

Team: 052

**John H. Jackson Moot Court Competition  
2020-2021**

**Dale – 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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Short Title	Full Title and Citation
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<i>GATT 1994</i>	<i>General Agreement on Tariffs and Trade 1994</i> , 15 April 1994, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1867 UNTS 190.
<i>SPS</i>	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i> , Apr. 15, 1994, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1867 UNTS 493.
<i>TBT</i>	<i>Agreement on Technical Barriers to Trade</i> , 1 January 1995, being Annex 1A of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1868 UNTS 190.
<i>TBT Committee</i>	Decisions and Recommendations Adopted by the TBT Committee on Technical Barriers to Trade Since 1 January 1995, 9 June 2011, <i>TBT Committee</i> , G/TBT/1/Rev.10.
<i>TFA</i>	<i>Agreement on Trade Facilitation</i> , 22 February 2017, being Article X3 of the <i>Marrakesh Agreement Establishing the World Trade Organization</i> , 1868 UNTS 190.
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### **LIST OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Description</b>
AB	Appellate Body
ABR	ABR
Art / Arts	Article / Articles
BCA	Budican Customs Act
Celtic or Budican food bars	<i>Celtic Flavour Bars</i>
Draft Decree	Draft Presidential Decree No. 457
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FAO	Food and Agriculture Organization of the United Nations
FIP	<i>Food Information Package</i> (Presidential Decree No. 457)
Healthy Spear or Dalean food bars	<i>Healthy Spear Bars</i>
MFN	Most Favoured Nation
RAHO	Regional Azula Health Organization
TBT Agreement	Agreement on Technical Barriers to Trade
TFA	Agreement on Trade Facilitation
Wild Tropic or Engen food bars	<i>Wild Tropic-All Natural Bars</i>
WHO	World Health Organization
WTO	World Trade Organization
2012 WHO Guideline	2012 WHO <i>Guideline: Sugar Intake for Adults and Children</i>

### **SUMMARY OF ARGUMENTS**

#### **1. FIP constitutes a technical regulation under Annex 1.1 of the TBT Agreement and is inconsistent with Art 2.1 of the TBT Agreement because:**

- (i) FIP is a technical regulation because the product is identifiable, the measure lays down product characteristics, and compliance is mandatory;
- (ii) Dalean food bars are 'like products' compared to domestic Budican and imported Engen food bars because of their competitive relationship; and
- (iii) FIP accords less favourable treatment by modifying competition conditions to the detriment of Dalean food bars where there is no legitimate regulatory distinction.

#### **2. FIP is inconsistent with Art 2.2 of the TBT Agreement**

- FIP undermines its objectives to provide consumers with accurate information and curb obesity in Budica.
  - FIP results in providing consumers with inaccurate labeling of the amounts of sugar, sodium, and saturated fat in processed foods.
  - FIP does not help reduce obesity in Budica because it results in providing consumers with inadequate information.
- FIP is more trade-restrictive than necessary because Budica could achieve its objectives using alternative, reasonably available, and less trade-restrictive measures.
- The objectives' non-fulfillment creates minimal risk as consumers can compare products on healthiness grounds by viewing the list of ingredients on food products.

#### **3. Failure of the Budican enquiry point to reply to Dale's request is inconsistent with Art 10.1.1 of the TBT Agreement because:**

- Dale's enquiry was reasonable because it was specific;
- Budica's enquiry point failed the duty of an enquiry point and is insufficient; and
- the Budican enquiry point failed on all fronts on other supplementary points:
  - Budican enquiry point did not acknowledge Dale's enquiry,
  - full product scope or additional information on FIP were not published, and
  - no evidence that Members could refer to websites for more information.

#### **4. FIP is inconsistent with Art 20 of the TRIPs Agreement because:**

- FIP is a special requirement that unjustifiably encumbers Spear Bars Inc.'s ability to use its trademark in the course of trade.

- FIP requires Spears Bars Inc. to remove the word “Healthy” from its trademark because the bars contain certain amounts of sugar, sodium, and saturated fat.
- By removing the word “Healthy” from the *Healthy Spear Bars* trademark, the product becomes less recognizable to consumers.

**5. Budican Customs Authority’s application of FIP is inconsistent with Article 10.8.2 of the TFA because:**

- Budica did not provide a reasonable period of time; and
- Budica has not shown ‘urgent’ or ‘particular’ circumstances for a short period of 10 days.

**6. Dale bringing the dispute to the DSB is not premature because it challenged a measure taken by another Member.**

- FIP was enacted on October 1, 2019, and came into force on February 1, 2020. The measure had taken effect due to its enactment.
- In line with Art 3.3 of DSU, disputes arose where Dale considered its benefits impaired because of Budica’s measures.
- While Budica has not completed its domestic legal proceedings, FIP is still in effect, and any future applications of the measure may be highly prejudicial to Dale.

**7. Dale’s claim is consistent with Art 3.7 of DSU requiring Members to exercise their judgments on whether an action under DSU would be fruitful to bring.**

- A Panel or AB must presume Dale has duly exercised its judgment in deciding whether bringing an action is fruitful.
- A Panel or AB are not required or authorized to question Dale’s exercise of judgment.

**(iv)**

**STATEMENT OF FACTS**

1. Dale, Budica, and Enge are WTO members. Budica and Dale are parties to the TFA and members of the WHO, FAO, and RAHO.
2. FIP regulates processed, domestic and imported, food products labelling. Products that do not comply with FIP may be confiscated, destroyed, or re-consigned. FIP aims to respond to the obesity epidemic in Budica. The purpose is to promote consuming healthy foods and provide accurate, understandable, and simple information to empower consumers to choose a healthy diet. On August 1, 2019, Budica published the Draft Decree and notified the WTO under the TBT Agreement. On October 1, 2019, Budica enacted FIP. FIP came into force six months after its publication.
3. Celtic bars are produced in Budica and consumed as snacks. Per 100 gm, each bar contains 4 gm of added sugar (sucralose), 1.3 gm of saturated fats, and 0.11 gm of sodium.
4. Budica imports Wild Tropic bars from Enge which are used as snacks. Per 100 gm, each bar contains zero added sugars and sodium, 15 gm of fructose (a type of sugar), and 0.08 gm of saturated fats.
5. Budica imports Healthy Spear bars from Dale which are used as snacks. Each bar contains 11 gm of added sugar (sucralose), 2 gm of fructose, 5 gm of saturated fats, and 0.5 gm of sodium per gm.
6. Under FIP, foods are labeled based on the amount of saturated fat, sugar (excluding sugar found naturally in fresh or dehydrated fruits), and sodium they contain. Products may have “Free-Content” labelling if, per 100 gm, there is less than 0.0005 gm of sodium, 0.5 gm of sugar, and 0.1 gm of saturated fats. Products may have “Low-Content” labelling if, per 100 gm, there is less than 0.12 gm of sodium, 5 gm of sugar, and 1.5 gm of saturated fats. Products must have “Health Warning High-Content” labelling if, per 100 gm, there is more than 0.4 gm of sodium, 10 gm of sugar, and 4 gm of saturated fats.
7. FIP prohibits trademarks evoking the healthiness of products containing, per 100 gm, equal to or over 0.4 gm of sodium, 10 gm of sugar, or 4 gm of saturated fat.
8. On September 15, 2019, Dale sent Budica’s enquiry point a request to clarify the definitions of “added sugar” and “saturated fats” under FIP and received no response.
9. On April 2, 2020, Budica rejected a Dalean shipment of Healthy Spear bars containers for failing to meet FIP’s labelling requirements. The BCA notified Spear Bars Inc. that the merchandise would be declared ‘uncleared goods’ if not re-consigned or returned within 10 calendar days. On April 13, 2020, Budica declared the merchandise ‘uncleared goods’ and destroyed them on April 16, 2020.

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

1. Whether FIP is a technical regulation according to Annex 1.1 to the TBT Agreement and whether it is inconsistent with Art 2.1 of the TBT Agreement.
2. Whether FIP is more trade-restrictive than necessary and therefore inconsistent with Art 2.2 of the TBT Agreement.
3. Whether the Budican enquiry point failed to reply to Dale's enquiry dated September 15, 2019 and therefore inconsistent with Art 10.1.1 of the TBT Agreement.
4. Whether FIP is a special requirement that unjustifiably encumbers the use of the Healthy Spear Bars trademark, and therefore inconsistent with Art 20 of the TRIPS Agreement.
5. Whether Budica gave Dale an unreasonable period of time making the application of FIP by Budican Customs Authority inconsistent with Article 10.8.2 of the TFA.
6. Whether Dale's application to the DSB is consistent with Art. 3.7 of the DSU.

### **LEGAL PLEADINGS**

#### **I. FIP constitutes a technical regulation under Annex 1.1 of the TBT Agreement and is inconsistent with Art 2.1 of the TBT Agreement**

[1] TBT Art 2.1 contains a national treatment and a MFN obligation. Three elements are needed to establish inconsistency with Art 2.1:

- A) the measure constitutes a technical regulation within the meaning of Annex 1.1;
- B) imported products must be like domestic products or products of other origins; and
- C) the treatment accorded to imported products must be less favourable than that accorded to like domestic products or like products from other countries.<sup>1</sup>

***A. FIP constitutes a technical regulation because the product is identifiable, the measure lays down product characteristics, and compliance is mandatory.***

[2] The legal test for 'technical regulation' in Annex 1.1 is laid out in *EC – Asbestos* and *EC – Sardines*:

- (i) Products need to be identifiable but do not need to be expressly identified in the measure;
- (ii) The measure as a whole lays down one or more product characteristics which may be intrinsic or related to the product; and,

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<sup>1</sup> ABR, *US – Clove Cigarettes*, [87]; ABR, *US – Tuna II (Mexico)*, [202].

(iii) Compliance with the measure is mandatory.<sup>2</sup>

[3] When comparing different parts of the measure to determine its purpose, a panel must examine the measure's design, operation, and circumstances to identify integral and essential aspects of the measure before concluding its legal characterization.<sup>3</sup>

**(i) Products must be identifiable but do not need to be expressly identified in the measure**

[4] FIP Art 2 sets out the scope of applying the measure and identifies all domestic and imported packaged processed food products sold in the national territory. Celtic is a domestic packaged processed product sold in Budica, and Wild Tropic and Healthy Spear bars are imported packaged processed food products from Enge and Dale, respectively, also sold in Budica. Hence, all three food bars are identifiable products under FIP Art 2, even though they are not expressly identified, and satisfy the first element.

**(ii) FIP as a whole lays down one or more product characteristics that are intrinsic or related to Healthy Spear bars.**

[5] Regarding 'product characteristics' in Annex 1 of the TBT Agreement, the second sentence in the definition of a 'technical regulation' states that the document (FIP in the present case) may also include or deal exclusively with labelling requirements. Such 'characteristics' might relate to a product's composition.<sup>4</sup> Requirements concerning the appearance and packaging of products could be said to lay down product characteristics.<sup>5</sup> In the present case, Arts 7, 8, and 9 of FIP consist of the packaging and labelling framework based on the product's composition. Art 15 details restrictions on the use of trademarks on products' packaging, also based on the product's composition. These articles fall within the definition of 'product characteristics' and therefore satisfy the second requirement.

**(iii) Compliance with FIP is mandatory**

[6] A 'technical regulation' must regulate the 'characteristics' of products in a binding or compulsory fashion.<sup>6</sup> Voluntary provisions are also assessed when identifying the level of

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<sup>2</sup> ABR, *EC – Sardines*, [176]; *citing* ABR, *EC – Asbestos*, [66]-[70].

<sup>3</sup> ABRs, *EC – Seal Products*, [5.29].

<sup>4</sup> ABR, *EC – Asbestos*, [67].

<sup>5</sup> PR, *Australia – Tobacco Plain Packaging*, [7.151]; *citing* PR, *EC – Trademarks* [7.449].

<sup>6</sup> ABR, *EC – Asbestos*, [68].



compliance mandated by the measure.<sup>7</sup> In the present case, Arts 9 and 15 are required measures, and Arts 7 and 8 are the voluntary provisions that have a mandatory element (i.e. criteria must be met to use the label).

[7] Art 9 states that the products “shall include a “Health Warning High-Content” front-of-pack nutrition label if the product’s final composition equals or exceeds the prescribed threshold. Art 15.2 states that the restriction applies to “anything on the package, including brand, business, or company name.” This language clearly indicates that any products with the prescribed characteristics must include the specific labelling or must face Art 15.2 restrictions. Dale is mandated to comply with the measure because FIP requires Healthy Spear bars to have the “Health Warning High-Content” labelling, and face restrictions on the brand name (further discussed in claim 4).

[8] Arts 7 and 8 state that the ‘Free’ and ‘Low’ content labelling are not required for the products to be sold in the market. However, FIP makes it mandatory for products to comply with the sugar, saturated fat, and sodium content thresholds to be able to access the labelling at all. In *US – Tuna II (Mexico)*, the USA argued that compliance with a labelling requirement is not mandatory where producers choose not to use the label and can still sell the product on the market. The AB found that while it was possible to sell the products without the ‘dolphin-safe’ label in the USA, any producer, importer, exporter, distributor, or seller must comply with the measure at issue in order to make any ‘dolphin-safe’ claim.<sup>8</sup> Applying this to the present case, since Dale is required to comply with the prescribed thresholds to have access to the labelling, compliance with the measure is mandatory.

[9] Art 1 of FIP states what is included and excluded in the definition of ‘Saturated Fat’, ‘Sugar’, and ‘Sodium’, further prescribing conditions for packaging based on the product’s composition. In *US – Tuna II (Mexico)*, the AB found that the single and legally mandated definition of the term ‘dolphin-safe’ prescribed, broadly and exhaustively, the conditions that applied for making any assertion on a product regardless of how the statement is made.<sup>9</sup> Applying this to the present case, Art 1 definitions prescribe conditions that apply for making any assertions on the product through the labelling framework laid out in FIP.

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<sup>7</sup> ABR, *US – Tuna II (Mexico)*, [196].

<sup>8</sup> *Ibid.*, [188].

<sup>9</sup> *Ibid.*, [199].

[10] The enforceability of a measure through sanctions is also indicative of mandatory compliance and is an important component of the measure's 'mandatory' character.<sup>10</sup> In the present case, Art 16 of FIP is the enforceability provision that lays out the sanctions for any producer, importer, exporter, distributor, or seller trading packaged processed food products that do not comply with Arts 7, 8, or 9.

[11] To summarize, the mandatory thresholds set in Arts 7, 8, 9, and 15.2, the legal definitions in Art 1, and the enforceability through sanctions in Art 16, all satisfy the third requirement of the legal test.

[12] Alternatively, if Arts 7 and 8 are found to be permissive elements of FIP, and if either the prohibitive or permissive elements of FIP are found to not constitute a technical regulation, FIP measure as a whole is still a technical regulation because of its purpose. The prohibitive elements are Arts 9 and 15.2 because they prohibit products to be sold unless they comply. The permissive elements are Arts 7 and 8 because they allow complying products to be sold with or without the labelling. It is necessary to consider the measure at issue in its entirety, i.e. both the prohibitive and the permissive elements.

[13] The AB in *EC – Asbestos* rejected the approach of assessing the elements individually and weighing them against each other.<sup>11</sup> The objective of FIP to inform consumers and curb obesity through accurate labelling is addressed through both elements. These provisions are not supplementary or ancillary aspects of the measure. Insead, they are integral and essential since they are the measure's primary focus, which is evident in the measure's name (*Food Information Package*). To conclude, FIP as a whole is a technical regulation because of the overarching purpose of the measure, even if only the prohibitive (or permissive) elements are found to satisfy the legal test.

***B. Dalean food bars are 'like products' compared to domestic Budican and imported Engen food bars because of their competitive relationship.***

[14] Art III:4 of the GATT 1994 (which applies to TBT 2.1) sets a likeness criteria for 'no less favourable treatment':

- (i) product's properties, nature, and quality to the extent it likely affects the competitive relationship;

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<sup>10</sup> PR, *Australia – Tobacco Plain Packaging*, [7.168].

<sup>11</sup> ABR, *EC – Asbestos*, [64].

- (ii) product's end-uses, the extent to which products are capable of performing similar functions;
- (iii) consumers' tastes and habits, the extent to which consumers are willing to use the products to perform these functions; and
- (iv) tariff classification.

[15] The first three criteria are linked to the criterion of the competitive relationship between the products. Even if the criteria produce conflicting indications, the relevant evidence must still be assessed.<sup>12</sup>

**(i) Food bars' properties affect their competitive relationship.**

[16] All three food bars have the same base content of sugars and saturated fats. Healthy Spear and Celtic bars have the same base content in sodium too. Healthy Spear bars have both sucralose and fructose sugars, Wild Tropic has only fructose, and Celtic has only sucralose. The fructose in both Healthy Spear bars and Wild Tropic are attributed to dehydrated fruits. Identifying the sugars cumulatively as done by RAHO, Healthy Spear bars have 13 gm, Wild Tropic has 15 gm, and Celtic has 4 gm. Healthy Spear's overall sugar composition is most similar to Wild Tropic. Healthy Spear and Celtic bars also have similar base ingredients - oats, muesli, wheat, rice, and whey protein.

**(ii) Food bars' end-use in the Budican market is a 'snack replacement'.**

[17] Regarding the products' end uses, consumers globally consider nutrition food bars as healthy alternatives to other snacks like chocolates, cakes, and cookies. In our case, the food bars are all recognized in the Budican market as snack replacements based on majority consumers' use.<sup>13</sup>

**(iii) Consumers are willing to use all three food bars to perform the same function showing consumers' tastes and habits.**

[18] Consumers' tastes can also be inferred by the average bar market shares and import figures in 2019 and 2020 in Annex III. Following FIP, Healthy Spear bars' market share dropped from 34% to 25%, while Celtic rose from 18% to 22%, and Wild Tropic rose from 37% to 46%. Healthy Spear's imports decreased by 13% and Wild Tropic's increased by 20%. The loss of Healthy Spear's market share to Celtic and Wild Tropic, and the loss of

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<sup>12</sup> ABR, *Japan – Alcoholic Beverages II*, [20]; *EC – Asbestos*, [101]-[103], [114], and [117].

<sup>13</sup> Case, [2.4], [2.6], and [2.8].

imports to Wild Tropic, show that the food bars are substitutable to consumers and the extent to which consumers are willing to use these products for the same function.

**(iv) Celtic and Healthy Spear bars both have the same tariff classification - HS 190420**

[19] Both food bars are identified as prepared foods obtained from unroasted cereal flakes or mixtures of unroasted cereal flakes and roasted cereal flakes or swelled cereals.<sup>14</sup> Wild Tropic's tariff classification is different (HS 190421), but it can be inferred that this is to account for the food bar being gluten-free. Countries are allowed to add longer codes to the first six digits for further classification,<sup>15</sup> which explains the difference between Celtic and Healthy Spear bars, HS 19042014 and HS 190420, respectively.

[20] Aside from the four criteria, regulatory concerns such as associated health risks may be relevant to the likeness analysis.<sup>16</sup> But, considering the products are alike, there is no evidence to suggest that Dalean food bars specifically present a health risk unless consumed excessively or compared to the sugar intake from other sources. The 2012 WHO Guideline recommended a maximum of 50 gm of sugar for the average adult. According to RAHO, any product comprising more than 10 gm per 100 gm of added sugar should be considered as containing a high amount of sugar, following an average of 5 meals per day.<sup>17</sup> The labelling requirements unfairly brand the Dalean food bars as posing health risks without context of what the thresholds are based on. Healthy Spear bars can easily be under the daily recommended sugar intake of 50 gm if balanced appropriately with sugar from other meals.

[21] While the AB in *US – Clove Cigarettes* did not object to considering health objectives, it disagreed with the particular weight attached to the technical regulation's health objective at issue in its assessment of the products' physical characteristics and consumers' tastes and habits.<sup>18</sup> The AB explained that "if products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would

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<sup>14</sup> U.S. Census Bureau, *Foreign Trade Schedule B [2021]*, Chapter 19.

<sup>15</sup> International Trade Administration, 'Understanding HS Codes and the Schedule B'.

<sup>16</sup> ABR, *US – Clove Cigarettes*, [119].

<sup>17</sup> Problem, Annex IV.

<sup>18</sup> ABR, *US – Clove Cigarettes*, [107], [112], and [121-160].

inevitably distort the less favourable treatment comparison, as it would refer to a 'marketplace' that would include some like products, but not others."<sup>19</sup>

***C. FIP accords less favourable treatment by modifying the competition conditions to the detriment of Dalean food bars without a legitimate regulatory distinction.***

[22] The approach adopted by the AB is the two-step assessment of whether the technical regulation accords *de facto* less favourable treatment:

- (i) whether the technical regulation modifies the conditions of competition to the detriment of imported products that are like domestic and/or imported products of other origin; and
- (ii) whether such detrimental impact "stems exclusively from a legitimate regulatory distinction."<sup>20</sup>

[23] To determine whether a technical regulation discriminates against a group of imported products, the particular circumstances of the case must be scrutinized. These circumstances are the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed.<sup>21</sup>

**(i) The technical regulation modifies the competition conditions to the detriment of Healthy Spear bars.**

[24] FIP discriminates *de facto* because of its adverse impact<sup>22</sup> on Healthy Spear bars. Healthy Spear bars are treated less favourably because they are subject to a restrictive labelling requirement which will affect the way consumers respond in the marketplace (i.e. would prefer other bars). Consumer response is illustrated by the import and market share figures mentioned above. Because of the onerous statutory baseline, Healthy Spear bars would incur labelling expenses and would need to increase their selling price to reflect costs affecting the equality of competitive opportunities.<sup>23</sup>

[25] In *US – Tuna II (Mexico)*, the AB agreed that the lack of access to a particular label had a detrimental impact on imported products' competitive opportunities. The argument that the detrimental impact stemmed from the actions of private parties (i.e. the consumers choice)

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<sup>19</sup> *Ibid*, [116].

<sup>20</sup> *US – Tuna II (Mexico)*, [215]; *US – COOL*, [271]; *US – Tuna II (Mexico) (Article 21.5 DSU)*, [7.26].

<sup>21</sup> *US – Clove Cigarettes*, [182].

<sup>22</sup> *ABR, US – Tuna II (Mexico)*, [225].

<sup>23</sup> *PR, US – Gasoline*, [6.10].

was unsuccessful because it was the measure itself that controlled the access to the label and allowed consumers to express their preferences for products with the label.<sup>24</sup> Similarly, in the present case, the lack of access to the ‘low’ or ‘free’ content labelling has a detrimental effect for Healthy Spear bars. FIP controls access to the label which in turn allows Budican consumers to express their preferences for food bars with the ‘low’ or ‘free’ content labels. Essentially, Healthy Spear bars are subject to mandatory labelling measures and other like products are not.

[26] In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the AB confirmed that the treatment comparison should be done between the group of Mexican products on one the hand (where Mexico was the complainant), and the groups of like products from domestic and other countries on the other hand. Mexican products were not to be treated as a subset of the imported like products group.<sup>25</sup> Applying this to our case, the Dalean food bars should be compared as a group on one hand, and the Engean and Budican food bars on the other hand.

[27] Even if it is found that competition conditions were not modified significantly, that does not mean Budica has fulfilled its obligation to treat the imported products no less favourably because ‘treatment no less favourable’ is not qualified by a *de minimis* standard.<sup>26</sup>

**(ii) The detrimental impact on Dale products does not stem exclusively from a legitimate regulatory distinction.**

*FIP is not even-handed and Budica has not demonstrated that the differences in access to labels were calibrated to the health risks.*

[28] FIP is not even-handed because it addresses the risks of sucralose but not fructose, and it does not calibrate other factors (i.e. lack of exercise and public health initiatives) that contribute to the health concern. The even-handed test was laid out in *US – Tuna II (Mexico)*. The AB considered whether the measure was even-handed in addressing the risks arising from different methods of catching fish and whether the differences in access to the label were calibrated to the risks. While the US measure fully addressed adverse effects on dolphins in the ETP, it did not address the adverse effects (observed or unobserved) on dolphins outside the ETP.<sup>27</sup>

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<sup>24</sup> *Ibid*, [19].

<sup>25</sup> *Supra* note 23, [21-22].

<sup>26</sup> PR, *China – Publications*, [7.1537].

<sup>27</sup> *Ibid*, [25].

[29] As underlined in *US – Tuna II (Mexico) (Article 21.5 – US)*, there is also no evidence to suggest there even was a calibration analysis for FIP which considered the rational relationship between the regulatory distinctions and the health objective of the measure.<sup>28</sup>

[30] The AB in *US – Clove Cigarettes* found that the health risks would remain in the market unless the domestic products were banned as well.<sup>29</sup> Similarly, in the present case, the health concern in Budica's market will remain as long as other products that contain the same or greater amounts of sugar remain in the market.

[31] The detrimental impact on Healthy Spear bars stems exclusively from an arbitrary regulatory distinction. FIP segregates between different kinds of sugars (sucralose and fructose), leaving a detrimental effect on only Healthy Spear bars with no evidence, studies, or explanation provided to consumers or other parties to support the regulatory distinction. The sweetness of Healthy Spear bars (13 gm sugar) and Wild Tropic bars (15 gm sugar) would entice consumers equally, and Wild Tropic bars likely even more so because it tastes sweeter. In *US – Clove Cigarettes*, the AB rejected the differentiation between menthol and clove cigarettes on the grounds that both products had similar characteristics because both masked the flavor of tobacco which made it more enticing for younger consumers to smoke.<sup>30</sup>

[32] The 2012 WHO Guideline,<sup>31</sup> referred to above in para 20, does not differentiate between the different kinds of sugars. The FIP regulatory distinction contradicts the guidelines by allowing other food bars (i.e. Wild Tropic) with a higher sugar content to remain in the market, and by assuming that consumers have an average of 5 meals per day with 10 gm of sugar in each meal. This does not support Budica's claim that the purpose of the measure is to promote the consumption of healthy foods and provide accurate, understandable and simple information for empowering consumers to make healthy dietary choices. The consumption of Dalean and even Engen bars (both above 10 gm of sugar) can still be healthy if the consumers are informed about balancing the sugar intake in other meals and the overall target of 50 gm of sugar per day.

*Misleading labelling under FIP has led to unjustifiable discrimination against Healthy Spear bars.*

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<sup>28</sup> *Supra* note 26, [30].

<sup>29</sup> ABR, *US – Clove Cigarettes*, [162].

<sup>30</sup> *Supra* note 26, [23].

<sup>31</sup> Case, [Annex IV].

[33] FIP arbitrarily informs consumers through the mandated ‘high’ content labelling that Dalean food bars are or can be risky to consumer health. Because of inaccurate labelling, FIP places a disproportionate burden on the producers to inform consumers about recommended daily dietary intake. There is no evidence to support the disconnect between producers’ burden and consumer information, or to show that Budica has communicated this information to consumers in an understandable way, if at all. Similarly, the AB in *US – COOL* found that the way the measure sought to provide information to consumers was arbitrary and the disproportionate burden imposed on producers was unjustifiable.<sup>32</sup>

[34] To conclude FIP is inconsistent with Art 2.1 of the TBT Agreement because:

- FIP constitutes a technical regulation because the product is identifiable, the measure lays down product characteristics, and compliance is mandatory,
- Dalean food bars are ‘like products’ compared to domestic Budican and imported Engen food bars because of their competitive relationship, and
- FIP accords less favourable treatment by modifying the competition conditions to the detriment of Dalean food bars where there is no legitimate regulatory distinction.

## II. FIP is inconsistent with Art 2.2 of the TBT Agreement

[35] For there to be a violation of Art 2.2, the measure must be more trade-restrictive than necessary to fulfil a legitimate objective, and the objective can be reasonably fulfilled using alternative measures taking into account the risks of the objective’s non fulfilment.<sup>33</sup>

[36] An Art 2.2 assessment includes a relational analysis focusing exclusively on the challenged measure and a comparative analysis contrasting the challenged measure with alternative measures.<sup>34</sup> A comparative analysis should assess how alternative measures can achieve the same degree of contribution in a less trade-restrictive manner.<sup>35</sup>

[37] The sugar, sodium, and saturated fat labelling measure undermines FIP’s objectives. It is more trade-restrictive than necessary and an unnecessary obstacle to international trade. Additionally, Budica can contribute to FIP’s objectives through alternative, less trade-restrictive, and reasonably available measures.

### ***A. FIP does not contribute to its objectives.***

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<sup>32</sup> *Ibid*, [26].

<sup>33</sup> ABR, *US – Tuna II (Mexico)*, [318].

<sup>34</sup> *Supra* note 32, [318] and [320].

<sup>35</sup> *Supra* note 32, [318].



[38] In *US – COOL (Art. 21.5 – DSU)*, the AB found a panel’s task is to analyze whether a regulation makes any contribution to a legitimate objective and the degree of that contribution.<sup>36</sup>

[39] FIP aims to respond to the obesity epidemic in Budica by imposing labelling and marketing requirements on processed food products to reduce obesity in Budica. FIP’s purpose is to promote the consumption of healthy foods and provide accurate, understandable, and simple information to empower consumers to make healthy choices regarding their diets.

[40] FIP’s objectives are to protect human health and provide customers with accurate information. These objectives fall under the legitimate objectives in Art 2.2. Particularly, the protection of human health is under Art 2.2’s *inter alia* list of legitimate objectives. Additionally, in *US – COOL*, the AB held that providing consumers with accurate information is a legitimate objective.<sup>37</sup>

**(i) The measure does not provide consumers with accurate information.**

[41] FIP sets a labelling measure that results in providing inaccurate information to consumers. The “Free-Content” labelling falsely suggests no amount of sodium, sugar, or saturated fat is in a product. The labelling is also misleading because sugar from fruits is not considered “sugar” under this labelling measure.

[42] FIP makes consumers unable to accurately and adequately compare food products on healthiness grounds. Because of the inaccurate labelling, consumers will be less informed and less empowered to make healthy choices regarding their diets.

**(ii) The measure does not help curb obesity in Budica.**

[43] FIP provides consumers with information insufficient to help curb obesity in Budica. The labelling measure does not flag other ingredients that contribute to obesity or an unhealthy diet. It also does not distinguish between different types of sugar, sodium, and saturated fats.

[44] FIP sets the same sugar, sodium, and saturated fat labelling requirements for food products with very different health and obesity implications. For example, products must

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<sup>36</sup> ABR, *US – COOL (Art. 21.5 – DSU)*, [5.208]–[5.209], [5.211].

<sup>37</sup> ABR, *US – COOL*, [1.2].

have “Health Warning High-Content” labelling if they contain, per 100 gm, more than 0.4 gm of sodium, 10 gm of sugar, and 4 gm of saturated fats. FIP mandates the same labelling requirement for a broad spectrum of products.

[45] In practice, the measure does not help reduce obesity because it encourages consumers to falsely assume that all products with the same labelling have similar amounts of sugar, sodium, and saturated fat. In reality, these products could have very different amounts of sugar, sodium, and saturated fat. Products with the mandatory “Health Warning High-Content” labelling have very different amounts of sugar, sodium, and saturated fat. A product with 90 gm of sugar per 100 gm will have the same sugar labelling as a product with 10 gm of sugar per 100 gm.

***B. FIP is more trade-restrictive than necessary to fulfill its legitimate objectives.***

[46] To demonstrate that the measure is more trade-restrictive than necessary, Dale must show that a proposed alternative measure is reasonably available<sup>38</sup> and achieves an equivalent contribution to the objective.<sup>39</sup> Assessing whether a measure is more trade-restrictive than necessary requires weighing and balancing the measure’s trade-restrictiveness with its level of contribution of the objectiveness and the importance of the objective.<sup>40</sup>

[47] Budica’s measure is more restrictive than necessary because there are less trade-restrictive alternatives that are reasonably available and fulfil the objective. Budica could address its obesity epidemic by campaigns promoting public knowledge of nutritional health and balanced diets, encouraging physical activity, improving or creating cycling and walking routes, funding sports programs, and promoting active breaks. These alternative measures are reasonably available to Budica and will effectively help reduce obesity. These alternative measures are also not trade-restrictive and ensure the public receives necessary knowledge to empower them to make healthy choices regarding their diets. Budica did not invest in programs or measures other than FIP to address its obesity epidemic.

[48] Weighing and balancing the measure’s trade restrictiveness with its level of contribution to the objectives and importance of the objectives, the measure is more trade-restrictive than necessary. The measure does not contribute to and undermines its objectives to protect human health and provide consumers with accurate information because it provides consumers with

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<sup>38</sup> ABR, *Australia – Tobacco Plain Packaging*, [6.8].

<sup>39</sup> ABR, *US – COOL*, [5.201].

<sup>40</sup> ABR, *US – Tuna II (Mexico)*, [321].

insufficient, inadequate, and inaccurate information. FIP is more trade-restrictive than necessary because it undermines its objectives and heavily restricts international trade.

***C. There are minimal risks to the non-fulfillment of the objectives.***

[49] In *US – COOL (Art. 21.5 – DSU)*, the AB found considering the risks of non-fulfilment requires identifying the type of risk at issue and the gravity of consequences that would arise if the country fails to achieve its objectives through the technical regulation.<sup>41</sup> The ABR asserts that there is no prescribed methodology for assessing whether the risks non-fulfillment would create and risks can be assessed in qualitative and quantitative terms. The ABR also asserts that “some types of risks might not be susceptible to quantification.”<sup>42</sup>

[50] The risk of non-fulfilment is taken into account or considered after weighing and balancing the necessity of a trade-restrictive measure with any reasonably available and less trade-restrictive alternative measures that would make an equivalent contribution to a legitimate objective.<sup>43</sup>

[51] If Budica does not implement its measure, consumers would be able to compare products on healthiness grounds by viewing the list of ingredients in them. Rather than relying on arbitrary and broad categories of free, low, and high content labelling, customers will access more detailed and accurate information when making decisions about their diets. The risk to the non-fulfillment of FIP is, therefore, negligible.

**III. Failure of the Budican enquiry point to reply to Dale’s request is inconsistent with Art 10.1.1 of the TBT Agreement.**

***A. Dale’s enquiry was reasonable because it was specific***

[52] Art 10.1.1 of the TBT Agreement states that all Members must ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members as well as to provide the relevant documents regarding any technical regulations adopted or proposed. Not responding to reasonable enquiries is a breach of Art 10.1.1.

[53] Dale’s communication was reasonable because it specifically asked about the definitions of “added sugar” and “saturated fats,” as well as certain aspects of Art 15 of FIP. One of the

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<sup>41</sup> ABR, *US – COOL (Art. 21.5 – DSU)*, [5.217].

<sup>42</sup> *Ibid*, [5.218].

<sup>43</sup> ABR, *US – Tuna II (Mexico)*, [321]-[322].

recommendations adopted by the the TBT Committee<sup>44</sup> clarify that an enquiry should be considered “reasonable” when it is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations, or procedures for assessment of conformity.

***B. Budica’s enquiry point failed the duty of an enquiry point and is insufficient***

[54] The duty of an enquiry point is discussed in *Korea – Radionuclides (Japan)* in the context of Art 3 of Annex B to the SPS Agreement. Although the SPS and TBT agreements are mutually exclusive, provisions relating to common elements, i.e. enquiry points, are referred to in the present case for interpretation purposes. The extent to which an enquiry point actually provides answers to all reasonable questions and provides documents is relevant for the assessment. All the relevant factors are examined, including the 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.<sup>45</sup>

[55] In *Korea Radionuclides*, Korea did respond to some but not all enquiries, and so was found to have acted consistently with Art 3 of Ann B. However, in the present case, Budica did not respond to any of Dale’s enquiries sent to the enquiry point on September 15, 2019, or to Dale’s follow up dated October 2, 2019. Budica’s actions do not even come close to meeting the standard applied in *Korea Radionuclides*.

[56] The Budican delegation reasoned that because the enquiry point received a large number of requests from different Members which slowed down their processing, and because Dale’s enquiry was addressed in the Committee meeting, Budica would not respond to the enquiry. Responding to only 32 out of the 50 requests received<sup>46</sup> shows that the Budican enquiry point is an insufficient one. The enquiry point’s insufficiency is especially relevant in the present case because the Budican authorities enacted FIP causing irreparable harm without a reasonable timeline for Dale to appropriately prepare or respond. It is unreasonable for Budica to swiftly enforce the measure on one hand, but not promptly address reasonable enquiries on the other hand.

[57] Lastly, the Budican enquiry point failed in all fronts on other supplementary points:

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<sup>44</sup> TBT Committee, [34].

<sup>45</sup> ABR, *Korea – Radionuclides (Japan)*, [5.216].

<sup>46</sup> Clarification, [37].

- (i) Even though Budica's delegation acknowledged Dale's enquiry point, the Budican enquiry point itself did not;<sup>47</sup>
- (ii) The Budican enquiry point did not publish the full product scope of the blanket import provisions, or any additional information on FIP; and
- (iii) Budica did not provide any evidence or explanation that interested Members would have known to look to the websites indicated by Budica for information on the measures at issue.<sup>48</sup>

#### **IV. FIP is inconsistent with Art 20 of the TRIPS Agreement.**

[58] Art 20 of the TRIPs prohibits unjustifiably encumbering by special requirements the use of trademarks in the course of trade; these requirements include the use of include the use in a special form or use in a manner detrimental to the ability to distinguish the goods of one undertaking from other undertakings.

##### ***A. Budica's trademark measure amounts to a 'special requirement'***

[59] Budica's measure amounts to a 'special requirement' because (a) there is a condition we must comply with; (b) the condition has a close connection with or specifically addresses the use of trademarks in the course or trade; and (c) the measure is limited in application to particular aspects of trademarks or their use.<sup>49</sup>

[60] FIP prohibits trademarks evoking healthiness of products containing specific amounts of sodium, sugar, or saturated fat. The measure requires Healthy Spear bars not to use the word "Healthy" in its trademark. Therefore, the requirement is directly related to the use of the 'Healthy Spear Bars' trademark. The trademark is used in the course of trade as it generates consumer product recognizability. The trademark requirement is limited in application to a specific aspect of trademarks.

##### ***B. The measure unjustifiably encumbers the use of the Healthy Spear Bars trademark in the course of trade***

[61] Spear Bars Inc.'s trademark is used in the course of trade as consumers are able to distinguish Healthy Spear bars from other nutrition bars through its trademark. The term 'in the course of trade' is not restricted to the buying and selling of goods. The course of trade

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<sup>47</sup> ABR, *Korea – Radionuclides (Japan)*, [5.216].

<sup>48</sup> SPS Agreement, Annex B(1).

<sup>49</sup> PR, *Australia – Tobacco Plain Packaging*, [7.2261].

“more broadly covers the process relating to commercial activities.”<sup>50</sup> By changing the trademark, Spear Bars Inc.’s products will be less recognizable to consumers thereby encumbering Spear Bars Inc.’s ability to use its trademark in the course of trade. The trademark measure is unjustifiable because it severely encumbers Healthy Spear bar’s market recognizability without helping to reduce obesity.

[62] In *Australia – Tobacco Plain Packaging*, the Panel held that determining whether special requirements unjustifiably encumber the use of trademarks involves the following steps: “(i) 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; (ii) the reasons for the imposition of special requirements; and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.”<sup>51</sup> The AB upheld the Panel’s decision and clarified that there is not a rigid or exact set of factors to consider.<sup>52</sup>

[63] In an effort to curb obesity, the measure prevents *Healthy Spear Bars* from using the word ‘Healthy’ in its trademark. In reality, consumers are aware that different nutrition bars have different amounts of sugar, sodium, and saturated fat. Healthy decisions regarding food consumption will depend on the consumer’s dietary needs and the components of a balanced diet rather than depending primarily on the product’s components. Therefore, prohibiting Health Spear bars from using its trademark will not help curb obesity.

[64] In *Australia – Tobacco Plain Packaging*, the AB found that trademark measures for public health objectives or against the use of trademarks linked to the potentially misleading nature of a product can trigger the permissibility of an encumbrance<sup>53</sup>. The *Healthy Spear Bars* trademark is not misleading. The amounts of sodium, sugar, and saturated fats in a product do not necessarily indicate a product’s healthiness. In the alternative, it is clear that the word “Healthy” is part of the trademark rather than a blanket description. Further, Budica cannot justify the encumbrance prohibiting using the word ‘healthy’ for bars of this type.

[65] Finally, in assessing justifiability, “the availability of an alternative measure could, in the circumstances of a particular case, call into question the reasons a respondent would have

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<sup>50</sup> PR, *Australia – Tobacco Plain Packaging*, [7.2261].

<sup>51</sup> *Supra* note 50, [7.2423]-[7.2428].

<sup>52</sup> *Supra* note 50, [7.2505].

<sup>53</sup> *Supra* note 50, [6.469].

given for the adoption of a measure challenged under Article 20.”<sup>54</sup> In our case, promoting the public’s nutritional knowledge will help them understand how to build a balanced and healthy diet. An informed consumer will be able to make healthy choices regarding their diet thereby curbing obesity.

**V. The Budican Customs Authority’s (“BCA”) application of FIP is inconsistent with Article 10.8.2 of the TFA.**

***A. Budica did not provide a reasonable period of time.***

[66] Article 10.8.2 of the TFA states that where the importer fails to exercise to re-consign or return the rejected goods within a reasonable period of time, the competent authority may take a different course of action. The journey between Dale and Budica for a vessel travelling at the average speed of 13 knots is over 6 days long. Dale was notified on April 3, 2020 and given 10 calendar days to respond to the Budican Customs Authority’s notification on April 13. Considering the travel time, Dale would have only 4 calendar days to reply if they wanted to deal with the goods within the prescribed time frame, and only 7 calendar days to reach Budica in time to prevent the destruction of their goods. In either situation, 1 week is not a reasonable time and travel time should have been considered by Budica.

[67] Jurisprudence has not defined ‘reasonable period of time’ for rejected goods, allowing flexibility to consider the relevant circumstances. In the present case, Healthy Spear bars are processed food bars and do not require immediate disposal or destruction because of a short shelf life, which would be expected for products such as milk. Dale could reasonably have expected to have a longer period than 10 days to deal with the merchandise as needed.

[68] Another fact to be considered for the present case is that Dale lacked clarity on how to adapt their products or production methods to the requirements of the technical regulation because of Budica’s failure to respond to Dale’s earlier enquiries (see Claim 3). This was considered in *Japan – Alcoholic Beverages II* in context of the DSU Agreement<sup>55</sup> to establish when the ‘reasonable period of time’ was applicable. Even if Dale had received a response, the ‘reasonable period of time’ should be applicable from the date of Budica’s response or at least when there is a clear path forward. This would allow both Budican authorities and

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<sup>54</sup> ABR, *Australia – Tobacco Plain Packaging*, [6.654].

<sup>55</sup> Distinction from ABR *Japan – Alcoholic Beverages II*; and DSU, Art. 21(3).

producers the required time to respond appropriately to enquiries or set in motion the required adaptations.

***B. Budica has not shown ‘urgent’ or ‘particular’ circumstances for a short period of 10 days.***

[69] Looking at other agreements that have considered exceptions for ‘reasonable period of time,’ the TBT and DSU agreements allow for Members to have a short period of time in ‘urgent circumstances’<sup>56</sup> or ‘particular circumstances.’<sup>57</sup> However, applying those principles here, Budica has not shown either to justify having such a short period of time (10 days) nor whether 10 days has any effect on achieving the legislative objective of FIP. Instead, in this circumstance, Budica is using section 48 of the Customs Act as a legal vehicle to arbitrarily strict a ‘reasonable period of time’ under the TFA to 10 days.

**Budica's preliminary objections contest Dale's right to bring a claim under the DSU.**

[70] Budica wrongly notes that the measure has not yet taken effect, and Dale’s bringing of the dispute is premature as it is not challenging a measure “taken” by another Member.<sup>58</sup> However, FIP was published in the Gazette and enacted on October 1, 2019 and came into force 6 months later, on February 1, 2020. The measure had taken effect due to its enactment. Because it was in effect, the BCA also notably enforced it by rejecting the Healthy Spear bars containers. The BCA’s actions show that the measures were “taken” and Dale’s bringing of the dispute to the DSB is not premature.

[71] Art 3.3 of DSU states that a dispute arises where a Member considers their benefit impaired because of “measures taken by another Member.” In *Saudi Arabia – IPRs*, the Panel notes that a ‘measure’ under Art 3.3 are often legally binding instruments in a domestic legal framework such as Decrees.<sup>59</sup> In our case, the measures were introduced through FIP and are legally binding in Budica.

[72] In *US – Corrosion-Resistant Steel Sunset Review*, the AB held there is no basis for finding Members can challenge only certain types of measures in dispute settlement proceedings. A Member can bring an action for both mandatory and non-mandatory

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<sup>56</sup> TBT, Art. 2.12; *US – Clove Cigarettes*, [277].

<sup>57</sup> DSU 21(3)(c); *Japan – Alcoholic Beverages II*, [28].

<sup>58</sup> Case, [5.7]

<sup>59</sup> PR, *Saudi Arabia – Protection of IPRs*, [7.49].



measures. Hence, Dale may bring a dispute to the DSB for both voluntary and mandatory aspects of FIP.<sup>60</sup>

[73] In interpreting “a measure taken by another Member, the AB in *US – Corrosion-Resistant Steel Sunset Review* states that “any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.”<sup>61</sup> As FIP is attributable to Budica (a WTO Member), it is a measure for dispute settlement purposes.

[74] Budica has also claimed that FIP would not take effect because of the tribunal’s interim measure.<sup>62</sup> Although the domestic legal proceedings have not been completed, FIP remains in effect. Further, any future application of the measure could be highly prejudicial to Dale. FIP has not been suspended, and the measures will continue to have a detrimental impact on Healthy Spear bars.

[75] Lastly, Art 3.7 of DSU requires Members to “exercise its judgment on whether action under [DSU] procedures would be fruitful.” Budica falsely maintained that Dale’s actions were inconsistent with Art. 3.7 of DSU for Members to determine whether a claim would be fruitful to bring. The AB in *Mexico – Corn Syrup (Art. 21.5 – DSU)* held that a panel and AB must presume the Member bringing the action has duly exercised its judgment in deciding whether bringing an action is fruitful. A Panel and AB are neither required nor authorized to question a member’s exercise of judgment.<sup>63</sup> Dale acted consistently with Art 3.7 of the DSU because The DSU gives WTO members the right to bring disputes where there are violations by other members.

[76] Alternatively, if it is found that Dale’s claim is premature, Dale still has a right to bring a claim because a Member can intervene if there is (or could be) a competitive relationship<sup>64</sup> and there is a strong competitive relationship between the food bars as illustrated above.

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<sup>60</sup> ABR, *US – Corrosion-Resistant Steel Sunset Review*, [88].

<sup>61</sup> *Ibid*, [81].

<sup>62</sup> Case, [5.7]

<sup>63</sup> ABR, *Mexico – Corn Syrup (Art. 21.5 –DSU)*, [74].

<sup>64</sup> ABR, *EC Asbestos*, [117].

**REQUEST FOR FINDINGS**

1. FIP is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement and is inconsistent with Art 2.1 of the TBT Agreement.
2. FIP is inconsistent with Art 2.2 of the TBT Agreement as it is more trade restrictive than necessary to meet its objectives and it creates unnecessary obstacles to international trade.
3. The Budican enquiry point failed to reply to Dale's request and is, therefore, inconsistent with Art 10.1.1 of the TBT Agreement.
4. FIP is inconsistent with Art 20 of the TRIPs Agreement as it unjustifiably encumbers the use of trademarks in the course of trade.
5. The BCA's application of FIP is inconsistent with Art 10.8.2 of the TFA.
6. Dale's bringing of the dispute to the DSB is not premature and it challenges a measure taken by another Member.
7. Dale's claim is consistent with Art 3.8 of DSU requiring Members to exercise their judgment on whether bringing an action under DSU is fruitful.