected a cargo of Dalean *Healthy Spear Bars* on the grounds that it failed to meet the labelling requirements established by the FIP<sup>52</sup>. It is because

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<sup>40</sup> ABR, *EC-Asbestos*, [68].

<sup>41</sup> PR, *Australia-TPP*, [7.164-7.168].

<sup>42</sup> PR, *US – COOL*, [7.175].

<sup>43</sup> Case, [3.4].

<sup>44</sup> PR, *Australia-TPP*, [7.165].

<sup>45</sup> *Id.*, [7.164-7.168].

<sup>46</sup> Case, [3.6].

<sup>47</sup> PR, *Australia – TPP*, [7.165].

<sup>48</sup> *Merriam-Webster Dictionary Online*.

<sup>49</sup> PR, *US – COOL*, [7.175].

<sup>50</sup> *Id.*, [7.176].

<sup>51</sup> Case, [3.6].

<sup>52</sup> *Id.*, [4.1].

the FIP has a formal and *de facto* mandatory character that the events that led to the present dispute arose.

Dale acknowledges that FIP Arts. 7 and 8 differ from Arts. 9 and 15. While the adoption of the *Free-* and *Low-Content* labels is not required to enter the Budican market, the adoption of the *High-Content* label and the prohibition on the use of trademarks evoking healthiness is necessary to market the products when the thresholds are exceeded<sup>53</sup>. On this account, the respondent party might erroneously argue that FIP Arts. 7 and 8 are voluntary. Nevertheless, a measure can still be a technical regulation if the adoption of the labels it prescribes is not necessary to place the products on the market<sup>54</sup>. This is the case of Arts. 7 and 8, which set labelling requirements that are not indispensable to place packaged processed food products on the Budican market<sup>55</sup>. Indeed, the fact that the *Free-* and *Low-Content* labels are not required to sell or market packaged processed food products does not exclude their mandatory character.

Overall, the FIP refers to an identified group of products, namely packaged processed food products. The measure lays down product characteristics as it imposes labelling requirements and prohibitions on the use of symbols in the packaging. Lastly, the FIP is a mandatory legal instrument which is binding and enforceable under Budican law. It has also proven to be a *de facto* mandatory measure through its effects.

The FIP meets the three requirements of the standard and constitutes a technical regulation within the meaning of TBT Annex 1.1.

### III. THE FIP IS INCONSISTENT WITH TBT ART. 2.1

To establish a violation under TBT Art. 2.1, a complainant must prove that the imported and domestic products at issue are ‘like’ products and the treatment accorded to imported products is ‘less favorable’ than that accorded to like domestic products<sup>56</sup>. Dale argues that the FIP is inconsistent with TBT Art. 2.1 because (A) *Celtic Flavour Bars* and *Healthy Spear Bars* are like products and (B) the latter are accorded a *de facto* LFT.

#### A. *Celtic Flavour Bars* and *Healthy Spear Bars* are ‘like’ products.

Products are ‘like’ based on the nature and extent of the competitive relationship between them in the market<sup>57</sup>. A non-exhaustive list of four criteria has been used: “(i) the properties,

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<sup>53</sup> *Id.*, [3.6].

<sup>54</sup> ABR, *US – Tuna II (Mexico)*, [196].

<sup>55</sup> Case, [3.6].

<sup>56</sup> ABR, *US – Clove Cigarettes*, [87].

<sup>57</sup> *Id.*, [120].

nature and quality of the products; (ii) the end-uses of the products; (iii) the consumers' tastes and habits (...) in respect to the products; and (iv) the tariff classification of the products"<sup>58</sup>.

Dale submits that *physical characteristics* indicate a close competitive relationship between the two products. Both products are made of oats, muesli, rice and whey protein<sup>59</sup>. Also, both bars are coloured in tones of yellow<sup>60</sup>. Moreover, the products can serve the same *end-uses*. They are both snacks that can be used to replace meals or to complement dietary intakes<sup>61</sup> with almost identical ingredients. These facts indicate they can serve the same end-uses that consumers attribute to them. Dale argues that the difference in *consumers' habits* does not relate to the inherent characteristics of the products. Rather, these differences can be explained by the fact that *Celtic Flavour Bars* are marketed differently<sup>62</sup>. And yet, they are both used as snacks. Finally, both products have the same *international tariff classification* as they are included under HS Code 190420. The additional digits in *Celtic Flavour Bars'* classification are not part of the Harmonized System and were added by Budica<sup>63</sup>. Hence, *Celtic Flavour Bars* and *Healthy Spear Bars* are 'like' products.

**E. Treatment accorded to *Healthy Spear Bars* is less favorable than that accorded to *Celtic Flavour Bars***

Dale submits that the FIP accords a *de facto* LFT to *Healthy Spear Bars* since (1) it modifies the conditions of competition to the detriment of imported products *vis-à-vis* like domestic products and (2) the detrimental impact on competitive conditions does not stem from a legitimate regulatory distinction<sup>64</sup>. Once a complainant shows that conditions have been modified in detriment of imported products, the burden of proof regarding the legitimacy of the regulatory distinction rests on the respondent<sup>65</sup>.

**1. The FIP modifies the conditions of competition to the detriment of imported products vis-à-vis like domestic products**

A modification occurs when the conditions under which like goods, domestic and imported, compete in the market within a Member's territory are affected<sup>66</sup>. Art. 2.1 prohibits both *de jure* and *de facto* LFT<sup>67</sup>. In the latter, a measure may create incentives for market

<sup>58</sup> ABR, *EC – Asbestos*, [101]; Marceau (2013), 6-7.

<sup>59</sup> Case, [2.3][2.8].

<sup>60</sup> *Id.*, [2.4][2.8].

<sup>61</sup> *Id.*, [2.1].

<sup>62</sup> *Id.*, [2.4].

<sup>63</sup> HS Convention, Art. 3.

<sup>64</sup> ABR, *US – Clove Cigarettes*, [180][182].

<sup>65</sup> ABR, *US – Tuna II (Mexico)*, [216].

<sup>66</sup> ABR, *US – COOL*, [271].

<sup>67</sup> PR, *US – COOL*, [7.301].

participants to behave in certain ways. Thereby, according LFT<sup>68</sup>. That examination may consider all the relevant features of the market such as market shares, consumer preferences, and historical trade patterns<sup>69</sup>.

Although imported and domestic packaged processed food products are given formally identical treatment under the FIP, it *de facto* modifies the conditions of competition to the detriment of *Healthy Spear Bars* in two manners. First, the FIP creates incentives that discourage the importation of *Healthy Spear Bars*. On the one hand, it creates additional costs associated with the product's compliance with the labelling requirements. Considering the labelling requirements are exclusive to the Budican market, the cost makes the product pricier and therefore less desirable. These do not apply to *Celtic Flavour Bars* as they are not covered by the *High-Content* labelling requirements. Because they belong to the ample *Low-Content* threshold, the labelling requirements are not necessary to place the products on the market. If they decide to use the label, it will be due to a calculated business decision. The measure thus modifies the way in which imported and domestic products compete because it imposes additional costs on the former which are not borne by the latter.

On the other hand, the FIP seriously impairs the ability to promote and market *Healthy Spear Bars*<sup>70</sup>. The measure prohibits the use of the product's commercial name. This disables retailers and importers to rely on the product's brand recognition. This impairment extends to the competitive opportunity that stems from the exploitation of the *Healthy Spear Bars* trademark. Trademarks help consumers identify a product or service they are already familiar with<sup>71</sup>. Without the commercial name this function cannot be achieved. Another benefit of trademarks is to stimulate sales through the marketing of products<sup>72</sup>. Because the use of the Dalean product's mark is prohibited, retailers and importers are barred from enjoying this benefit. This impairment in the use of trademarks only applies to *Healthy Spear Bars* because *Celtic Flavour Bars* are under the thresholds imposed in Art. 15. The restriction on the use of trademarks applied to imported bars affects the way in which both products compete. The effect on imports generated by these incentives can already be perceived<sup>73</sup>.

Second, the FIP puts *Healthy Spear Bars* in a disadvantageous position regarding consumer preferences<sup>74</sup>. These bars are forced to use a *High-Content* health warning while

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

<sup>69</sup> *Id.*, [269].

<sup>70</sup> *Id.*, [269].

<sup>71</sup> WIPO (2019).

<sup>72</sup> *Id.*

<sup>73</sup> Case, [Annex III].

<sup>74</sup> ABR, *US – Tuna II (Mexico)*, [233].

*Celtic Flavour Bars* are not. Dale notes that those labelling conditions constitute a disadvantage as consumers will be less inclined to buy a product with health warnings. Disparately, *Celtic Flavour Bars* can use the *Low-Content* label, which can drive consumers toward their acquisition. Thus, the labelling requirements of the FIP deter buyers from consuming the imported products while giving the domestic products the possibility to use a label that can incite costumers to purchase them. This conclusion is confirmed by the change in consumers' behaviour when the FIP was in force. In the period from April to September 2020, *Healthy Spear Bars*' market share reduced 9% in comparison to the same period the year before the measure entered into force<sup>75</sup>.

Hence, the FIP modifies the conditions of competition to the detriment of *Healthy Spear Bars* vis-à-vis like domestic products.

## **2. The detrimental impact caused by the FIP does not stem from a legitimate regulatory distinction**

The legitimacy of a distinction is assessed by whether it is designed and applied in an 'even-handed manner'<sup>76</sup>. A distinction is not legitimate if it is designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination<sup>77</sup>. Discrimination is arbitrary or unjustifiable when the alleged rationale for discriminating does not relate to the pursuit of, or would go against the objective of the measure, or when aspects of the measure are difficult to reconcile with its declared objective<sup>78</sup>. Furthermore, regulatory distinctions must be "calibrated" to fulfil the objective pursued by the technical regulation<sup>79</sup>.

The FIP pursues the objective of providing consumers with information that can guide them towards healthier diets<sup>80</sup>. Dale argues that the FIP is designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination considering this objective. First, the determination to not make the *Free-* and *Low- Content* labels necessary to place nutritional bars in the market cannot be reconciled with the measure's goal. The FIP only provides half of the required information: consumers will know if they are making a presumably unhealthy decision, but not if they are striving towards a healthier diet.

Second, the ample *Low-Content* labelling threshold goes against the objective of providing consumers with information. The labelling for this category gives consumers the impression that they are purchasing a healthy product. Yet, because any packaged food

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<sup>75</sup> Case, [Annex III].

<sup>76</sup> ABR, *US – Tuna II (Mexico)*, [216].

<sup>77</sup> ABR, *US – COOL*, [271].

<sup>78</sup> ABR, *Brazil – Retreated tyres*, [227].

<sup>79</sup> ABR, *US – Tuna II (Mexico)*, [283].

<sup>80</sup> Case, [3.6].



product can be allocated in one of the labelling standards, many products that have contents close to the *High-Content* threshold will be eligible for the *Low-Content* label. There is no intermediate level. Thus, the measure fails to inform buyers of the specific risk that certain *Low-Content* products pose to their health.

Third, the measure is not calibrated to address the risks of obesity because it does not inform consumers of other unhealthy substances. The measure only considers added sugars as unhealthy. Research has demonstrated that natural sugars in heavily processed foods are as noxious as the former<sup>81</sup>. Additionally, it only considers saturated fats while ignoring trans fats, monounsaturated fats and polyunsaturated fats. Leaving out of the labelling requirements these other substances goes against the objective of addressing public health because it will not deter consumers of their consumption. Also, if the objective is to empower citizens with information on the contents of the products, disregarding these other ingredients with potentially harmful effects does not contribute to that pursuit.

Fourth, the distinction is *arbitrary* because it contradicts international standards regarding nutrition content and health claims. A measure is understood to be arbitrary if it is ‘capricious’ or ‘random’<sup>82</sup>. Budica has, despite being a member of the FAO, capriciously departed from relevant international standards without providing reasons for such course of action. The FAO *Guidelines* only contemplate *Low-* and *Free-Content* labels<sup>83</sup>. Moreover, the *Codex Alimentarius*<sup>84</sup> stipulates the principle that “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”. The latter has been violated as the *High-Content* label includes a health warning while the other labels only state the classification of the nutritional content.

Finally, Budica cannot rely on the WHO-RAHO *Recommended Daily Intake* or the WHO-FAO Report to legitimate its discrimination<sup>85</sup>. These documents, while recommending daily intakes of sugars, saturated fats and sodium, do not establish thresholds for content categories nor do they contemplate front-of-pack nutritional labels. An intent to support the FIP’s regulatory distinction thus bears no connection with these reports and could further be considered *arbitrary*.

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<sup>81</sup> Gearing (2015).

<sup>82</sup> ABR, *Brazil – Retreaded tyres*, [232].

<sup>83</sup> Case, [Annex IV].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

The arbitrariness stemming from the departure from the relevant international standards must be read in accordance with TBT Art. 2.4. Under this provision Members are required to use the relevant international standards in technical regulations except when they would be ineffective or inappropriate. Budica has not met this burden.

Therefore, the FIP is inconsistent with TBT Art. 2.1.

#### **IV. THE FIP IS INCONSISTENT WITH TBT ART 2.2**

According to TBT Art. 2.2, Members must ensure that the adoption of technical regulations does not create unnecessary obstacles to international trade. Such measures cannot be more trade restrictive than necessary to fulfil a legitimate objective, considering the risks non-fulfilment would create<sup>86</sup>. To determine inconsistency with TBT Art 2.2, a Panel must identify the objective pursued by the measure<sup>87</sup> and perform a *necessity* test. Dale submits that the FIP is inconsistent with Art. 2.2 because (A) it pursues an illegitimate objective and (B) is more restrictive than necessary to fulfil its stated objective.

##### **A. The FIP pursues an illegitimate objective**

A Panel is not bound by a Member's characterization of the objective pursued by a measure but must independently and objectively assess it<sup>88</sup>. This assessment entails an analysis of the measure's design, structure and characteristics<sup>89</sup>.

Dale submits that the objective of the FIP is *exclusively* to provide consumers with information regarding their diet and not to protect Budicans from obesity. Three reasons support this view. First, the title of the FIP<sup>90</sup> is "Food Information Package". Second, while the preamble of the FIP acknowledges obesity as a risk factor for NCDs, it does not state that the FIP's aim is to tackle it. The last clause of the preamble states that the FIP desires to provide Budicans with accurate, understandable, and simple information to make healthy decisions regarding their diet<sup>91</sup>. Third, the operative provisions of the FIP contain labelling requirements and restrictions on the use of trademarks. These types of measures are designed to inform or prevent misleading statements and have proven insufficient to tackle obesity.<sup>92</sup> Hence, an analysis of the measure's design, structure and characteristics leads to conclude that the FIP is aimed at providing Budicans with information regarding their diet and not at tackling obesity.

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<sup>86</sup> ABR, *US – COOL*, [369]

<sup>87</sup> ABR, *US - Tuna II (Mexico)*, [314].

<sup>88</sup> PR, *US – Tuna II (Mexico)*, [7.405].

<sup>89</sup> *Id.*, [7.406].

<sup>90</sup> *Id.*, [7.409].

<sup>91</sup> Case, [3.6].

<sup>92</sup> See Section IV.B.2 of this document.

Dale argues that this is also not a legitimate objective due to the illegitimacy of the means used to pursue it. In *US – Tuna II*, the AB did not reject Mexico’s reasoning that an objective may not be legitimate for the purposes of TBT Art. 2.2 due to the illegitimacy of the means used to pursue it<sup>93</sup>. Thereby implicitly accepting that the means used to achieve an objective may be considered in assessing its legitimacy. As stated above, the FIP asserts labelling contents based on distinctions that arbitrarily depart from relevant international standards and discriminate against imported products. Thus, the FIP’s objective is illegitimate.

**F. The FIP is more restrictive than necessary to fulfil its stated objective.**

Should the Panel find that the FIP seeks to address public health (*quod non*) or that the consumer information objective is legitimate (*quod non*), Dale submits that the FIP is more restrictive than necessary. To address this, the panel must make an analysis of three elements<sup>94</sup>: (1) the trade restrictiveness of the measure, (2) the degree of contribution to the objective pursued and (3) the risks that non-fulfilment would create. A measure’s consistency with TBT Art. 2.2 may be determined on the basis of this analysis alone, without proceeding to a comparative analysis<sup>95</sup>.

**1. The FIP is highly trade restrictive.**

A measure is trade restrictive if it has a limiting effect on international trade<sup>96</sup>. International trade is limited when imports of products are reduced<sup>97</sup> or when conditions of competition are modified<sup>98</sup>. The volume of imports of *Healthy Spear Bars* has been affected by the FIP. Within the year following the publication of Draft Decree 457, the imports of *Healthy Spears Bars* reduced in 13%<sup>99</sup>. Because of the structure and design of the FIP, certain packed processed food products are imposed labelling requirements that deter consumption. This might persuade consumers not to buy those products, therefore decreasing their internal demand. If the internal demand for a product declines, it follows that imports will decline as well. In the present case, the FIP affects Dalean products because *Healthy Spear Bars* have the strictest requirements and include the most discouraging labelling features imposed by the FIP<sup>100</sup>. Thus, it can be concluded that the FIP has contributed to the decrease in imports.

Further, as stated in Section III.B.1 above, the FIP modified the conditions of competition in detriment of the Dalean food bar industry. As a result of this alteration, international trade

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<sup>93</sup> ABR, *US – Tuna II (Mexico)*, [338].

<sup>94</sup> *Id.*, [320].

<sup>95</sup> *Id.*, [647].

<sup>96</sup> *Id.*, [319].

<sup>97</sup> PR, *Australia – TPP*, [7.1208].

<sup>98</sup> ABR, *Australia - TPP*, [6.385].

<sup>99</sup> Case, [Annex III].

<sup>100</sup> *Id.*, [Annex I, Figure 3].

between Budica and Dale has been affected. The incentives created by the measure have resulted in a reduction of trade flows: a 13% decline on volumes of imports since August 2019.

Hence, the FIP is highly trade restrictive.

## **2. The degree of contribution made by the FIP to address its objective is not substantial**

The degree of contribution of a measure can be analyzed in quantitative or qualitative terms<sup>101</sup>. Panels have examined it by analyzing the measure's design, structure and operation<sup>102</sup>. Scientific evidence also plays a significant role in this assessment, particularly when there is not enough data related to the application of the measure<sup>103</sup>. The former is a consequence of the required balance between the regulating nature of technical regulations and international trade<sup>104</sup>.

Dale submits that the FIP is insufficient to address consumer misinformation. First, the FIP is limited exclusively to warning consumers about 'unhealthy' diets. Nevertheless, as was stated in Section III.B.2 above, the FIP does not establish what is considered 'unhealthy'. Second, the FIP does not inform consumers on how to carry out a healthier diet because the *Free-* and *Low-Content* labels are not required in order for products to enter the Budican market.

Second, the degree of contribution made by the FIP to address public health is uncertain. Front-of-pack nutrition labelling has proven ineffective to address public health. Scientists from Tufts University analyzed 60 intervention studies and determined that labelling did not significantly impact consumers intakes of carbohydrates, total proteins, unsaturated fats, whole grains or other healthy options<sup>105</sup>. Results indicated that labelling was not as relevant as the general presence or absence of information<sup>106</sup>. Likewise, it has been shown that other factors such as physical inactivity, smoking, alcohol use, socioeconomic status and genetics bear a toll on obesity<sup>107</sup>. Because the measure disregards all other relevant factors, the contribution cannot be substantial. Therefore, the contribution of the measure is uncertain and it does not have a prospectus of being highly effective.

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<sup>101</sup> PR, *Australia - TPP*, [5.211]

<sup>102</sup> *Id.*, [7.488]

<sup>103</sup> *Id.*, [7.499].

<sup>104</sup> ABR, *US - Clove Cigarettes*, [109].

<sup>105</sup> Shangguan, S. et al. (2018).

<sup>106</sup> *Id.*

<sup>107</sup> WHO Best Buys (2020).

**3. The nature of the risks and the gravity of consequences that would arise from non-fulfilment are, at best, uncertain**

The burden of proof for this step rests on the respondent<sup>108</sup>. At this stage a Panel must assess the likelihood and the gravity of potential risks -and any associated adverse consequences- that might arise in the event that the legitimate objective being pursued would not be fulfilled<sup>109</sup>. These adverse consequences must be seen in light of the alternative measures available to Budica which have a similar degree of contribution<sup>110</sup>. Dale bears in mind that the risks of not addressing obesity might be grave. In fact, Dale has imposed measures to tackle it within its territory. However, in the present case the risk arising from consumers' misinformation is only grave if it bears a toll on public health. Yet, a measure that addresses these objectives must have a balance between the pursuance of said objective and the restriction of trade<sup>111</sup>. As was stated before, the contribution of the measure to address these legitimate objectives is uncertain and insufficient. Then, the non-fulfilment of the measure would, at best, have an uncertain impact on public health and consumer misinformation.

**C. There are less restrictive, readily available alternative measures that contribute similarly to the objective**

A comparison with alternative measures must be based on the same criteria used in the relational analysis<sup>112</sup>. When considering alternative measures, the degree of contribution does not have to be identical but equivalent<sup>113</sup>. Dale proposes as a less restrictive alternative a campaign similar to the Dalean *Get Fit* campaign<sup>114</sup>.

This campaign sought to address obesity by increasing physical activity; improving cycling routes and discouraging motorized transport to schools; funding and organizing 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<sup>115</sup>.

First, regarding trade restrictiveness, this measure will not have a limiting effect on international trade. All elements of the campaign may be implemented without regulating any aspect of the market or of product consumption, sale or other competitive conditions. Second,

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<sup>108</sup> PR, *US - Clove Cigarettes*, [7.424]; PR, *Australia - TPP*, [7.1321.]

<sup>109</sup> *Id.*

<sup>110</sup> ABR, *US - Tuna II (Mexico)*, [321].

<sup>111</sup> ABR, *US - Clove Cigarettes*, [109].

<sup>112</sup> PR, *US - Clove Cigarettes*, [7.424]; PR, *Australia - TPP*, [7.1321].

<sup>113</sup> ABR, *US - COOL*, [5.215].

<sup>114</sup> Case, [1.17].

<sup>115</sup> *Id.*

bearing in mind the degree of contribution, as mentioned above, physical activity is paramount in modulating NCDs associated with obesity. The Rotterdam study found no difference in risk between obese/overweight individuals who maintained a high level of physical activity and those of normal body mass index. Other studies have recorded the benefit of physical activity in genetic factors associated with obesity. One of those concluded that while the fat mass and obesity gene significantly increased the odds of obesity, this risk was attenuated by almost 30% in physically active individuals<sup>116</sup>. Considering the above, the contribution of a physical activity driven measure would have a greater impact on public health.

Hence, the FIP is inconsistent with TBT Art. 2.2.

#### V. THE FIP IS INCONSISTENT WITH TRIPS ART. 20

To establish a breach of TRIPS Art. 20 three elements must be demonstrated: the measure sets ‘special requirements’; such special requirements ‘encumber’ the use of a trademark in the course of trade and they do so ‘unjustifiably’<sup>117</sup>. Dale submits that the FIP (A) sets special requirements that (B) encumber the use of a trademark in the course of trade (C) in an unjustifiable manner.

##### A. The FIP sets special requirements

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’. The prohibition of a trademark is within this definition<sup>118</sup>.

The FIP sets special requirements in two ways. First, FIP Art. 15 prohibits the use of trademarks that evoke healthiness on processed packaged food products that contain a certain amount of sodium, added sugars and saturated fats. This provision thus mandates compliance that affects the use of trademarks. There are already examples on how this measure has set these requirements. As the Panel can observe from the record, Spear Bars Inc. registered the *Healthy Spear Bars* trademark in Budica in January 2019<sup>119</sup>. Because *Healthy Spear Bars* do not conform with the thresholds established by Budica, it cannot access the market unless it compromises its trademark. Hence, the FIP effectively prohibits the use of the trademarks and commercial name in them.

Second, FIP Art. 9 requires that products containing certain content of added sugars, saturated fat and sodium include the *High-Content* label. FIP Annex A mandates what the

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<sup>116</sup> Caballero (2019), 6.

<sup>117</sup> PR, *Australia – TPP*, [7.2156], [7.2169].

<sup>118</sup> *Id.*, [7.2231].

<sup>119</sup> Case, [2.8].

predetermined expressions of the front-of-pack nutrition label must include. This being a predetermined expression, be accompanied with certain symbols and specific labelling features. The Panel in *Australia - TPP* concluded that because the measure required that word marks appeared in a prescribed form, Australia's regulation fell within the scope of a special requirement<sup>120</sup>. The present case is analogous because FIP Art. 9 establishes a prescribed form in which words and marks shall appear on the package. Hence, the FIP sets special requirements.

#### **G. The FIP encumbers the use of the *Healthy Spear Bars* trademark in the course of trade**

A measure encumbers the use of a trademark when the special requirements "restrict the manner in which the trademarks at issue may be displayed on the relevant products and their packaging"<sup>121</sup>. Encumbrances may range from specific types of requirements to a prohibition on the use of a trademark in certain situations<sup>122</sup>. The terms 'use' and 'in the course of trade' must be interpreted broadly<sup>123</sup>. The 'use' of a trademark is not limited to distinguish goods and 'the course of trade' refers to the whole process related to commercial activities<sup>124</sup>.

FIP Arts. 9 and 15 restrict the manner in which trademarks are displayed. The former requires the inclusion of a health warning sign which must meet features relating to location, size and colour. These constraints apply to the way in which processed food packages are displayed. The latter prohibits the use of words such as 'healthy', 'light', 'low sugar/sodium/saturated fats' and 'fitness' in products with predetermined characteristics. When these words are part of a product's brand or commercial name, their use is prohibited. That is the case of *Healthy Spear Bars*, which do not comply with the thresholds set in Art. 15. Hence, the FIP encumbers the use of the *Healthy Spear Bars* trademark in the course of trade.

#### **H. The encumbrance is unjustifiable**

To determine if the encumbrance of a measure is unjustifiable under TRIPS Art 20, three elements must be considered: (1) 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; (2) the reasons for the imposition of special requirements and (3) a demonstration of how the reasons for the imposition of special

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<sup>120</sup> PR, *Australia – TPP*, [7.2241].

<sup>121</sup> *Id.*, [7.2242].

<sup>122</sup> *Id.*, [7.2239].

<sup>123</sup> *Id.*, [7.2286][7.2261].

<sup>124</sup> *Id.*

requirements do not support the resulting encumbrances<sup>125</sup>. The manner in which these elements should be weighted and balanced needs to be determined on a case-by-case basis<sup>126</sup>.

**1. The nature and extent of encumbrances resulting from special requirements is high, even taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade**

The FIP involves a high degree of encumbrances. In order to make this finding, a Panel shall weigh the impact of the constraints against the reasons for which the special requirements were applied, and whether these reasons provide sufficient support for the resulting encumbrances<sup>127</sup>. On one hand, the FIP prohibits *Healthy Spear Bars* from using its commercial name because it includes the word ‘healthy’. This seriously impairs brand recognition because *Healthy Spear Bars* is the commercial name through which the product has gained brand recognition allowing a high market share<sup>128</sup>. The prohibition will result in a change of name which will affect the way in which consumers can distinguish nutritional bars. This prohibition entails a high degree of encumbrance, which is the inability to use a particular trademark all together<sup>129</sup>. On the other hand, the *High-Content* labelling requirements and the prohibition to use any sign evoking healthiness affects the capacity of Spear Bars Inc. to compete in equal footing on the nutrition bar market. In this sector, the apparent healthiness of the product has a vital role because the trend is for consumers to prefer products with these characteristics<sup>130</sup>.

**2. The reason for the imposition of special requirements is exclusively to prevent consumer disinformation**

Even if the Panel found that the measure’s objective under TBT Art. 2.2 is to protect public health (*quod non*), Dale submits that the reason for the imposition of special requirements is *exclusively* to prevent consumer disinformation. It is possible for a measure to have two objectives<sup>131</sup> and for certain provisions of the same measure to be supported in reasons different from those objectives. Further, from the design, structure and characteristics of the measure it can be inferred that the reasons for the restrictions on trademarks are specific. That is the present case. The Draft Decree 457 explicitly indicated that marketing restrictions, including claims contained in brand names or trademarks, were formulated to

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<sup>125</sup> ABR, *Australia – TPP*, [6.651].

<sup>126</sup> PR, *Australia – TPP*, [7.2530].

<sup>127</sup> *Id.*, [7.2534].

<sup>128</sup> Case, [2.7].

<sup>129</sup> PR, *Australia – TPP*, [7.2441].

<sup>130</sup> Fortune (2020).

<sup>131</sup> PR, *US – Tuna II (Mexico)*, [7.406].



prevent deceptive or misleading uses of adjectives related to health<sup>132</sup>. Moreover, a ban on the use of certain trademarks can prevent companies to make health claims about products but it cannot lead buyers towards healthier diets. Studies have suggested that when driving consumers to healthier eating the decisive factor is the presence of nutritional information<sup>133</sup>. Thus, the reasons that must be weighed against the encumbrances are not those concerning public health but the ones set forth in this section.

### **3. Reasons for the imposition of special requirements do not support the resulting encumbrances**

To find whether the reasons provide sufficient support for the resulting encumbrance, a Panel must assess, in this case, consumers' information concerns that underline the FIP<sup>134</sup>. The reasons for the imposition of the special requirements do not support the high degree of encumbrances found in this case. Particularly, it is relevant to consider the arguments invoked in this document when addressing TBT Art. 2.2<sup>135</sup>. As stated above, the FIP does not contribute to addressing consumers misinformation issues stated by Budica because the labelling requirements are misleading. In setting these special requirements Budica has departed from scientific research, the WHO-FAO Report, and the FAO *Codex Alimentarius*. This means that although the measure proposed could have some effect on public health, it does so in a disproportionate manner in which trade is unnecessarily restricted and does not empower consumers to have information in order to have a healthier lifestyle. Concerning *Healthy Spear Bars*, even if the products do not contain a high content of any of the prescribed components and are, therefore, not considered unhealthy, the measure seriously encumbers the use of the trademark. Because the provisions of the FIP affecting trademarks contribute insufficiently and uncertainly and, in this particular case, to the realization of the proposed objectives, then the reasons do not support the resulting encumbrances.

Hence, the FIP is inconsistent with TRIPS Art. 20.

## **VI. THE FIP, AS APPLIED BY THE BCA TO THE SPEAR BARS INC.' SHIPMENT IS INCONSISTENT WITH TFA ART. 10.8.2**

TFA Art. 10.8.1 requires that the importer of a product rejected due to technical regulations is allowed to exercise an option to re consign or return the goods. Also, Art. 10.8.2 mandates that the importer be given a 'reasonable' amount of time to exercise that option.

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<sup>132</sup> Case, [3.3].

<sup>133</sup> Shoup, 2019.

<sup>134</sup> PR, *Australia - TPP*, [7.2591].

<sup>135</sup> *Id.*, [7.2593].

Thereafter, the Member will take action to dispose of the goods in accordance with national laws and regulations<sup>136</sup>.

Dale submits that the BCA decision to reject a *Healthy Spear Bars* cargo on April 3, 2020, is inconsistent with these rules. First, the time given by the Budican authorities to reconsign or return the merchandise was not ‘reasonable’. The term ‘reasonable’ must be assessed in a case-by-case basis<sup>137</sup>. When interpreting this term in GATT Art. X (3), Panels have analysed the objective, cause or the rationale behind the measure<sup>138</sup>. Dale considers this last interpretation to be relevant context to shed light on the meaning of ‘reasonable’ in TFA Art. 10.8.2<sup>139</sup>. Particularly, because the Preamble of the TFA states that one of the objectives of the Agreement is to clarify and improve relevant aspects of Art. X. In this case, the 10-day period was not reasonable because it could not have allowed the importer to return the merchandise. The distance between the main ports of Budica and Dale is 6 days and 7 hours<sup>140</sup>. This period of time added to ordinary portuary logistics and shipment planning schedules make the reasonable period of time for a ship to haul the merchandise back well above 10 days.

Dale also argues that BCA’s decision was inconsistent with Art. 10.8.2. because it contradicted Budica’s national laws. FIP Art. 16 excludes confiscation and destruction as legal consequences for the non-compliance of *imported* goods with the *High-Content* label. It specifically mandates reconsignation or return of these products. Nonetheless, the BCA proceeded to destroy the merchandise imported by *Healthy Spear Bars*, in spite of its own legal norms.

Further, the BCA decision is contrary to the principles of the TFA. Art. 1 requires Members to provide information about rules governing import, export, transit, duties and penalty provision for breaches of customs regulations in advance and with sufficient clarity<sup>141</sup>. This transparency obligation derives from GATT Art. X, which the TFA develops<sup>142</sup>. In the present case, the manner in which the option to reconsign was offered was inconsistent with this principle. Spear Bars Inc. was not informed of the consequences that would arise from not responding to the BCAs option in the short time period. Moreover, even if Budica argues that the penalty was established in the Budican Customs Act, the FIP

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<sup>136</sup> International Trade Centre, (2020).

<sup>137</sup> ABR, *US - Hot-Rolled Steel*, [85-86].

<sup>138</sup> ABR, *US - COOL*.

<sup>139</sup> PR, *Australia – TPP*, [7.2415].

<sup>140</sup> Corrections and Clarifications, [7].

<sup>141</sup> Armella (2019), 283.

<sup>142</sup> *Id.*

explicitly excludes destruction of *imported* merchandise as a sanction. The cargo was rejected because of failure to comply with the FIP labelling requirements. Yet, the BCA departed from the FIP without explanation.

Additionally, the decision of the BCA violates a crucial guarantee of the TFA: the right to an appeal. TFA Art. 4 lays down the unconditional obligation for WTO Members to enable appeals against any customs-related administrative decisions<sup>143</sup>. This applies to decisions under TFA Art. 10.8.2. By destroying the merchandise immediately after the absence of response, the BCA essentially denied Spear Bars Inc. the right to appeal. Even if the company could formally initiate appellate procedures, it was no longer possible to return or reassign the cargo or to seek clearance of the goods. This made the object of the appeal void as the company could only request compensation and not reversal.

Overall, this application of the FIP was inconsistent with TFA Art. 10.8.2.

#### **VII. THE ABSENCE OF RESPONSE FROM BUDICA'S ENQUIRY POINT TO DALE'S REQUEST IS INCONSISTENT WITH TBT ART. 10.1.1**

Art. 10.1.1 sets an obligation according to which Members must designate an enquiry point. It must be able to answer all reasonable enquiries from other Members or interested parties regarding technical regulations adopted or proposed within their territory. An enquiry point is an institution that helps connecting Members and interested parties in order to guarantee the implementation of the transparency provisions of the TBT<sup>144</sup>. Most of the times, a Members' enquiry point is a pre-existing office that already deals with TBT issues, for instance the standards body or the ministry of trade, commerce or foreign affairs<sup>145</sup>. In essence, enquiry points aim to provide Members with information regarding international trade transactions so that clarity and predictability are guaranteed. All while saving time and costs by giving ready access and exhaustive information<sup>146</sup>.

An enquiry should be considered 'reasonable' when it specifically relates to a product or group of products, and not to an entire category of business and regulations<sup>147</sup>. In order to assess inconsistencies with the obligation to have an enquiry point, it is necessary to examine factors such as the total number of requests received, the proportion and extent of answered questions and whether the enquiry point repeatedly failed to answer<sup>148</sup>. Also, enquiry points should acknowledge the receipt of Members' enquiries and process them within five working

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<sup>143</sup> *Id.*, 284.

<sup>144</sup> WTO TBT Enquiry Point Guide (2018).

<sup>145</sup> *Id.*

<sup>146</sup> UNCTD (2011).

<sup>147</sup> G/TBT/1/Rev.10.

<sup>148</sup> *Id.*

days<sup>149</sup>. Even though enquiry points should not be judged under the standard of perfection, a failure to provide an answer to a Members' request at all contravenes TBT Art. 10.1.1<sup>150</sup>. Dale submits that Budica's lack of response constituted a violation of its obligations under TBT Art. 10.1.1 since it failed to provide an answer whatsoever, even though the request was reasonable.

On September 15, 2019 Dale requested information to Budica's enquiry point and followed up on October 2, due to the lack of response to its first concern<sup>151</sup>. The respondent party might submit that Dale's requests were answered by the representative of Budica at the TBT Committee on October 16, 2019<sup>152</sup>. Nevertheless, the delegate of Budica as an individual is not the enquiry point that Budica established under the obligation created by TBT Art. 10.1. Therefore, his answer at the TBT Committee cannot be considered as a valid answer from Budica's enquiry point, nor as an answer that complies with the obligation set by the TBT.

Moreover, Dale's requests were reasonable according to the recommendations made by the TBT Committee on this matter<sup>153</sup>. Indeed, Dale specifically asked for a clarification on the definition of the terms 'saturated fats' and 'added sugars', as well as certain aspects from FIP Art. 15. The terms and the Art. that required further explanation were clearly specified and were not ambiguous or unidentifiable. Thus, the request was reasonable and merited an answer. Also, even though Budica acknowledged receiving Dale's request at the enquiry point<sup>154</sup>, no estimate about when the information should be expected to be delivered was provided. While it is true that Budica received the considerable number of 50 requests regarding Draft Decree 457, after more than a year it has only succeeded to answer 32 in written<sup>155</sup>. Such a long period of time to answer the requests made by other Members does not only indicate inconsistency with TBT Art. 10.1.1; it also diminishes the importance and objective of enquiry points. In fact, it would be incoherent with the text and purpose of Art. 10.1.1 to allow Members not to answer other Members' requests without consequences<sup>156</sup>. Thus, taking a long time to answer or not answering at all results in Members and businesses

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<sup>149</sup> *Id.*

<sup>150</sup> PR, *Korea – Radionuclides*, [7.507].

<sup>151</sup> Case, [3.7].

<sup>152</sup> *Id.*, [Annex IV].

<sup>153</sup> G/TBT/1/Rev.10.

<sup>154</sup> Corrections and Clarifications, [38].

<sup>155</sup> *Id.*, [37].

<sup>156</sup> PR, *Korea – Radionuclides*, [7.508].

not having adequate information on measures that affect international transactions or struggling to find it. This discourages and hinders international trade<sup>157</sup>.

Therefore, the absence of response to Dale's enquiry is inconsistent with TBT Art. 10.1.1 and affects international trade negatively.

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**REQUEST FOR FINDINGS**

In light of the above, Dale requests the Panel to find:

1. That Dale acted consistently with DSU Art. 3.7.
2. That the FIP is a technical regulation within TBT Annex 1.1.
3. Following from that, the FIP is inconsistent with TBT Arts. 2.1. and 2.2.
4. That the FIP is inconsistent with TRIPS Art. 20.
5. That the BCA's application of the FIP was inconsistent with TFA Art. 10.8.2.
6. That the failure of the Budican enquiry point to reply to Dale's request dated September 15, 2019 is inconsistent with TBT Art. 10.1.1.