

*Budica - Measures relating to the importation and marketing of nutrition food bars*

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## 1. INTRODUCTION

1.1. The Federal Republic of Budica (“Budica”) is a developing country, with a population of approximately 50 million. The Republic of Dale (“Dale”) is a developed country, with a population of 80 million. Budica and Dale are founding Members of the World Trade Organization (“WTO”) and are parties to the Agreement on Trade Facilitation (“TFA”). Both States ratified the TFA in 2017. Budica notified Article 10.8 of the TFA in its Category A commitments.

1.2. The Independent Republic of Enge (“Enge”) is a least developed country and a recently acceded Member of the WTO. Enge is an island located in the Pacific near the equator and has a population of approximately 5 million.

1.3. Budica, Dale, and Enge are members of the United Nations (“UN”), the World Health Organization (“WHO”), the Food and Agriculture Organization of the United Nations (“FAO”), and the Regional Azula Health Organization (“RAHO”).<sup>2</sup>

### *Obesity Epidemic Worldwide*

1.4. According to the WHO, obesity is one of today’s most blatantly visible – yet most neglected – public health problems. Adult obesity is defined as excessive body fat accumulation and, more specifically, as an adult person having a body mass index (“BMI”)<sup>3</sup> of greater than or equal to 30. Obesity poses an augmented risk of suffering from serious non-communicable diseases (“NCDs”),<sup>4</sup> such as diabetes, musculoskeletal disorders, cardiovascular diseases, and some cancers (*e.g.*, endometrial, breast, and colon).

1.5. The underlying causes of obesity have not been fully identified. Nevertheless, the WHO considers the fundamental cause of obesity and overweight to be an energy imbalance between

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<sup>1</sup> The case authors thank the Academic Board of the John H. Jackson Moot Court Competition and the WTO staff for their comments on earlier versions of the case.

<sup>2</sup> RAHO is a regional public health organization working to improve health and living standards of the people in the Pacific and serving as a regional office for the equatorial Pacific region of the WHO.

<sup>3</sup> Weight in kilograms divided by the square of height in metres.

<sup>4</sup> An NCD is a disease that is not transmissible directly from one person to another.

calories consumed and calories expended.<sup>5</sup> Some studies associate certain risk factors with obesity, including unhealthy diets (such as those containing high amounts of fats, sodium, and sugar); physical inactivity and increased relative costs of exercising; genetic predisposition<sup>6</sup>; slow metabolism; decreases in the relative costs of food; and decreases in the time available for the preparation of food, accompanied by an increase in the demand for fast food. In addition, other factors such as behaviour, age, sex, environment, culture, and socioeconomic status of an individual may also affect the incidence of obesity.

1.6. According to the WHO, an escalating global epidemic of overweight and obesity – “globesity” – is taking over many parts of the world. The most recent WHO statistics show that the worldwide prevalence of obesity nearly tripled between 1975 and 2016 and that over 650 million adults were obese in 2016 (*i.e.*, about 13% of the world’s adult population). Each year, at least 2.8 million people around the globe die as a result of obesity. Deaths are not the only cost of obesity: health systems worldwide expend substantial shares of their budgets on treating obesity and obesity-related diseases.

1.7. Childhood obesity<sup>7</sup> is one of the most pressing issues of the century. Mounting evidence furnished by the RAHO indicates that, if infant obesity is not duly addressed, one-third of all children born in 2016 or later would suffer from diabetes and other obesity-related diseases in their adulthood. Available RAHO reports indicate that the prevalence of childhood overweight and obesity increased from 4.2% in 1990 to 6.7% in 2010, with a forecasted increase to 9.1% in 2025. With respect to the causes of childhood obesity, the WHO has noted that the lack of information about sound approaches to nutrition and poor availability and affordability of healthy foods contribute to the problem. The aggressive marketing of energy-dense foods and beverages to children and families further exacerbate it.<sup>8</sup> The WHO has stated that developing countries are the most affected by childhood overweight and obesity, with a yearly increase rate significantly higher than that of developed countries (approximately 30% higher).

1.8. Various international and regional organisations and bodies have prepared and published guidelines and recommendations with the aim of supporting States in their regulatory interventions concerning adult obesity, in general, and childhood obesity, in particular.

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<sup>5</sup> See WHO key facts on obesity and overweight, available at: <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight>.

<sup>6</sup> More commonly, people who have obesity have multiple genes that predispose them to gain excess weight. One such gene is the fat mass and obesity-associated gene (FTO), which is found in up to 43% of the population.

<sup>7</sup> Children having a BMI at the same level or higher than 95% of other children of their same age and sex are considered to be obese.

<sup>8</sup> See WHO Facts and figures on childhood obesity, available at: <https://www.who.int/end-childhood-obesity/facts/en/>.

1.9. With regard to adult obesity, in 2017 the WHO published the *'Best Buys' and other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases (2013-2020)*. Pursuant to this document, in order to address risks arising from obesity, WHO Members are encouraged, among other things, to replace saturated fats with unsaturated fats through fiscal and agricultural policies; to limit portion and package size to reduce energy intake; and to implement media campaigns and labelling measures (*e.g.* nutrition and front-of-pack labels) with the aim of promoting the reduction in the intake of total fats, sugar, and sodium.

1.10. In 2018, the RAHO published the *2018–2019 Obesity Action Plan* recommending measures such as imposing front-of-pack nutrition labels designed to impact the eating habits of consumers, implementing nutrition education and counselling, promoting the intake of fresh and dehydrated fruits and vegetables, and reducing the intake of added sugar.<sup>9</sup>

1.11. Concerning childhood obesity, the WHO recommended feeding newborns with breast milk exclusively for the first 6 months of life, and feeding them with solid foods and breast milk from the age of 6 months to 2 years old. The WHO underscored that these solid foods should not contain high amounts of fats, sugar, and sodium. In addition, the WHO has recommended that children be physically active and accumulate at least 60 minutes of regular, moderate- to vigorous-intensity activity each day.

### *Obesity in Budica*

1.12. In 2018, NCDs were the main cause of death in Budica. As of that year, 20 out of 100 people aged 25 were projected to die before the age of 60 because of an NCD. The yearly costs incurred by the Budican health system in the treatment of NCDs amounted to 5% of its gross domestic product.<sup>10</sup>

1.13. Since the 1990s, obesity in Budica has risen steadily. By 2018, the Budican population's obesity rate was estimated at 32%, and obesity was linked to 5 out of every 10 NCD-related deaths. Several studies undertaken by Budica's Ministry of Public Health forecasted that, by 2050, without proper State intervention, the proportion of obese men and women in Budica would rise to 60% and 40%, respectively.

1.14. According to Budica's Ministry of Public Health, in the last decades consumption habits have shifted towards the increased preference for fast foods and packaged foods with high

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<sup>9</sup> Added sugars are sugars and syrups that are added to foods or beverages when they are processed or prepared. Naturally occurring sugars such as those in fruit or milk are not added sugars.

<sup>10</sup> This amount includes both direct costs (*e.g.*, treatments, medical staff fees, and diagnosis) and indirect costs (*e.g.*, productivity loss and sick pay).

contents of saturated fats, sugar, and sodium. These behavioural patterns, combined with physical inactivity, have been linked by the Ministry of Public Health to the rise in obesity rates.

1.15. By 2018, childhood<sup>11</sup> obesity has become an even more critical problem in Budica. Obesity rates in Budica's children rose from less than 4% in 1975 to nearly 15% in 2016. Pursuant to research conducted by the Budican National University, the continuation of this increase would result in a higher proportion of obese children compared to that of healthy children by 2030. Obese children are likely to transition to adulthood as obese, having an increased risk of suffering from NCDs and increasing the strain on the national health system.

### *Obesity in Dale*

1.16. Historically, Dale has had low obesity rates. Low obesity rates have been linked, among other things, to the cultural traits of this population, which highly values physical activity and sports. However, during the last 5 years, childhood obesity increased threefold in Dale. In 2018, the obesity rate in Dale was estimated at 10%, mainly affecting children and adult men.<sup>12</sup>

1.17. As a response, William Ecallaw, Dale's Prime Minister, launched the *Get Fit* campaign. The campaign was intended to reduce childhood obesity by increasing physical activity; improving cycling routes and discouraging motorised transport to schools; funding and organising national sports tournaments; investing in infrastructure for sports facilities and outdoor parks; offering sports scholarships; promoting active breaks, and adequately funding school gym classes at public schools.

1.18. McKindle & Partners, a consultancy firm, designed the *Get Fit* campaign using the objectives and targets provided in the WHO *Global Action Plan on Physical Activity 2018–2030: More Active People for a Healthier World*. The rationale behind the *Get Fit* campaign is that Dalean youngsters are suffering from obesity as a result of sedentary lifestyles.

1.19. McKindle & Partners previously structured Dale's successful anti-tobacco campaign. Diverging from the anti-tobacco strategy, the firm did not recommend the imposition of taxes and labelling schemes on food considering the significant differences between the two public health concerns. According to McKindle & Partners: "The bottom line is that food is necessary, tobacco is not. Food, in almost any form, is good whereas tobacco, in any form and over any periods of time, is bad."

1.20. Concerning taxation measures, McKindle & Partners highlighted the lack of available information on the existence of a causal link between higher taxes and changes in consumption. Regarding labelling measures, McKindle & Partners considered that the effects of food labelling

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<sup>11</sup> Between the ages of one (1) to eighteen (18).

<sup>12</sup> Obesity rate is defined as the percentage of a country's population considered to be obese.

on obesity rates are at best negligible, and questioned: “Do labels on packaged processed chips induce a switch to steamed broccoli or to a different brand of chips?” The firm reasoned that labelling effects are often limited to the demand for particular brands and do not impact the overall demand for products.

## 2. BUDICAN MARKET FOR NUTRITION FOOD BARS

2.1. Consumers globally consider nutrition food bars<sup>13</sup> as healthy alternatives to other snacks, such as chocolates, cakes, and cookies. In 2014, the nutrition food bars’ global market size was estimated at USD 19.15 billion and was expected to grow at a compound annual growth rate of 5.64% from 2015 to 2025.

### *Nutrition Food Bars Produced in Budica*

2.2. Budica has a world-renowned food bars industry, which has positioned itself, through an innovative marketing strategy aimed towards the promotion of healthy sweets and tasty snacks, as one of Budica's most robust industries. In November 2015, one of the leading producers of nutrition food bars in Budica launched a new product, the *Celtic Flavour Bars*.

2.3. These bars are classified under the subheading 19042014 of the Harmonized System (“HS”).<sup>14</sup> They are mainly made of oats, muesli, wheat, rice and whey protein. Each bar contains 4 gm/100 gm of added sugar (sucralose), 1.3 gm/100 gm of saturated fats and 0.11 gm/100 gm of sodium.

2.4. *Celtic Flavour Bars* are regularly consumed as snacks for long hours of work and study, especially for consumers seeking to meet their nutritional needs in short periods of time. They are marketed as meal replacement bars and nutritional boost bars and have a vivid yellow colour. These bars have been a massive success among the population of Budica.

### *Nutrition Food Bars Imported into Budica*

2.5. Enge, seeking to capitalise on its unique climate and abundant grains, tropical fruits, and vegetables, has recently adopted a poverty reduction and industrialisation strategy that includes the creation of a domestic nutrition food bar industry. With the support of the government and international donors, several private companies in Enge have begun producing nutrition food bars. These include the *Wild Tropic–All Natural Bars*. Engen producers recently entered the

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<sup>13</sup> Nutrition food bars include all prepared foods obtained from unroasted cereal flakes, mixtures of unroasted cereal flakes, roasted cereal flakes, or swelled cereals. They may contain animal or vegetal protein. They may also contain gluten-free ingredients, such as rice and quinoa, and other foods such as nuts, coconut, apple, or banana.

<sup>14</sup> International nomenclature developed by the World Customs Organization, which is arranged in six-digit codes allowing all participating countries to classify traded goods on a common basis.

second phase of the strategy by exporting their nutrition food bars to several foreign markets, including that of Budica.

2.6. In December 2018, *Wild Tropic–All Natural Bars* entered Budica’s market. *Wild Tropic–All Natural Bars* are prepared with sodium-free and gluten-free ingredients (e.g., rice and quinoa) and vegan protein, such as legumes. Each bar contains zero added sugars and sodium, 15 gm/100 gm of fructose attributed to dehydrated coconut, apple, and banana used in the bars, and 0.08 gm/100 gm of saturated fats. *Wild Tropic–All Natural Bars* are usually brown and orange coloured and are typically used for extended study hours and working schedules. These food bars are classified under subheading HS 190421.<sup>15</sup>

2.7. During the last three years, Dale’s food bars sector experienced exponential growth, mainly due to the efforts undertaken by the producer of *Healthy Spear Bars*, Spear Bars Inc., to expand its operations in global markets. Total exports of food bars represent 2% of Dale’s gross domestic product, providing approximately 1.2 million jobs to Daleans.

2.8. In January 2019, Spear Bars Inc. registered the *Healthy Spear Bars* brand name and started marketing in Budica. *Healthy Spear Bars* have an amber colour and are mainly made of oats, muesli, rice, and whey protein. Each bar contains 11 gm/100 gm of added sugar (sucralose), 2 gm/100 gm of fructose attributed to dehydrated apple and banana used in the bars, 5 gm/100 gm of saturated fats, and 0.5 gm/100 gm of sodium. These bars are classified under subheading HS 190420. The majority of consumers of the *Healthy Spear Bars* use them as snacks or for recovery after exercise.

### 3. ENACTMENT OF THE FOOD INFORMATION PACKAGE

#### *Draft Presidential Decree No. 457 (1 August 2019)*

3.1. In response to the exponential growth of the obesity epidemic in the country, the government of Budica published the Draft Presidential Decree No. 457 (“Draft Decree”) on 1 August 2019. On the same date, the Draft Decree was notified to the WTO under the Agreement on Technical Barriers to Trade (“TBT Agreement”).

3.2. The Draft Decree was declared to be aimed at addressing the obesity epidemic, both in adults and children, in Budica by imposing front-of-pack nutrition labelling requirements and restricting marketing techniques. This was done with the stated purpose of promoting the consumption of healthy foods and providing accurate, understandable and simple information for empowering consumers in making healthy choices with regard to their diet.

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<sup>15</sup> Prepared foods obtained from gluten-free almond flour, buckwheat flour, sorghum flour, amaranth, teff, arrowroot, brown rice, oat, and other gluten-free products.



3.3. On the one hand, front-of-pack nutrition labels were designed to assist consumers in understanding quantitative information regarding the content of sodium, added sugar and saturated fats in products, including an indication of “free”, “low” and “high” contents. On the other hand, marketing restrictions were formulated to prevent deceptive or misleading uses of adjectives related to health and healthy consumption habits in food products’ packaging. These restrictions relate to any marketing claims as to the health benefits of the food on the packaging, including those contained in brand names or trademarks.

3.4. To date, Budica has not published any other draft regulations concerning obesity prevention, such as taxation measures or policy actions to increase physical activity among its population.

***Presidential Decree No. 457: Food Information Package (1 October 2019)***

3.5. Two months after its publication and notification, Budica enacted the Presidential Decree No. 457 of 2019 (“Food Information Package”) (please refer to Annexes I and II).

3.6. The *Food Information Package* provided the following:

“NOTING that non-communicable diseases (NCDs) are the primary cause of deaths and preventable diseases in Budica;

CONSIDERING that obesity is classified as a disease, under the code 5B81, per the World Health Organization International Classification of Diseases (ICD);

WHEREAS the World Health Organization (WHO) has recognised obesity as one of the major risk factors for NCDs;

BEARING IN MIND that obesity disproportionately affects children, being recognised by the WHO as one of the most pressing issues of the century;

ACKNOWLEDGING that the WHO and the Regional Azula Health Organization (RAHO) have identified diets containing high contents of sodium, added sugar and saturated fats as one of the main contributors to obesity, in general, and childhood obesity, in particular;

DESIRING to provide Budicans with accurate, understandable, and simple information for empowering consumers and families in making healthy decisions concerning their diet and the diet of their children (...)

**Article 1. Definitions**

**Saturated Fat:** a fat with no double bonds between the individual carbon atoms of the fatty acid chain (commonly present in animal products such as beef, pork, and chicken).

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

**Sodium:** chemical element (symbol: Na, atomic number: 11) (commonly present in sodium salts).

## **Article 2. Scope of Application**

This regulation applies to all domestic and imported packaged processed food products sold in the national territory (...)

## **Article 7. Free-Content Labelling**

7.1 Packaged processed food products, ready to be offered to consumers, may include a “Free-Content” front-of-pack nutrition label provided that (a) no Sodium, Sugar, or Saturated Fats have been added in their preparation process or (b) the content of Sodium, Sugar, or Saturated Fats in their final composition is less than the following values:

Sodium	Sugar	Saturated Fats
< 0.005 gm per 100 gm	< 0.5 gm per 100 gm (solid) < 0.5 gm per 100 ml (liquid)	< 0.1 gm per 100 gm (solid) < 0.1 gm per 100 ml (liquid)

7.2 Only products in compliance with literals 7.1(a) and 7.1(b) may be sold in the national territory with the “Free-Content” front-of-pack nutrition label.

7.3 The use of the “Free-Content” front-of-pack nutrition label is not required in order to place packaged processed food products for sale on the national market.

## **Article 8. Low-Content Labelling**

8.1 Packaged processed food products, ready to be offered to consumers, may include a “Low-Content” front-of-pack nutrition label provided that, in their final composition, the content of Sodium, Sugar, or Saturated Fats is less than the following values:



Sodium	Sugar	Saturated Fats
< 0.12 gm per 100 gm	< 5 gm per 100 gm (solid) < 5 gm per 100 ml (liquid)	< 1.5 gm per 100 gm (solid) < 0.75 gm per 100 ml (liquid)

8.2 Only products in compliance with the values set above may be sold in the national territory with the “Low-Content” front-of-pack nutrition label.

8.3 The use of the “Low-Content” front-of-pack nutrition label is not required in order to place packaged processed food products for sale on the national market.

### Article 9. High-Content Labelling

Packaged processed food products, ready to be offered to consumers, shall include a “Health Warning High-Content” front-of-pack nutrition label provided that, in their final composition, the content of Sodium, Sugar, or Saturated Fats equals or exceeds the following values:

Sodium	Sugar	Saturated Fats
≥ 0.4 gm per 100 gm	≥ 10 gm per 100 gm (solid) ≥ 10 gm per 100 ml (liquid)	≥ 4 gm per 100 gm (solid) ≥ 4 gm per 100 ml (liquid)

(...)

### Article 15. Restrictions on the use of Trademarks

15.1 Words, letters, numerals, pictures, shapes, colours, or any combination thereof evoking healthiness associated with the nature, manufacturing process, characteristics, or qualities of the concerned product (terms such as “healthy,” “light,” “low sugar/sodium/saturated fats,” and “fitness”) shall not be used on the package of processed food products containing, in their final composition, Sodium, Sugar, or Saturated Fats equal to or in excess of the following values:

Sodium	Sugar	Saturated Fats
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≥ 0.4 gm per 100 gm	≥ 10 gm per 100 gm (solid)	≥ 4 gm per 100 gm (solid)
	≥ 10 gm per 100 ml (liquid)	≥ 4 gm per 100 ml (liquid)

15.2 This restriction applies to anything on the package, including brand, business, or company name.

### Article 16. Enforceability

16.1 A producer, importer, exporter, distributor, or seller trading packaged processed food products (a) using the label “Sodium/Sugar/Saturated Fats-Free” or the label “Low- Sodium/Sugar/Saturated Fats” and (b) disregarding the thresholds set forth in Articles 7 and 8 of this Decree may be subject to confiscation, destruction or, in case of import, re-consignation of the merchandise.

16.2 A producer, importer, exporter, distributor, or seller trading packaged processed food products not complying with Article 9 of this Decree shall be subject to confiscation, destruction or, in case of import, re-consignation of the merchandise (...)

### Article 18. Entry into force

This Decree shall come into force six (6) months after its publication in the Official Gazette (...)

3.7. On 15 September 2019, Dale sent a communication to the Budican enquiry point established under Article 10.1 of the TBT Agreement. Dale sought, in particular, to clarify the definitions of “added sugar” and “saturated fats” in Article 1 as well as certain aspects of the application of Article 15 of the *Food Information Package*. In the absence of a reply from Budica, Dale followed up on its request on 2 October 2019. To date, Dale has not received a reply to its enquiry.

3.8. During the TBT Committee meeting held on 16 October 2019, Dale raised a specific trade concern regarding the labelling requirements set forth in the Food Information Package, claiming that these deviated from the relevant international standards and were deceptive, misleading, and a source of unjustified fear for consumers. Dale also raised a concern about the lack of response from the Budican enquiry point to Dale’s request (see Annex IV).

#### 4. APPLICATION OF THE FOOD INFORMATION PACKAGE BY BUDICAN CUSTOMS AUTHORITY

4.1. On 2 April 2020, a Dalean ship arrived at Budica's main port of entry carrying 10 containers filled with *Healthy Spear Bars*. On 3 April 2020, Budica's customs authority rejected the import of the cargo on the grounds of its failure to meet the labelling requirements set out in the *Food Information Package*.

4.2. On the same date, this decision was notified via e-mail to Spear Bars Inc., the exporter. The notification read as follows "(...) the exporter shall re-consign or return the merchandise, directly or through a duly designated third party (...) failure to exercise this obligation within ten (10) calendar days will automatically, and without further notice, result in the declaration of the merchandise as uncleared goods in terms of Section 48 of the Budican Customs Act.<sup>16</sup>"

4.3. In the absence of a response from the exporter, on 13 April 2020, Budica's customs authority issued an administrative decision declaring Spear Bars Inc.'s merchandise as uncleared and ordering its immediate destruction. The destruction of the merchandise took place on 16 April 2020.

4.4. On 20 April 2020, Spear Bars Inc. submitted an official request for the return of the rejected merchandise. The customs authority informed the exporter about the decision adopted on 13 April and the subsequent destruction of the merchandise.

4.5. Spear Bars Inc. immediately contested the actions undertaken by the Budican customs authority through an administrative appeal. Spear Bars Inc. argued, in particular, that the amount of time provided for re-consignment of goods (10 calendar days) was not a reasonable period of time within the meaning of Article 10.8.2 of the TFA.

#### 5. CLAIMS OF WTO INCONSISTENCY IN DALE'S PANEL REQUEST

5.1. On 5 May 2020, Spear Bars Inc. challenged the *Food Information Package* before the Budican administrative court. Spear Bars Inc. questioned the accuracy of the labels and trademark restrictions contained therein. In particular, the claimant alleged that the *Food Information Package* is in breach of Budica's Consumer Protection Act on the grounds that it misleads consumers by, first, portraying potentially healthy foods as unhealthy (e.g., *Healthy Spear Bars*) and, second, creating the false impression that food products containing potentially harmful substances (e.g.,

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<sup>16</sup> According to Section 48 of the Budican Customs Act, if merchandise imported into the customs territory is not cleared for consumption, warehoused, or transhipped within 10 days from the date of unloading thereof at a port or is declared as uncleared by the Budican Customs Authority, such goods can be destroyed or disposed of by the custodian.

sugar naturally found in fresh or dehydrated fruits and fats other than saturated fats<sup>17</sup>) are beneficial.

5.2. Spear Bars Inc. requested the tribunal to suspend the application of the *Food Information Package* through an interim measure. On 23 August 2020, the tribunal admitted the lawsuit and granted the requested interim measure on the basis that not preserving the *status quo* would cause irreparable harm to Spear Bars Inc.'s interests during the pendency of the litigation.<sup>18</sup>

5.3. As a matter of practice, the tribunal may issue a ruling in approximately one year and, if appealed, Budica's Supreme Administrative Court may take an additional year to issue a final decision.

5.4. In parallel, one of Dale's new producers was exploring the possibility of exporting nutrition food bars to Budica. In the course of designing its strategy, the company noted the measures recently imposed by Budica and their possible adverse effects on export opportunities and further marketing and sale. After intense industry lobbying, funded by Spear Bars Inc. and supported by interested new producers, the government of Dale decided to challenge the measures imposed by Budica through the WTO dispute settlement system.

5.5. The government of Dale requested consultations with the Budican government. On 14 August 2020, after unsuccessful consultations, Dale submitted a request for the establishment of a panel to the Dispute Settlement Body ("DSB") pursuant to Articles 4.7 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the GATT, Article 14.1 of the TBT Agreement, and Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").

5.6. The request for the establishment of a panel contained the following claims:

1. Presidential Decree No. 457 (*Food Information Package*) constitutes a technical regulation within the meaning of Annex 1.1 to the TBT Agreement because it lays down mandatory labelling requirements, and is inconsistent with Article 2.1 of the TBT Agreement because it accords to Dalean food bars treatment less favourable than that accorded to like food bars of national origin and to like food bars originating in any other country.

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<sup>17</sup> Such as trans fats (fats derived from the partial hydrogenation of vegetable oils, commonly present in cakes, cookies, crackers, icings, and margarines); monounsaturated fats (fats with one double bond between the carbons in the fatty acid chain, commonly present in salmon, olive oil, avocado, peanuts, and other seeds), and polyunsaturated fats (fats with two or more double bonds between carbons in the fatty acid chain, commonly present in omega 3 and 6, hemp, and canola).

<sup>18</sup> "The government shall not issue acts or regulations which are likely to deceive or mislead the general public, particularly as to the geographical origin, nature, manufacturing process, characteristics, qualities, or suitability for use of the goods or services concerned."

2. Presidential Decree No. 457 (*Food Information Package*) is also inconsistent with Article 2.2 of the TBT Agreement because it creates unnecessary obstacles to international trade and is more trade-restrictive than necessary to fulfil a legitimate objective.
  3. The failure of the Budican enquiry point to reply to Dale's request dated 15 September 2019 is inconsistent with Article 10.1.1 of the TBT Agreement.
  4. Presidential Decree No. 457 (*Food Information Package*) is inconsistent with Article 20 of the TRIPS Agreement because, by prohibiting the use of words, letters, numerals, pictures, shapes, colours, or any combination thereof evoking healthiness and by imposing the front-of-pack nutrition labelling requirements, it unjustifiably encumbers, by special requirements, the use of trademarks in the course of trade.
  5. The application of Presidential Decree No. 457 (*Food Information Package*) by Budica's customs authority to Spear Bars Inc.'s shipment is inconsistent with Article 10.8.2 of the TFA.
- 5.7. In response to the panel request, Budica contested before the DSB each of the claims of violation arguing that the measure at issue is fully compliant with WTO rules. Budica also noted that the measure had not yet taken effect, nor would it due to the tribunal's interim measure. Budica expressed the view that Dale's bringing of the dispute to the DSB was premature as it did not challenge a measure "taken" by another Member. Finally, Budica maintained that Dale's actions were inconsistent with the requirements of Article 3.7 of the DSU for Members to determine whether a claim would be fruitful before bringing it.
- 5.8. On 5 September 2020, the DSB established the panel, which was composed on 15 September 2020.

## ANNEX I: LABELING REQUIREMENTS UNDER DECREE NO. 457

[EXCERPTS]

Annexure A to Decree No. 457

### ***Free-Content Labelling***

The front-of-pack nutrition label set out in Article 7 shall consist of the expression “NO [SUGAR/SATURATED FAT/SODIUM] CONTENT,” as applicable. This expression shall be accompanied by the following symbol, circular design, and figure background:

Figure 1: Free content front-of-pack nutrition label



### ***Low-Content Labelling***

The front-of-pack nutrition label set out in Article 8 shall consist of the expression “LOW [SUGAR/SATURATED FAT/SODIUM] CONTENT,” as applicable. This expression shall be accompanied by the following symbol, circular design, and figure background:

Figure 2: Low-Content front-of-pack nutrition label



### ***High-Content Labelling***

The front-of-pack nutrition label set out in Article 9 shall consist of the expression “HEALTH WARNING: HIGH [SUGAR/SATURATED FAT/SODIUM] CONTENT,” as applicable. This expression shall be accompanied by the following symbol, circular design, and figure background:



*Figure 3: High-Content front-of-pack nutrition label*



### ***Labelling Features***

The labels shall be included on the packaging indelibly and shall not be partially or totally covered by any other element. The labels shall be placed on the main front face of the product package, preferably on the upper area of the main front face, using the dimensions set out in Table 1. If more than one label is to be used, the corresponding labels shall be placed one after the other.

*Table 1: Dimensions of the labelling according to the area of the main face of the package*

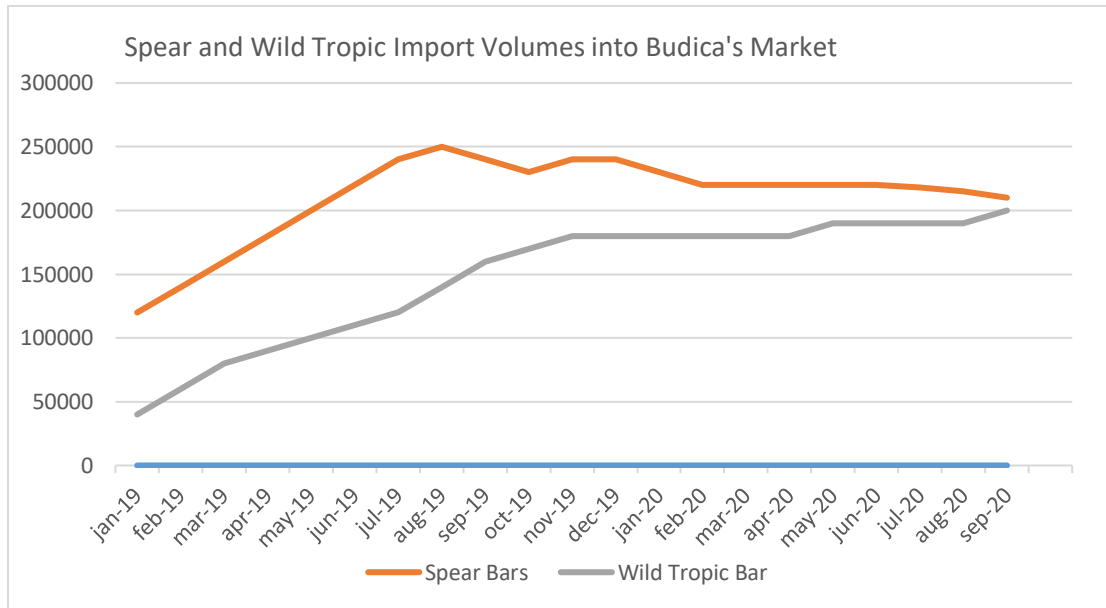
<b><i>Area of the main side of the packaging</i></b>	<b><i>Dimensions of each of the symbols</i></b>
Less than 30 cm <sup>2</sup>	2 x 2 cm
More than or equal to 30 and less than 60 cm <sup>2</sup>	2. 5 x 2. 5 cm
(...)	(...)

ANNEX II: APPLICATION OF THE LABELLING REQUIREMENTS UNDER  
DECREE NO. 457 TO NUTRITION FOOD BARS

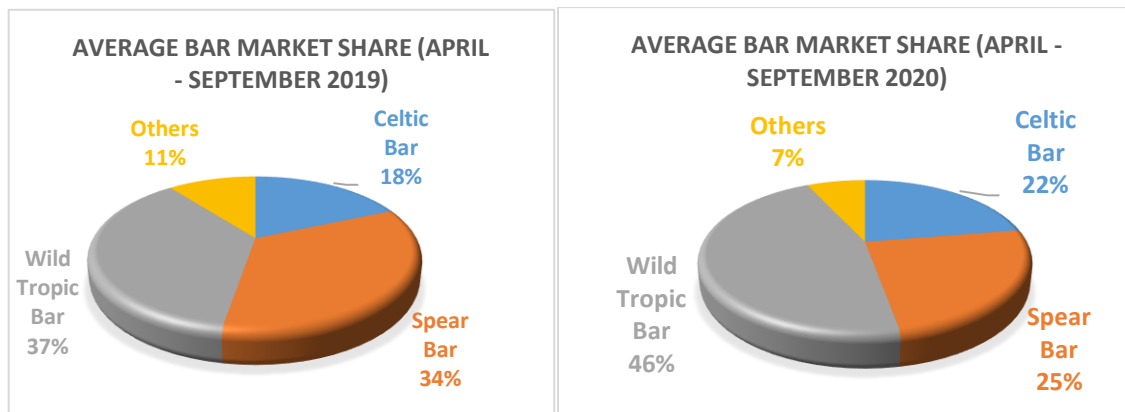
<i>Bars packaging before the entry into force of Decree No. 457 (per item)</i>	<i>Bars packaging after the entry into force of Decree No. 457 (per item)</i>
 The packaging is grey with yellow lightning bolts. It features the text "CELTIC" in large bold letters and "FLAVOUR BAR" in smaller bold letters below it.	 The packaging is grey with yellow lightning bolts. It features the text "CELTIC" in large bold letters and "FLAVOUR BAR" in smaller bold letters below it. It also includes three circular icons: "100% NATURAL", "NO ADDED SUGAR", and "NO ARTIFICIAL FLAVOURS".
 The packaging is green with illustrations of tropical fruits and leaves. It features the text "WILD TROPIC" in large bold letters and "All Natural Bar" in a script font below it.	 The packaging is green with illustrations of tropical fruits and leaves. It features the text "WILD TROPIC" in large bold letters and "All Natural Bar" in a script font below it. It also includes three circular icons: "100% NATURAL", "NO ADDED SUGAR", and "NO ARTIFICIAL FLAVOURS".
 The packaging is blue with white curved lines. It features the text "Healthy" in a script font and "SPEAR BAR" in large bold letters below it.	 The packaging is blue with white curved lines. It features the text "SPEAR BAR" in large bold letters. It also includes three circular icons: "100% NATURAL", "NO ADDED SUGAR", and "NO ARTIFICIAL FLAVOURS".

### ANNEX III: NUTRITION FOOD BARS IMPORTS AND MARKET SHARES

***Nutrition Food Bar Imports into Budica's Market:*** By September 2020, *Healthy Spear Bars* imports decreased by approximately 13% compared to import levels in September 2019. By the same date, *Wild Tropic – All Natural Bars* imports into Budica increased by approximately 20%.



***Nutrition Food Bar Shares in Budica's Market:*** The major products in the Budican food bar market include Wild Tropic, Celtic, and Spear bars. After the adoption of the *Food Information Package*, the market share of *Healthy Spear Bars* decreased by approximately 26%, while the market share of *Wild Tropic – All Natural Bars* increased by approximately 20%, as compared with the April–September period of 2019. The market share of *Celtic Flavour Bars* in Budica's market increased by approximately 18% in April–September 2020, compared to the same period in 2019.



## ANNEX IV: SPECIFIC TRADE CONCERN

### [EXCERPTS]

#### Budica–Presidential Decree No. 457

The representative of Dale raised concerns regarding the adoption of the draft Presidential Decree No. 457 (Decree), notified by Budica to the TBT Committee on 1 August 2019, which introduces mandatory labelling requirements on the content of added sugar, sodium, saturated fats and related health warnings to packaged processed food products. Dale recognised the right of WTO Members to implement measures for the legitimate purposes of providing consumer information and protecting human health, including via food labelling. However, Dale stressed that, in exercising such a right to regulate, Budica ought to comply with its WTO obligations.

In this regard, Dale's concerns were mainly related to the nutrient thresholds established in the Decree for determining whether food products are to be labelled as “free-content”, “low-content” or “high-content” in Budica's market. Dale acknowledged that there was evidence of a positive association between the intake of the nutrients at issue (*i.e.*, added sugar, sodium and saturated fats) and the risk of developing certain non-communicable diseases (NCDs). Yet, importantly, there was no scientific evidence suggesting an identifiable threshold above which that risk existed. Therefore, Dale urged Budica to explain the scientific or technical basis for the nutrient thresholds laid down in the measure.

In addition, Dale observed that the Decree significantly deviated from the FAO Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims* (CAC/GL 23-1997, p.3), which provide the following conditions for nutrient content claims:

Table of Conditions for Nutrient Content Claims

<i>Component</i>	<i>Claim</i>	<i>Conditions (not more than)</i>
Saturated Fats (including trans fatty acids)	Low	1.5 gm per 100 gm (solids) 0.75 gm per 100 ml (liquids)
	Free	0.1 gm per 100 gm (solids) 0.1 gm per 100 ml (liquids)
Sugars ( <i>i.e.</i> , all mono-saccharides and di-saccharides present in food)	Low	5 gm per 100 gm (solids) 5 gm per 100 ml (liquids)
	Free	0.5 gm per 100 gm (solids) 0.5 gm per 100 ml (liquids)
Sodium	Low	0.12 gm per 100 gm
	Free	0.005 gm per 100 gm

In addition, Dale was concerned that the Decree and, in particular, the “high-content” health warning label created unnecessary obstacles to international trade. Dale requested clarification from Budica as to why the “free” and “low” claims set out in the Codex Guidelines were not deemed sufficient to fulfil its regulatory objectives. It also sought information as to whether Budica had considered the adoption of other, less trade-restrictive, measures to tackle obesity such as the promotion of physical activity, which has the potential to reach a more significant number of people being less costly for the population.

Dale recalled that the *Codex Alimentarius Guidelines on Nutrition Labelling* (CAC/GL 2-1985, p.2) set out the principles for nutrition labelling at the international level, including the following: (i) “information should not lead consumers to believe that there is exact quantitative knowledge of what individuals should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product” and (ii) “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.” Dale considered that Budica’s mandatory “high-content” health warning requirement, combined with the “low-content” and “free-content” labels, are not consistent with these principles.

Dale further argued that foods have intrinsic nutritional characteristics that cannot be categorised as “healthy” or “unhealthy” by a limited analysis of nutritional content. Thus, the “high-content” health warning label could provoke unjustified fear in consumers by misleading them to assume that diseases, such as obesity, are only caused by the consumption of food products with specific nutritional contents.

Finally, Dale recalled that, on 15 September 2019, it sent a communication to the Budican enquiry point established under Article 10.1 of the TBT Agreement, in which it sought certain clarifications of the provisions of the Decree. Dale noted that it had not received a reply to its enquiry.

The representative of Budica thanked the delegation of Dale for its comments. Budica reiterated that the measure pursues the legitimate objectives of providing consumers with sufficient information so that healthy dietary choices can be made and of protecting human health by reducing the risk of obesity and associated NCDs, while being fully in line with its obligations under the TBT Agreement.

Budica first recalled that the *Codex Alimentarius Guidelines* are voluntary and, hence, do not have a binding effect on national food legislation. Furthermore, the delegation of Budica noted that the *Guidelines on the Use of Nutrition and Health Claims* explicitly state that claims should be consistent with national nutrition and health policies and, accordingly, do not prevent the adoption of regulations containing higher levels of consumer and health protection.

Budica noted that there was sufficient scientific evidence on the correlation between excessive consumption of added sugar, saturated fats and sodium and the development of obesity. Budica further clarified that the measure did not intend to prohibit the public from consuming particular foods. It merely provided clear and precise information to increase consumer awareness and understanding of the content of added sugar, saturated fats and sodium in food products, including in such quantities that have been scientifically proven as unhealthy, as follows:

<i>Component</i>	<i>WHO-RAHO Recommended Daily Intake (gm)</i>	<i>Estimated Serving per Day (#)</i>	<i>Maximum Amount per Serving (gm)</i>
Saturated Fats	22	5	4
Sugars	50	5	10
Sodium	2	5	0.4
* Values for the average adult at a calorie intake of 2.000 kcal per day			

Budica underscored that the joint WHO-FAO Report on *Diet, Nutrition, and the Prevention of Chronic Diseases* recommended that healthy adults should limit their saturated fat intake to no more than 10% of their total daily calorie intake. Budica also highlighted the 2019 RAHO Report on *Consequences of Unsaturated Fats Intake on Health and Obesity in Adults* which concluded that, in an average 2.000 intake calorie diet per day, a person should not consume more than 22 gm of saturated fats. The report, estimating an average of 5 meals per day, concluded that food products with 4 gm per 100 gm of saturated fats should be regarded as harmful for health.

Budica further referred to the 2012 WHO *Guideline: Sugar Intake for Adults and Children* which advised reducing the daily sugar intake, at all stages of life, to under 10% of calories to reduce the risk of unhealthy weight gain. It recommended a maximum of 50 gm of sugar (approximately 10 teaspoons) for the average adult with a daily calorie intake of 2.000 kcal. In addition, Budica asserted that, according to the 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 estimated average of 5 meals per day.



Lastly, Budica recalled that the *WHO Guidelines on Sodium* provided that adults should consume less than 2 gm of sodium per day and that the RAHO recommended consuming less than 3 gm per day.

Budica mentioned that, in the drafting process of the Decree, other alternatives, such as the promotion of physical activity and taxation, were assessed and disregarded due to the lack of sufficient data concerning their effectiveness.

Budica also stated that it was premature to evaluate the impact of front-of-pack nutrition labellings in the country. However, Budica further indicated that similar labelling measures had been proven effective in the past.

Budica further referred to a survey published by the RAHO, namely, the *2017 Obesity: Front of Pack Labelling and Consumer Behaviour*. Budica asserted that, pursuant to the survey, 92.9% of consumers declared that they usually do not understand nutritional facts information printed on packaged food products. Budica highlighted that, when asked about their consumption behaviours, 48.1% of the surveyed consumers affirmed they examined the presence of the labelling when buying and 79.1% indicated that the label influenced their purchasing decisions.

With respect to Dale's comment regarding the lack of reply from the enquiry point, the representative of Budica noted that the enquiry point received a large number of requests from different WTO Members regarding the Draft Decree, which slowed down their processing. Budica further stated that the TBT Agreement does not impose on Members an obligation to respond to such enquiries. In any event, since the text of the Draft Decree was available to Dale and since this issue has been discussed at the TBT Committee meeting, the representative of Budica saw no added value in a separate reply from the enquiry point on this matter.

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