



TAIKON – REQUIREMENTS ON THE IMPORTATION OF PREPARED FOODS AND LIVE ANIMALS FROM ASTOR

FOR THE 18TH EDITION OF THE JOHN H. JACKSON MOOT COURT COMPETITION

BENCH MEMORANDUM

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

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CASES CITED IN THIS BENCH MEMORANDUM

Short Title	Full Case Title and Citation
<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/AB/R and Add.1, adopted 9 May 2016
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R , adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW , adopted 20 March 2000, DSR 2000:IV, p. 2031
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R , adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R , WT/DS142/AB/R , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R , WT/DS142/R , adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R , adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R , adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, p. 481
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R , adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R , adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131

EC – Approval and Marketing of Biotech Products	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R , Add.1 to Add.9 and Corr.1 / WT/DS292/R , Add.1 to Add.9 and Corr.1 / WT/DS293/R , Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Asbestos	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R , DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R , adopted 25 September 1997, DSR 1997:II, p. 591
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EC – Hormones	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
EC – Hormones	Panel Reports, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS48/R/CAN (Canada) / WT/DS26/R/USA (US), adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R , WT/DS48/AB/R , DSR 1998:II, p. 235 / DSR 1998:II, p. 699
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EC – Seal Products	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R , DSR 2014:II, p. 365
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India – Agricultural Products	Appellate Body Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/AB/R , adopted 19 June 2015, DSR 2015:V, p. 2459
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Indonesia – Iron or Steel Products	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R , WT/DS496/AB/R , and Add.1, adopted 27 August 2018
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Japan – Alcoholic Beverages II	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97
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Korea – Radionuclides	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/AB/R and Add.1, adopted 26 April 2019
Korea – Radionuclides	Panel Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/R and Add.1, adopted 26 April 2019, as modified by Appellate Body Report WT/DS495/AB/R

Korea – Various Measures on Beef, para. 161.	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R , WT/DS169/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Taxes on Soft Drinks	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R , adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Russia – Pigs (EU)	Appellate Body Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/AB/R and Add.1, adopted 21 March 2017, DSR 2017:I, p. 207
Russia – Railway Equipment	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/R and Add.1, circulated to WTO Members 30 July 2018 [appealed by Ukraine 27 August 2018]
Thailand – Cigarettes (Philippines)	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203
Turkey – Textiles	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R , adopted 19 November 1999, DSR 1999:VI, p. 2345
US – Animals	Panel Report, <i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS447/R and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085
US – Continued Suspension	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R , adopted 14 November 2008, DSR 2008:X, p. 3507
US – Gambling	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gambling	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R , DSR 2005:XII, p. 5797
US – Gasoline	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
US – Line Pipe	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R , adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Line Pipe	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R , adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/R , DSR 2002:IV, p. 1473
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R , adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW , Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW , DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
US – Tuna (Mexico) (Article 21.5 – United States / Article 21.5 II – Mexico)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS381/AB/RW/USA and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW2 and Add.1, adopted 11 January 2019

ABBREVIATIONS USED IN THIS BENCH MEMORANDUM

Abbreviation	Description
ALOP	Appropriate Level of Protection
ATC	Agreement on Textiles and Clothing
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CU	Customs Union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU	Eurasian Economic Union
EC	European Communities
EU	European Union
ESODEC	East Stormy Ocean Development and Economic Community
FTA	Free Trade Area
GATT 1994	General Agreement on Tariffs and Trade 1994
MERCOSUR	Common Market of the South
RCA	ESODEC Regulatory Community Agreement, signed 18 October 2012, entered into force 24 March 2015
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMS Agreement	Agreement on Trade-Related Aspects of Investment Measures
US	United States

TIMELINE OF THE DISPUTE

Date	Event
23 January 2009	Astor, Cosmia and Taikon sign the ESODEC Agreement
23 December 2009	The ESODEC Agreement enters into force
15 October 2012	The ESODEC Free Trade Area is notified to the WTO under Article XXIV:7(a) of the GATT
18 October 2012	Astor, Cosmia and Taikon sign the ESODEC Regulatory Community Agreement
24 March 2014	Joint Committee promulgates the RCA at the Cosmopolis Summit
10 March 2015	Joint Committee adopts the ECP Regulation at the Astorville Summit
24 March 2015	The ESODEC regulatory community enters into force
12 October 2017	At the Taikoa Summit, the Joint Committee celebrates the growth of intra-ESODEC trade
14 November 2017	Astor, Cosmia and Taikon submit to the CITES Secretariat the Stormian crab for inclusion in Annex III of CITES
13 February 2018	The inclusion of the Stormian crab in Annex III of CITES takes effect
12 March 2018	ESODEC Joint Committee adopts the Crayfish Ban at the Cosmopolis Summit
2 April 2018	The Crayfish Ban is notified to the WTO through the SPS Notification Submission System
10 July 2018	The ESODEC Regulations Authority issues Directive 44/2018, containing the list of products to be subjected to the ECP in order to implement the Crayfish Ban
18 December 2018	President Terix takes office and announces intention to withdraw from ESODEC
14 January 2019	Astor notifies Taikon and Cosmia of its intention to withdraw from ESODEC
4 April 2019	The ESODEC Regulations Authority issues a report stating that no marbled crayfish were found in Astorian establishments during the March 2019 periodic inspections
13 April 2019	The ESODEC Regulations Authority issues Note 7/2019, withdrawing from Astor the recognition of regulatory equivalence and applying the ECP to its products
14 April 2019	Astor's withdrawal takes effect at midnight
15 May 2019	President Terix initiates visit to Taikon and Cosmia to demand recognition of regulatory equivalence
18 May 2019	President Terix announces the failure of negotiations
31 May 2019	Astor requests consultations over the application of the ECP to Astor's food products
31 July 2019	Astor submits a panel request to the DSB
9 August 2019	The DSB establishes the Panel

15 September 2019	The Director-General composes the Panel
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1 INTRODUCTION

1.1. On 31 May 2019, Astor requested consultations with Taikon pursuant to Articles 1 and 4 of the DSU, Article XXIII:1 of the GATT 1994, and Article 11 of the SPS Agreement with respect to the measures and claims set out below.

1.2. Consultations were held on 20 June 2019. Consultations did not resolve the dispute.

1.3. On 31 July 2019, Astor requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference. At its meeting on 9 August 2019, the Dispute Settlement Body (DSB) established the panel in accordance with Article 6 of the DSU.

2 KEY ISSUES

2.1. This dispute concerns four key issues, all of which raise points of interpretation of WTO law not settled by WTO Members or within WTO dispute settlement:

- a. Whether a measure that is ostensibly aimed at protecting from a health risk is an SPS measure, if there is no evidence that the risk in question exists. In this dispute, a Member has banned the importation of marbled crayfish as well as of products containing its meat. There is evidence that importing live marbled crayfish produces a risk to the native Stormian crab, but not that consuming the meat of marbled crayfish involves a health risk for humans. Can measures that ultimately aim at enforcing the ban on the meat be assessed under the SPS Agreement, together with the measures that aim at enforcing the ban on the live animal? Or are the former measures simply not covered under Annex (A)1 of the SPS Agreement due to the lack of evidence of risk?
- b. Whether bilateral and multi-party agreements providing for mutual recognition of equivalence of SPS measures are consistent with the non-discrimination provisions of the SPS Agreement. In this dispute, an economic organization requires its member states to mutually recognize the equivalence of their SPS measures and establishes conditions for third parties to obtain equivalence (including at least reciprocity). Does the fact that these schemes establish a distinction of treatment on the basis of legal status rather than risk conditions entail (i) arbitrary or unjustifiable discrimination under Article 2.3 of the SPS Agreement and/or (ii) a discriminatory arbitrary or unjustifiable distinction between levels of protection applied in different situations under Article 5.5 of the SPS Agreement? Are GATT defences, such as Article XX and Article XXIV, available under the SPS Agreement?
- c. Whether bilateral and multi-party agreements for recognition of equivalence of SPS measures lead to consequences under the equivalence provisions of the SPS Agreement. In this dispute, a Member lost its recognition of equivalence when it left an economic organization that features a mutual recognition scheme among its members. This scheme operates ostensibly outside of WTO law. Does Article 4, read together with the SPS Committee's Decision on Equivalence,¹ imply an obligation to justify, on the basis of evidence (factual or scientific), the withdrawal of recognition of equivalence of a Member's SPS provisions?
- d. How to consider under the GATT the application of different treatment to products imported from different WTO Members, on the basis of whether the Member has entered into a bilateral or multi-party agreement with the importing Member for recognition of regulatory equivalence. In this dispute, a Member's products are subject to regulatory checks additional to those that are applied to member states of an economic organization or states that have entered into an agreement with such an organization. Is this distinction consistent with the Most-Favoured Nation clause (Article I of the GATT 1994)? Is it justifiable under Article XX of the GATT 1994? Is it justifiable under Article XXIV of the GATT 1994?

¹ Decision on the Implementation of Article 4, last revised on 23 July 2004 (G/SPS/19/Rev.2).

3 FACTUAL ASPECTS

3.1 Norms, measures and claims at issue

3.1. The ESODEC norms at issue in this dispute are summarized below:

TABLE OF ESODEC NORMS

Measures	Effect
Regulatory Community Agreement (RCA) - Incorporated by Taikon's Law 14/2012	- Establishes recognition of regulatory equivalence for products imported from ESODEC Member States - Establishes the possibility of equivalence agreements between ESODEC and third countries
ECP Regulation [Regulation 7/2015] - Issued by the Joint Committee - Directly applicable [RCA Art 1(2)]	- Establishes the Enhanced Control Procedure for Potentially Dangerous Products (ECP), which imposes requirements for the importation of covered products
Crayfish Ban [Regulation 13/2018] [<i>not challenged</i>] - Issued by the Joint Committee - Directly applicable [RCA Art 1(2)]	- Prohibits the possession, importation, breeding, and marketing of marbled crayfish and products containing marbled crayfish within ESODEC Member States - Establishes enforcement procedures in ESODEC Member States, to be implemented by national authorities and supervised by the ESODEC Regulations Authority
Directive 44/2018 - Issued by Regulations Authority - Directly applicable [ECP Art 1]	- To control for marbled crayfish in imports, extends application of the ECP to cover '(f) All products consisting of marine and aquatic animals' and '(g) All food products containing the meat of marine and aquatic animals'
Note 7/2019 - Issued by Regulations Authority - Directly applicable [ECP Art 1]	- Withdraws from Astor the recognition of regulatory equivalence it enjoyed as an ESODEC Member State - Determines application of ECP to imports from Astor

3.2. The measures and claims at issue are summarized below:

TABLE OF MEASURES AND CLAIMS

Measures	Claims	Provisions
Crayfish Ban, Directive 44/2018, and ECP Regulation applied to enforce the Crayfish Ban	- These measures are SPS measures, including when applied to food products.	SPS Agreement, Annex A(1)
Taikonese Law 14/2012, incorporating the ESODEC Regulatory Community Agreement	- Law 14/2012 sets up a system for recognition of equivalence for ESODEC Member States that is more favourable than the system that is applied to other WTO Members, and thereby discriminates between Astor and ESODEC Members contrary to Article 2.3 of the SPS Agreement. - By applying a different ALOP to the same risk depending on whether a product comes from Cosmia or from Astor, Taikon is acting inconsistently with Article 5.5 of the SPS Agreement.	SPS Agreement, Article 2.3 SPS Agreement, Article 5.5
Taikon's application of Note 7/2019	By withdrawing the equivalence recognition previously enjoyed by Astor and applying the ECP to products from Astor, Taikon acts inconsistently with Taikon's obligations under Article 4.1 of the SPS Agreement.	SPS Agreement, Article 4.1
Taikon's application of the ECP Regulation to Astor	- Astorian prepared food products receive less favourable treatment than Cosmian ones. - This discrimination is not justified by Article XXIV of the GATT 1994. - Taikon cannot justify its measures under Article XX of the GATT 1994.	GATT Art I GATT Art XXIV GATT Art XX

3.2 Facts of the dispute

3.2.1.1 The ESODEC Regulatory Community and the Enhanced Control Procedure

3.3. In 2009, Astor, Taikon and a third WTO Member, Cosmia, entered into the Agreement Establishing the ESODEC. The ESODEC Agreement led to the establishment of a Free Trade Area among its parties, notified to the WTO under Article XXIV:7(a) of the GATT 1994 in 2012.

3.4. In 2015, the RCA entered into force. Its Article 2, entitled 'Regulatory Community', provides:

All products subject to ESODEC regulations and lawfully marketed in one Member State shall be admitted for marketing in every other Member State, without undergoing additional technical, sanitary, phytosanitary, or administrative controls to assess conformity with either the relevant ESODEC Regulation or the importing Member's own laws and regulations.

3.5. On the date this provision entered into force, ESODEC issued ESODEC Regulation 7/2015, establishing an Enhanced Control Procedure for Potentially Dangerous Products (ECP Regulation). The ECP Regulation requires ESODEC Member States to apply control procedures to shipments from non-ESODEC Member States of products that an ESODEC body has classified as "potentially containing a prohibited product, element, or substance whose entrance in the territory of the Community might produce a risk of irreversible damage", to ensure that the product, substance or element controlled for is not present in the inspected shipment. The specific method of assessment is defined in each case by the ESODEC Regulations Authority. The ECP must be applied to one in every twenty units of product, or 5% of the volume or mass of product imported. Once a shipment has been subject to the ECP in an ESODEC Member States, it is considered to be inside the Regulatory Community and Article 2 of the RCA applies.

3.2.2 The Crayfish Ban and its Enforcement through the ECP

3.6. The marbled crayfish is a newly discovered species whose females reproduce by parthenogenesis, i.e. "self-cloning", without the need for a male. Over the past few years, farmers in the East Stormy Ocean that previously bred a typical regional crab, the Stormian crab, started breeding marbled crayfish as a cheaper alternative, especially for use in prepared foods, often produced in Astor and Cosmia from local produce and exported to Taikon.

3.7. In 2018, following a social media campaign initiated by Mr. Baars Terix (subsequently elected Astor's president), ESODEC adopted a regulation banning in all ESODEC Member States marbled crayfish and products made of marbled crayfish (Crayfish Ban) and prohibiting the importation of these products. In its preamble, the Crayfish Ban indicates that the ban is due to "the unnatural character of the marbled crayfish, the environmental risks it poses, including to the Stormian crab and as a consequence to traditional Stormian cuisine and culture, and the unknown effects of its consumption on human health" and aimed at "preserving the natural habitat of indigenous species and ensuring that all food products sold within ESODEC are safe for human consumption". The Crayfish Ban determined that the ECP should apply to "[p]roducts potentially containing marbled crayfish entering the territory of the Community", which the ESODEC Regulations Authority determined to include "products consisting of marine and aquatic animals" and "food products containing the meat of marine and aquatic animals".

3.2.3 Astor's Withdrawal from ESODEC and Its Trade Effects

3.8. In 2018, Mr. Terix was elected President of Astor running on an anti-ESODEC platform, leading Astor to notify Taikon and Cosmia of its intention to withdraw from ESODEC. Astor's withdrawal took effect on 14 April 2019. The previous day, the ESODEC Regulations Authority issued Note 7/2019, instructing the customs and border agencies of ESODEC Member States as follows:

1. All products imported from Astor into a Community Member State shall be subject to the tariff applied by that Member State to third countries Members of the World Trade Organization;
2. All products imported from Astor into a Community Member State shall be subject to the regulatory controls applicable to third countries Members of the World Trade Organization.

3.9. Since 14 April 2019, Taikon's customs authorities have stopped admitting the importation of products from Astor without regulatory checks and have been applying the ECP to products classified by ESODEC organs as potentially dangerous. The application of the ECP to prepared foods implies significant costs for exporters and has led to a drop in exports of prepared foods from Astor to Taikon. Astor's president has sought to negotiate with Taikon an agreement providing for regulatory equivalence. However, Astor's president was told that, pursuant to the RCA, ESODEC rather than its Member States is competent to enter into equivalence agreements.

3.10. Astor subsequently initiated consultations with Taikon at the WTO and requested the establishment of this Panel.

4 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

4.1. Astor requests that the Panel find that Directive 44/2018, Taikonese Law 14/2012, Note 7/2019, and the application of the ECP to Astor are inconsistent with Taikon's obligations under the SPS Agreement and the GATT 1994.

4.2. Taikon requests that the Panel reject Astor's claims in this dispute in their entirety and argues that its measures are justifiable under the GATT. Taikon has stated before the DSB that membership of ESODEC is a relevant distinction justifying the application of different measures to different WTO Members. Taikon's statement may amount to an argument that this distinction is not arbitrary or unjustifiable under the chapeau of Article XX of the GATT 1994. Additionally or alternatively, it may argue that this distinction is justified under Article XXIV of the GATT 1994.

5 RELATIONSHIP BETWEEN SPS AND GATT

5.1 Relevance of the Issue

5.1. The relationship between the SPS Agreement and the GATT 1994 may arise for three related reasons. First, the panel may wish to inquire the parties with respect to the order of analysis of Astor's claims. Second, the parties may disagree with respect to whether, should the measures be found incompatible with the SPS Agreement, the panel should exercise judicial economy with regard to Astor's claims under the GATT. Third, the parties may disagree with respect to whether defences under the GATT – in particular, Article XXIV and subparagraphs of Article XX other than Article XX(b) – may be available with respect to the measures at issue.

5.2 Relevant legal provisions

5.2. The preamble of the SPS Agreement provides as follows:

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

...

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b);*

*Footnote 1: In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

5.3. Article 2(4) of the SPS Agreement provides:

Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of

GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

5.4. The General interpretative note to Annex 1A provides:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

5.3 Review of the jurisprudence

5.5. With respect to the order of analysis, the presumption in Article 2.4 of the SPS Agreement that measures that conform to its provision are presumed to conform with the GATT suggests that claims under the SPS Agreement should be examined first. This view was taken by the panels in *EC – Hormones*, *Australia – Salmon*, *US – Poultry (China)*, *US – Animals* and *Russia – Pigs (EU)*.

5.6. With respect to judicial economy, the panels above, having found violations of the SPS Agreement, exercised judicial economy with respect to the claims under the GATT. The panel in *US – Poultry (China)* is the exception, having examined both the claims under the SPS Agreement and the claims under the GATT. It did so because the United States had argued that China's claims under the SPS Agreement were outside the terms of reference of the panel and had focussed its defence on the invocation of Article XX(b) of the GATT.² The panel in *US – Animals* refused to follow the same route, arguing that assessing a claim under the GATT after having assessed it under the SPS Agreement would lead to circular reasoning, since, in the "examination of whether the measure was justified under Article XX(b) of the GATT 1994, the Panel would be led back to the SPS Agreement, with which the panel had already found inconsistencies"³ and that, due to Article 2.4 of the SPS Agreement, once a respondent "brings its measures into conformity with the SPS Agreement, any inconsistency with the GATT 1994 will also be addressed".⁴

5.7. With respect to the availability of GATT defences for the violation of provisions of the SPS Agreement, the panel in *US – Poultry (China)* found that the SPS Agreement "explains in detail the provisions of Article XX(b) in respect of SPS measures".⁵ This implies that invoking Article XX(b) of the GATT as justification for measures found to be inconsistent with the SPS Agreement would be fruitless. However, it does not resolve the issue of whether a Member could invoke a different GATT defence, such as Article XXIV or another subparagraph of Article XX.

5.8. As regards the applicability of Article XXIV, there is some support for the view that it might be available as a defence for SPS-inconsistent measures. With respect to the *Agreement on Safeguards*, the panel in *US – Line Pipe* found that, due to "the close interrelation between [GATT] Article XIX and the Safeguards Agreement ... if an Article XXIV defence is available for Article XIX measures, by definition it must also be available for measures covered by the disciplines of the Safeguards Agreement".⁶ This finding of "close interrelation" was grounded on Article 1 of the *Agreement on Safeguards*, which provides that that agreement "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994". The wording of this provision is similar to that of the eighth recital of the preamble of the SPS Agreement. In *Turkey – Textiles*, the Appellate Body found that Article XXIV is "incorporated in the ATC [Agreement on Textiles and Clothing] and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the ATC",⁷ despite the fact that the chapeau of Article XXIV:5 refers only to the provisions of the GATT. Article 2(4) of the ATC specifically permitted the introduction of new restrictions under "relevant GATT 1994 provisions".

² Panel Report, *US – Poultry (China)*, paras 7.59-7.69.

³ Panel Report, *US – Animals*, para. 7.730.

⁴ Panel Report, *US – Animals*, para. 7.731.

⁵ Panel Report, *US – Poultry (China)*, para. 7.481.

⁶ Panel Report, *US – Line Pipe*, para. 7.150. On appeal, the Appellate Body decided not to address the question, and made the panel's findings moot (Appellate Body Report, *US – Line Pipe*, para. 199).

⁷ Appellate Body Report, *Turkey – Textiles*, footnote 13.

5.9. As regards defences under subparagraphs of Article XX other than Article XX(b), the panel in *US – Poultry (China)* concluded that an SPS measure found to be inconsistent with provisions of the SPS Agreement cannot be justified under Article XX(b).⁸ It was not, however, confronted with the issue of whether a single measure – for example, a single requirement – might have more than one purpose, and be defensible as a non-SPS measure. In *EC – Approval and Marketing of Biotech Products*, the panel speculated that a single requirement could be both an SPS measure and a non-SPS measure, with the result that "a WTO Panel [c]ould find the requirement at issue to be WTO-inconsistent as an SPS measure but WTO-consistent as a non-SPS measure".⁹

5.10. Two related issues were dealt with by WTO adjudicators in disputes involving claims made under China's Accession Protocol. The first was the possibility for China to invoke Article XX as a defence of a violation of provisions of its Accession Protocol. In *China – Publications and Audiovisual Products*, the provision whose violation China sought to justify (Paragraph 5.1 of the Accession Protocol) stated that the obligation was "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". Relying on this text, the Appellate Body concluded that Article XX(a) was available to justify a violation of this provision.¹⁰ A similar approach was followed by the panel in *Russia – Traffic in Transit* with respect to the availability of Article XXI of the GATT 1994 as a defence in relation to obligations in Russia's Accession Protocol.¹¹ In *China – Raw Materials*, the Appellate Body found that the absence of similar language in Paragraph 11.3 of China's Accession Protocol meant that a violation of this paragraph could not be justified under Article XX.¹² The Appellate Body attached importance to the fact that, contrary to covered agreements that "incorporated, by cross-reference, the provisions of Article XX of the GATT 1994", Paragraph 11.3 "expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX".¹³

5.11. The second related issue is the relationship between the disciplines on quantitative restrictions under Article XI of the GATT 1994 and under Article 4.2 of the Agreement on Agriculture. In *Indonesia – Import Licensing Regimes*, the Appellate Body found, with respect to Article XI:1 of the GATT 1994 and Article 4.2 of the AoA, that there is "essentially no difference between" them, and that they "contain the same substantive obligations".¹⁴ Pointing to the fact that footnote 1 to the Agreement on Agriculture safeguards the rights of Members to adopt restrictions "under ... general, non-agriculture-specific provisions of GATT 1994", the Appellate Body concluded that this footnote "incorporates Article XX of the GATT 1994".¹⁵ As a result, the AoA obligation does not apply to the exclusion of the GATT obligation but the two obligations "apply cumulatively".¹⁶ By contrast, the Appellate Body found that there is a conflict between Article XI:2(c) of the GATT 1994 and Article 4.2 of the AoA, since import restrictions on agricultural products that are permitted by the former would violate the latter. As a result of this finding, the Appellate Body applied the conflict rule in Article 21.1 AoA, concluding that "Article XI:2(c) cannot be applied to justify or exempt measures that fall within the prohibition of quantitative import restriction under Article 4.2".¹⁷

5.12. This panel may consider the nature of the textual link between the SPS Agreement and the GATT. It may also consider whether it should seek harmonious interpretation between the different agreements of Annex 1A, in this case the GATT and the SPS Agreement which elaborates on its provisions, or whether it should identify a conflict between these agreements and apply a conflict rule, such as the General Interpretative Note to Annex 1A.

⁸ Panel Report, *US – Poultry (China)*, para. 7.481.

⁹ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.168-7.169.

¹⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215.

¹¹ Panel Report, *Russia – Traffic in Transit*, section 7.6.4.

¹² Appellate Body Report, *China – Raw Materials*, para. 304. The Appellate Body noted that Paragraphs 11.1 and 11.2 did require "conformity with the GATT 1994" (*Ibid*, para. 293).

¹³ Appellate Body Report, *China – Raw Materials*, para. 303 (referring to Article 3 of the Agreement on Trade-Related Aspects of Investment Measures (TRIMS)).

¹⁴ Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras 5.15-5.16.

¹⁵ Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras 5.46. The incorporation does not modify the burden of proof, which remains the same one that applies to Article XX of the GATT 1994.

¹⁶ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.18.

¹⁷ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.80.

5.4 Arguments of the parties

5.4.1 Astor

5.13. Astor may argue that the SPS Agreement elaborates on the provisions of the GATT 1994 as applied to SPS measures. As a result, it could argue that the panel should begin its analysis by examining the claims under the SPS Agreement. It may also argue that, given the dispute with respect to whether Taikon's measures are SPS measures when applied to food products and its broader claim concerning the compatibility of the ECP with GATT, the panel should not exercise judicial economy with respect to its claims under the GATT 1994. With respect to the applicability of Article XXIV and subparagraphs of Article XX other than XX(b), Astor may argue that a measure found to violate the SPS Agreement cannot be justified pursuant to any provision of the GATT 1994. It could find support for this argument in the General Interpretative Note to Annex 1A of the WTO Agreement, which provides that in the case of conflict between the GATT 1994 and other agreements in Annex 1A, "the provision of the other agreement shall prevail to the extent of the conflict" and in the findings of the Appellate Body in *Indonesia – Import Licensing Regimes*.

5.4.2 Taikon

5.14. Taikon may agree that, given the specific character of the SPS Agreement, the panel should begin its analysis with the SPS Agreement. Taikon may argue that the findings of the panel in *US – Poultry (China)* were limited to measures that are SPS measures and to the justifiability under subparagraph (b) of Article XX. As explained in Section 6 below, Taikon may argue, first, that its measures as applied to food products are not SPS measures and, second, that it is not seeking to justify them under Article XX(b) but under another subparagraph of Article XX, in particular XX(a) or XX(g). Taikon may argue, as a result, that the findings of the panel in *US – Poultry (China)* do not apply to its measures as applied to food products.

5.15. Additionally, Taikon might argue that the panel report in *US – Poultry (China)* in fact supports the argument that Article XXIV of the GATT 1994 may be used to justify measures found inconsistent with the SPS Agreement. Specifically, since the panel found that "the SPS Agreement 'explains in detail' how to apply Article XX(b)",¹⁸ it may be viewed as implicitly acknowledging that the SPS Agreement is an elaboration of the GATT 1994, with the result that an SPS measure, if justified under a provision of the GATT 1994 other than Article XX(b), could also be viewed as compatible with the SPS Agreement. With respect to the findings of the Appellate Body in *Indonesia – Import Licensing Regimes*, Taikon may argue that the SPS Agreement elaborates on rules of the GATT, and that therefore defences under the GATT other than Article XX(b) should be read into the SPS Agreement.

Suggested Questions to the Parties

Astor	Taikon
<ol style="list-style-type: none"> 1. What is the relationship between the SPS Agreement and the GATT? 2. If we find that there is a violation of the SPS Agreement, shouldn't we exercise judicial economy with respect to your claims under the GATT? 3. If, as you argue, the SPS Agreement is an elaboration of GATT provisions, does this mean that Taikon may argue that its measures are not SPS measures but seek to achieve one of the other legitimate objectives listed in Article XX? In this case, should we even examine the issue under the SPS Agreement? 4. If, as you argue, the SPS Agreement is an elaboration of GATT provisions, does this mean that Article XXIV of the 	<ol style="list-style-type: none"> 1. If we find that there is a violation of the SPS Agreement, should we also find that there is a violation of the GATT 1994? 2. Isn't your argument that Article XXIV GATT should be available to justify violations of the SPS Agreement negated by the General Interpretative Note to Annex 1A of the WTO Agreement? 3. Can we even consider the possibility of GATT Article XXIV justifying your restriction, given that this restriction was neither introduced during the formation of ESODEC nor seems necessary for the formation of ESODEC?

¹⁸ Panel Report, *US – Poultry (China)*, para. 7.471.

GATT may be used to justify SPS-inconsistent measures?	
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6 CLAIMS UNDER THE SPS AGREEMENT

6.1 Whether the challenged measures are SPS measures

6.1.1 Relevance of the issue

6.1. Astor seeks to challenge Taikon's measures under the SPS Agreement. Taikon may argue that, to the extent they are applied to food products, the measures at issue are not SPS measures, since there is no evidence of risk to human life or health from consuming marbled crayfish meat. The dispute may then turn on the interpretation of Annex A(1) of the SPS Agreement. A contextual element of interpretation is Article 5.7 of the SPS Agreement, which envisages scrutiny under the SPS Agreement of measures adopted to protect against risks when scientific evidence is insufficient.

6.1.2 Relevant legal provisions

6.2. Article 1.1 of the SPS Agreement provides that the SPS Agreement "applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade". Annex A(1), entitled Definitions, reads:

Sanitary or phytosanitary measure — Any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

6.3. Article 5.7 of the SPS Agreement Provides:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

6.1.3 Review of the jurisprudence

6.4. In *US – Poultry (China)*, the panel noted that it was China's burden to prove that the measure it challenged under the SPS Agreement was indeed an SPS measure.¹⁹ In *Indonesia – Iron or Steel Products*, the Appellate Body reasoned that "a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute".²⁰ The Appellate Body upheld the panel's finding that, given its conclusion that the measures at issue were not safeguards, there was "no legal basis for the complainants' claims under the Agreement on Safeguards".²¹

6.5. The *chapeau* of Annex A(1) provides that an SPS measure is "[a]ny measure" taken for one of the purposes specified in the subparagraphs. The Appellate Body in *Australia – Apples* indicated that the second paragraph, which specifies various types of SPS measures, including "laws, decrees, regulations, requirements and procedures", does not limit the scope of application of the SPS Agreement.²² In *US – Poultry (China)*, the panel found that a budgetary measure preventing the authorization of the importation of Chinese poultry constituted an SPS measure despite restricting importation through the budget rather than through a typical SPS regulation, because the measure was applied to achieve a purpose set forth in one of the subparagraphs of Annex A(1).²³

6.6. In *Australia – Apples*, the Appellate Body held that, in order to constitute an SPS measure, a measure must "exhibit the appropriate nexus to one of the specified purposes" listed in the subparagraphs.²⁴ The Appellate Body stated:

Whether a measure is "applied ... to protect" in the sense of Annex A(1)(a) must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied. For any given measure to fall within the scope of Annex A(1)(a), scrutiny of such circumstances must reveal a clear and objective relationship between that measure and the specific purposes enumerated in Annex A(1)(a).²⁵

6.7. The Appellate Body also noted that "the word "applied" points to the application of the measure and, thus, suggests that the relationship of the measure and one of the objectives listed in Annex A(1) must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure".²⁶

6.8. To assess whether the measures before it were SPS measures, the panel in *EC – Approval and Marketing of Biotech Products* examined "whether the specific risks or concerns identified in [the measures] are risks that fall within the scope of the definition of an SPS measure in Annex A(1)", stating that it did not "necessarily agree that all GMOs [genetically modified organisms], or even specific GMOs, actually or potentially give rise to such effects".²⁷ The panels in *Australia – Salmon*, *US – Animals*, and *India – Agricultural Products* were all able to infer the nature of the measure from its text.²⁸ In *India – Agricultural Products* the panel also noted that the measure had been notified to the SPS Committee.²⁹ Most recently the panel in *Korea – Radionuclides* found that "the stated intent of the measures, the relationship of those measures to Korea's ALOP for radionuclides, and the timing of the measures all indicate that they were adopted for the purpose set forth in Annex A(1)(b)".³⁰

¹⁹ Panel Report, *US – Poultry (China)*, para. 7.80.

²⁰ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.33.

²¹ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.46 (confirmed in Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.71).

²² Appellate Body Report, *Australia – Apples*, para. 181.

²³ Panel Report, *US – Poultry (China)*, paras 7.119-7.120.

²⁴ Appellate Body Report, *Australia – Apples*, para. 176.

²⁵ Appellate Body Report, *Australia – Apples*, para. 173.

²⁶ Appellate Body Report, *Australia – Apples*, para. 172.

²⁷ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras 7.188, 7.196.

²⁸ Panel Report, *Australia – Salmon*, para. 8.35; Panel Report, *US – Animals*, para. 7.35; ²⁸ Panel Report, *India – Agricultural Products*, paras 7.143-7.146.

²⁹ Panel Report, *India – Agricultural Products*, paras 7.143-7.146.

³⁰ Panel Report, *Korea – Radionuclides*, para. 7.27.

6.9. What remains unclear is whether the "appropriate nexus"³¹ of the measure to one of the objectives listed in Annex A(1) must mean that an ascertainable risk must exist and be identified or whether the concern with a potential health risk, expressed in the text of the measure and in a notification to the SPS Committee, is sufficient for a measure to be characterized as an SPS measure. The findings of the panels in *EC – Approval and Marketing of Biotech Products* and *Australia – Salmon* appear to favour the latter view, with the former having found that the SPS Agreement applies to "measures applied to protect against risks which might arise from" the entry of a product.³² More recently, the panel report in *US – Poultry (China)* found that a US measure was an SPS measure because its explanatory statement referred to "serious concerns about contaminated foods from China", even if, as China pointed out, the legislation did not mention "any animal diseases at all".³³ The panel accepted to base its analysis on China's submission, inferred from the United States' defence under Article XX(b) of the GATT, that the risk against which the US measures sought protection was the risk of pathogenic bacteria being present in imported poultry.³⁴

6.10. Article 5.7 of the SPS Agreement may serve as context for the interpretation of Annex A(1). Article 5.7 establishes disciplines for measures addressing risks that do not have a scientifically ascertainable basis. In *US/Canada – Continued Suspension*, the Appellate Body found that Article 5.7 applies to "situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk".³⁵ While the Appellate Body also emphasized that for a measure to comply with the second element of Article 5.7 "there must be a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure",³⁶ this appears to refer to a requirement for the compatibility of a measure with Article 5.7, not a requirement for this provision to apply in the first place. In *Japan – Apples*, the panel found that the absence of a rational relationship between the measure applied and the relevant scientific evidence (because the specific risk that the measure sought to tackle was deemed "negligible") was a reason for the measure to be incompatible with Article 2.2 of the SPS Agreement, not a reason for the measure not to be an SPS measure in the first place.³⁷ At the same time, in that dispute the parties agreed with respect to the *existence* of the risk the measure aimed to protect from (fire blight).

6.11. One issue is whether measures adopted on a precautionary basis would be covered by Annex 5.7. In *EC – Hormones*, the Appellate Body found that "the precautionary principle finds reflection in Article 5.7" as well as in other provisions of the SPS Agreement that permit a Member to adopt a level of protection "higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations", and that panels considering whether sufficient scientific evidence exists to warrant a measure should "bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned".³⁸ In *Canada/US – Continued Suspension*, the Appellate Body noted that in "emergency situations" a Member "will take a provisional SPS measure on the basis of limited information".³⁹ At the same time, the Appellate Body stated that "there may be situations where there is no pertinent scientific information available indicating a risk such that an SPS measure would be unwarranted even on a provisional basis".⁴⁰

6.12. The latter formulation is not determinative of whether the "unwarranted" measure would be an SPS measure inconsistent with the SPS Agreement or not an SPS measure at all. In *EC – Hormones*, the Appellate Body was before a situation in which the EC submitted articles and opinions that "constitute[d] general studies which d[id] indeed show the existence of a general risk of cancer" but that "d[id] not focus on and d[id] not address the particular kind of risk [t]here at stake – the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes".⁴¹ The

³¹ Appellate Body Report, *Australia – Apples*, para. 176.

³² Panel Report, *EC – Approval and Marketing of Biotech Products*, paras 7.189 (emphasis added).

³³ Panel Report, *US – Poultry (China)*, paras 7.110-7.114.

³⁴ Panel Report, *US – Poultry (China)*, para. 7.234.

³⁵ Appellate Body Reports, *Canada – Continued Suspension*, para. 677; *US – Continued Suspension*, para. 677

³⁶ Appellate Body Reports, *Canada – Continued Suspension*, para. 678; *US – Continued Suspension*, para. 678.

³⁷ Panel Report, *Japan – Apples*, paras 8.169, 8.180, 8.191, 8.197.

³⁸ Appellate Body Report, *EC – Hormones*, para. 124.

³⁹ Appellate Body Reports, *Canada – Continued Suspension*, para. 680; *US – Continued Suspension*, para. 680.

⁴⁰ Appellate Body Reports, *Canada – Continued Suspension*, para. 681; *US – Continued Suspension*, para. 681.

⁴¹ Appellate Body Report, *EC – Hormones*, para. 200.

consequence of this finding – that the risk assessment referred to a different risk than the one purportedly addressed by the measure – was that the measure was inconsistent with the obligation under Article 5.1 to base SPS measures on a risk assessment. In *Canada/US – Continued Suspension*, concerning the EC's attempt at complying with *EC – Hormones* by declaring the evidence concerning the risk insufficient, the Appellate Body noted that Article 5.7 applies to "situations where some evidence of a risk exists but not enough to complete a full risk assessment".⁴² However, the Appellate Body still maintained that it was incumbent upon the EC to "provide an adequate explanation of how the provisional ban taken under Article 5.7 rectifies the inconsistencies found in *EC – Hormones*. Such explanation had to include, inter alia, an identification of the insufficiencies in the relevant scientific evidence that precluded the European Communities from performing a sufficiently objective risk assessment".⁴³

6.13. Among SPS measures, the SPS Agreement applies to those "which may, directly or indirectly, affect international trade".⁴⁴ The panel in *EC – Hormones* found that "[i]t cannot be contested that an import ban affects international trade".⁴⁵ This approach was followed by the panels in *India – Agricultural Products* and *US – Animals*. The panel in *Korea – Radionuclides* noted that, in addition to a ban, "testing requirements or other administrative procedures that can delay or deny entry of products into a Member likewise affect international trade".⁴⁶

6.1.4 Arguments of the parties

6.1.4.1 Astor

6.14. The ban on live marbled crayfish and on products containing marbled crayfish appears to be both a "regulation" and a "requirement". The ECP is a "testing, inspection, certification and approval procedure[]" applied to protect against an SPS risk. Both the ban on crayfish and the ECP are measures affecting international trade.

6.15. To characterize them as SPS measures, Astor must establish that the purpose of Taikon's measures is one of those listed in Annex A(1).

6.16. With respect to the ban on live crayfish, given the speed with which it reproduces and the risks it presents to the Stormian crab, the marbled crayfish may be considered a pest. The crayfish measures as applied to live crayfish can thus be characterized as having the purpose "to protect animal or plant life or health within the territory of [Taikon] from risks arising from the entry, establishment or spread of pests", therefore falling under Annex A(1)(a). These measures can also fall under Annex A(1)(d), as measures applied "to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests". The latter would require characterizing the marbled crayfish as a pest, for example by mentioning the finding of the panel in *EC – Approval and Marketing of Biotech Products* that "the term 'pest' should be interpreted to cover 'destructive' animals or plants – that is animals or plants which destroy the life and threaten the very existence of other animals, plants or humans".⁴⁷

6.17. The crayfish meat contained in prepared foods does not reproduce. The measures as applied to prepared foods must, therefore, be justified under one of the other sub-paragraphs (e.g., (b) or (c)). There is no evidence that marbled crayfish is harmful to humans. In order to characterize the ban on food products containing marbled crayfish as an SPS measure, Astor may refer to the panel reports that considered as SPS measures those measures that express the intent of addressing a health risk, either without committing to the view that there was a risk (*EC – Approval and Marketing of Biotech Products*) or without defining what specific risk the measures aimed to address (*US – Poultry (China)*). In *EC – Hormones*, the Appellate Body found that a measure that addressed a given risk and

⁴² Appellate Body Reports, *Canada – Continued Suspension*, para. 678; *US – Continued Suspension*, para. 678.

⁴³ Appellate Body Reports, *Canada – Continued Suspension*, para. 716; *US – Continued Suspension*, para. 716.

⁴⁴ SPS Agreement, Article 1.

⁴⁵ Panel Report, *EC – Hormones*, para. 8.23.

⁴⁶ Panel Report, *Korea – Radionuclides*, para. 7.30.

⁴⁷ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.238-7.239.

that was based on scientific evidence that concerned a different risk was nonetheless subject to an assessment under the SPS Agreement.⁴⁸

6.18. As evidence of the purpose of the measures, Astor may point to the preamble of the Crayfish Ban, which states that the ban is based on "ample evidence relating to the unnatural character of the marbled crayfish ... and the unknown effects of its consumption on human health". Astor may also refer to the notification of the measure through the WTO's SPS Notification Submission System. In this case, the measures could arguably have the purpose to protect against risks arising from "disease-causing organisms in foods", falling under Annex A(1)(b). Astor may also argue that the measures aim to address risks to health "arising from diseases carried by animals ... or products thereof" under Annex A(1)(c).

6.19. Astor may argue that the language employed in the Crayfish Ban ("unknown effects") implies that the measure is at least a provisional measure under Article 5.7 of the SPS Agreement in cases where "relevant scientific evidence is insufficient". While Astor is not challenging the legality of the Crayfish Ban under this provision, it may argue that Article 5.7 is relevant context for the interpretation of "risks arising from" in Annexes A(1)(b) and A(1)(c) of the SPS Agreement, in that even a measure that is not based on scientific evidence is an SPS measure if, pursuant to the terms employed in the measure itself, it seeks to pursue one of the objectives listed in Annex A(1), protecting the Member's territory from a risk that might arise in one of the circumstances mentioned therein.

6.20. As regards the type of SPS measure, given the broad coverage of the second paragraph of Annex A(1), Astor would be expected to argue that each of the measures at issue is an SPS measure if it wishes to pursue claims under the SPS Agreement with respect to that measure.

6.1.4.2 Taikon

6.21. Taikon is likely to accept the notion that the Crayfish Ban, the ECP, and the non-recognition of equivalence fall under the second paragraph of Annex A(1). It is also likely to accept that the measures, as applied to live crayfish, fall under Annex A(1)(a) or A(1)(d) of the SPS Agreement, and that they affect international trade. It should nonetheless mention the issue, even if cursorily.

6.22. With respect to food products, Taikon could argue that the absence of evidence of risk to humans arising from the consumption of marbled crayfish means that there are neither risks to human life or health "arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs" under Annex A(1)(b) nor risks to human life or health "arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests" within the meaning of Annex A(1)(c). Taikon may argue that the panel is required to conduct an objective assessment of the measure and that the burden is on Astor to provide evidence of an "appropriate nexus" between the measures and a specific risk listed in Annex A(1). With respect to the argument that the text of the measure refers to health risks, Taikon may argue that Annex A(1) refers to measures "applied" to protect against risks. The focus of the assessment would thus be not the purpose for which the measure was adopted but the purpose for which it is applied. It may then propose that the measure is applied for another purpose, for example a purpose specified in a subparagraph of Annex XX other than Annex XX(b) (on which see Section 7.3).

6.23. With respect to the argument that the SPS Agreement also covers measures taken without sufficient scientific evidence and measures adopted on a precautionary basis, Taikon may argue that Astor has not challenged the measure as a measure taken under Article 5.7 and Taikon is not seeking to justify this measure under Article 5.7. Taikon may argue that, even for a provisional SPS measure, there needs to be a rational and objective relationship between the information concerning a certain risk and the provisional SPS measure. Not only is the panel precluded from assuming that Taikon has adopted an unlawful provisional SPS measure – when this has not been claimed by Astor – the panel should also conclude that, in the absence of any evidence presented by the complainant of a concrete risk covered by a subparagraph of Annex 1(A), the SPS Agreement is simply not the appropriate benchmark against which to assess the WTO-compatibility of a measure.

⁴⁸ Appellate Body Report, *EC – Hormones*, para. 200.

6.24. As regards the type of SPS measure, Taikon may concede that the measures at issue falls under the second paragraph of Annex A(1) and focus on challenging their connection to the four subparagraphs.

6.1.4.2.2

Suggested Questions to the Parties	
Astor	Taikon
<ol style="list-style-type: none"> 1. If there is no evidence of risk arising from a product, is the SPS Agreement an appropriate framework for assessing the WTO-compatibility of a measure concerning that product? 2. If the respondent claims that there is no risk to humans from consuming crayfish and Astor does not present evidence of any such risk, how is the panel supposed to assess the measure under the SPS Agreement? 3. Is the panel allowed to characterize Taikon's measure as an SPS measure adopted without sufficient scientific evidence, when Taikon itself rejects this characterization? 	<ol style="list-style-type: none"> 1. If a measure ostensibly aims at addressing a risk listed in Annex A(1) of the SPS Agreement, should a Member be able to shield itself from scrutiny under the SPS Agreement by claiming that the risk in reality does not exist? 2. The measure seems to address a potential risk to humans from consuming a new species. Shouldn't the panel assess objectively the measure itself rather than the characterization put forward by Taikon? 3. Isn't the argument that there is no ascertainable risk substantially the same as the argument that the measure is being applied in the absence of sufficient scientific evidence, and that therefore it should be subject to the disciplines of Article 5.7 and, by extension, to all other applicable obligations in the SPS Agreement?

6.2 Whether Taikonese Law 14/2012 discriminates between Astor and ESODEC Members contrary to Article 2.3 of the SPS Agreement

6.2.1 Relevant legal provisions

6.25. Article 2.3 of the SPS Agreement provides.

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

6.2.2 Review of the jurisprudence

6.26. The panel in *Australia – Salmon (Article 21.5 – Canada)* reasoned that three cumulative elements must be established to find a violation of Article 2.3: (i) the measure must discriminate between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (ii) the discrimination must be arbitrary or unjustifiable; and (iii) identical or similar conditions must prevail in the territories of the Members concerned.⁴⁹

⁴⁹ Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

6.27. The panel in *US – Poultry (China)* found Article 2.3 to be applicable to procedural requirements as well as to substantive SPS measures. The panel found that a measure found to be an SPS measure could be challenged under Article 2.3 "regardless of whether it relates to equivalence".⁵⁰

6.28. In *India – Agricultural Products*, the Appellate Body found that "logically, identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence".⁵¹ In *Korea – Radionuclides*, the Appellate Body agreed with the panel that "the regulatory objective of a measure should inform the determination of the relevant conditions under Article 2.3".⁵² The Appellate Body criticized the panel's finding that the "risk present in products in international trade" was "the relevant condition" to be assessed:

While the analysis under Article 2.3 may include consideration of conditions that can be characterized as being present in the products from different Members, a proper interpretation of Article 2.3 includes consideration of other relevant conditions, such as territorial conditions, to the extent they have the potential to affect the products at issue. The analysis under Article 2.3 thus entails consideration of all relevant conditions in different Members, including territorial conditions that may not yet have manifested in products but are relevant in light of the regulatory objective and specific SPS risks at issue.⁵³

6.29. The panels in *Australia – Salmon (Article 21.5 – Canada)*, *India – Agricultural Products* and *US – Animals* found that the relevant conditions were those relating to the presence of a certain disease in the territories of the Members compared. The panel in *US – Animals* agreed with the United States that "the level of risk posed by imports from ... two regions is not only a function of their disease-prevalence in a given point in time, but also, and most importantly, of the credibility of the sanitary measures in place in such regions to prevent and control [the disease]".⁵⁴ It found that conditions were similar, in part, because the Argentinean authorities "had the necessary veterinary and regulatory infrastructure to adequately monitor and control [the targeted disease] in Northern Argentina", the World Organisation for Animal Health had twice recognized the area as disease-free, and Argentinean authorities had undertaken systematic and compulsory action to reduce the likelihood of infection with and transmission of the disease in the region.⁵⁵ In *Korea – Radionuclides*, the Appellate Body found that the panel's consideration that similar conditions prevailed "on the sole basis of actual measurement levels in product samples" failed to account for the "potential for contamination in light of relevant conditions prevailing in the territories of different Members".⁵⁶

6.30. With respect to the assessment of discrimination, the panel in *US – Animals* noted that different treatment does not necessarily amount to discrimination, and that the focus of a discrimination analysis should be "whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member".⁵⁷ The panel in *India – Agricultural Products* resorted to the jurisprudence on Article XX of the GATT to find that "discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country".⁵⁸

6.31. With respect to whether discrimination is arbitrary or unjustifiable, the panel in *India – Agricultural Products* recalled the findings the Appellate Body made in *Brazil – Retreaded Tyres* in the context of Article XX of the GATT 1994. It found that "'the meaning of 'arbitrary or unjustifiable discrimination' within the context of Article 2.3 of the SPS Agreement involves a consideration of the

⁵⁰ Panel Report, *US – Poultry (China)*, para. 7.147.

⁵¹ Appellate Body Report, *India – Agricultural Products*, para. 5.261.

⁵² Appellate Body Report, *Korea – Radionuclides*, para. 5.62.

⁵³ Appellate Body Report, *Korea – Radionuclides*, para. 5.64 (footnotes omitted).

⁵⁴ Panel Report, *US – Animals*, para. 7.581.

⁵⁵ Panel Report, *US – Animals*, para. 7.594 (referring to paras 7.464, 7.466, and 7.475).

⁵⁶ Appellate Body Report, *Korea – Radionuclides*, para. 5.92.

⁵⁷ Panel Report, *US – Animals*, para. 7.523.

⁵⁸ Panel Report, *India – Agricultural Products*, para. 7.400. See also Appellate Body Report, *US – Shrimp*, para.

'cause' or 'rationale' put forward to explain the discrimination in question, and whether there is a 'rational connection' between the reasons given for the discriminatory treatment and the objective of the measure".⁵⁹ Similarly, the panel in *US – Animals* found that a determination that discrimination between imports from two areas is arbitrary or unjustifiable depends on "whether the regulatory distinction between the two sets of imports bears a rational connection to the stated objective of the measures".⁶⁰

6.32. Finally, with respect to the second sentence of Article 2.3, the jurisprudence is consistent in stating that discrimination is a type of "disguised restriction on international trade", considering a finding of discrimination sufficient to characterize a disguised restriction on international trade.⁶¹

6.33. What remains unclear is (i) the extent to which "all relevant conditions" may refer to regulatory or institutional conditions; and (ii) the extent to which a country's participation in a regulatory and institutional arrangement has a "rational connection" to the objective of the measure.

6.2.3 Arguments of the parties

6.2.3.1 Astor

6.34. Astor may claim that the system for recognition of equivalence Taikon applies to ESODEC Member States under the RCA is more favourable than the system that is applied to other WTO Members. It may argue that the territorial conditions in Astor are identical or similar to those in Cosmia with respect to the risk that marbled crayfish is present. Conditions that may be present in prepared foods and live animals imported from Astor are also similar to those that may be present in live foods and prepared animals from Cosmia. Taikonese Law 14/2012, incorporating the ESODEC Regulatory Community Agreement, sets up a system for recognition of Cosmian products that treats Cosmian products differently from Astorian products. Astor could claim that this discrimination is arbitrary or unjustifiable because there is no rational connection between the objective of the measure – to prevent the entry into Taikon of marbled crayfish and food products containing marbled crayfish – and the discrimination between ESODEC and non-ESODEC Members.

6.35. If Taikon argues that Article XXIV of the GATT 1994 applies to the SPS Agreement, Astor should reject this interpretation in the rebuttal (on the applicability of GATT Article XXIV to the SPS Agreement, see Section 5 . On the Article XXIV defense, see Section 7.2).

6.2.3.2 Taikon

6.36. Taikon could argue that the conditions in Taikon are not identical or similar to those in Cosmia. The term "conditions" does not refer solely to conditions present in products or physical territorial conditions but to all relevant conditions. "Relevant conditions" are those that are relevant/pertinent to the attainment of Taikon's ALOP. In this respect, the relevant institutional conditions in Cosmia are different from those in other WTO Members, including Astor. Cosmia's adherence to the same SPS measures as Taikon is subject to control by the ESODEC Regulations Authority and enforcement by the ESODEC Court.

6.37. Additionally, Taikon may argue that the different measures applied to Cosmia and Taikon do not amount to arbitrary or unjustifiable discrimination. The distinction between ESODEC Member States and third countries in the application of Taikon's procedures for assessing conformity with its ALOP is rationally related to the objective of these procedures. These differences do not arise solely from the Cosmia's membership of ESODEC but from the combination of a common set of rules and an institutional structure that verifies compliance with these rules.

6.38. Finally, Taikon could argue that Article XXIV of the GATT 1994 should apply to the SPS Agreement because the rules of the SPS Agreement merely "elaborate rules for the application of the provisions of GATT 1994". Despite being contained in a different agreement, the provisions of the SPS

⁵⁹ Panel Report, *India – Agricultural Products*, paras 7.428-7.429 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-227).

⁶⁰ Panel Report, *US – Animals*, para. 7.589.

⁶¹ Panel Report, *US – Animals*, para. 7.575; Panel Report, *India – Agricultural Products*, para. 7.476; Appellate Body Report, *US – Gasoline*, DSR 1996:I, 3, p. 25.

Agreement simply explain in detail how the rules of the GATT 1994 apply to sanitary and phytosanitary measures. Taikon could argue that the Panel should follow the panel in *US – Line Pipe* and hold that Article XXIV justifies the adoption of more favourable treatment among Members who are parties to a customs union or free trade area (on the applicability of GATT Article XXIV to the SPS Agreement, see Section 5 . On the Article XXIV defence, see Section 7.2).

Suggested Questions to the Parties	
Astor	Taikon
<ol style="list-style-type: none"> 1. Is a Member's participation in a common regulatory and institutional framework with the importing Member a condition that is relevant to the assessment of whether products comply with regulations? 2. How can Astor argue that the application of the ECP is discriminatory when its exports of live animals to Taikon have increased since the ECP started applying to its products? 3. Is the distinction drawn by Taikon between Members that participate in the ESODEC regulatory and control institutions and those that do not rationally related to the objective of controlling compliance by products with its regulations? 4. Does the RCA have a provision that would allow Astor to request equivalence? 5. Does Astor's argument amount to stating that WTO Members are required either to recognize regulatory equivalence to all WTO Members' or not to recognize any regulatory equivalence? Wouldn't this interpretation conflict with the permission given by Article 4.2 of the SPS Agreement for Members to enter into agreements on recognition? 6. Would Article XXIV of the GATT be applicable to SPS measures? 	<ol style="list-style-type: none"> 1. How does having a trade agreement with Taikon make the conditions in Cosmia different from those in Astor? 2. Didn't ESODEC authorities certify that the relevant conditions in Astor were the same as the ones in Cosmia one month before Taikon decided that the conditions were no longer similar due to Astor's withdrawal from ESODEC? 3. How can having a trade agreement with Taikon be rationally related to an advantage in the assessment of SPS measures? Doesn't this argument amount to stating that Taikon can itself determine which countries may receive advantages in recognition and which ones are not? 4. If the argument is that there is no discrimination because the RCA permits equivalence agreements with non-ESODEC Member States, how does that square with the argument that it is the regulatory and institutional framework that makes the distinction justifiable? Is there any requirement in the RCA that equivalence agreements involve joint institutions? Do equivalence agreements usually establish joint institutions? 5. If the argument is that Article XXIV of the GATT applies to SPS measures, are there even grounds for justifying the RCA under GATT Article XXIV in the first place (see Section 7.2)? 6. How do we square the argument that GATT Article XXIV should apply with the General interpretative note to Annex 1A, which determines that in case of conflict the SPS Agreement prevails over the GATT? Isn't the absence of an Article XXIV-type justification precisely the type of conflict that the General interpretative note addresses?

6.3 Whether Taikonese Law 14/2012 applies distinctions in ALOPs in comparable situations in a manner inconsistent with Article 5.5 of the SPS Agreement

6.3.1 Relevant legal provisions

6.39. Article 5.5 of the SPS Agreement reads as follows:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

6.40. Annex A(5) of the SPS Agreement defines the concept of ALOP as "the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". A Note to this provision adds that "Many Members otherwise refer to this concept as the 'acceptable level of risk'".

6.41. Article 2.3 of the SPS Agreement provides:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

6.3.2 Review of the jurisprudence

6.3.2.1 Interpretation of Article 5.5

6.42. The panel in *US – Poultry (China)* noted that Article 5.5 "embodies a non-discrimination principle in respect of the application of the appropriate level of sanitary or phytosanitary protection ('ALOP')".⁶² If a Member fails to determine its ALOP, or does so with insufficient precision, the panel may establish the ALOP "on the basis of the level of protection reflected in the SPS measure actually applied".⁶³

6.43. Demonstrating a violation of Article 5.5 requires the establishment of three elements: (a) that a Member adopts different levels of protection in different situations; (b) that these levels of protection show arbitrary or unjustifiable differences; and (c) that these arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade.⁶⁴ These elements were reaffirmed by the SPS Committee in its *Guidelines to Further the Practical Implementation of Article 5.5*.⁶⁵

6.44. In order for the first element to be established, a Member must have adopted different levels of protection in different situations, but these situations must also be comparable.⁶⁶ In *Australia – Salmon*, the Appellate Body concluded that different situations are comparable when there is a "common element" among them, which can be "either a risk of entry, establishment or spread of the same or a similar disease, or a risk of the same or similar 'associated potential biological and economic consequences'".⁶⁷ In this respect, the panel in *US – Poultry* found that a US restriction that applied solely to poultry products imported from China meant that two different situations in which the US measures applied – the importation of poultry products from China and that of poultry products from other WTO Members – were comparable because the US measures addressed the same risk: the risk of *Salmonella*, *Campylobacter* and *Listeria* being present in imported poultry products.⁶⁸

6.45. As regards a difference in levels of protection, the panel in *Australia – Salmon* inferred this element from "the rather substantial difference in sanitary measures imposed by Australia for the salmon products further examined (an import prohibition) as opposed to those imposed for the other

⁶² Panel Report, *US – Poultry (China)*, para. 7.218.

⁶³ Appellate Body Report, *Australia – Salmon*, para. 207.

⁶⁴ Appellate Body Report, *Australia – Salmon*, para. 140. See also Appellate Body Report, *EC – Hormones*, para. 214.

⁶⁵ Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5*, 18 July 2000 (G/SPS/15), para. A.2.⁶⁵ The Guidelines provide that they "do not add to nor detract from the existing rights and obligations of Members under the SPS Agreement nor any other WTO Agreement" and "do not provide any legal interpretation or modification to the Agreement itself" (*Ibid*, Introduction).

⁶⁶ Appellate Body Report, *EC – Hormones*, para. 217.

⁶⁷ Appellate Body Report, *Australia – Salmon*, para. 145. Reaffirmed in SPS Committee, *Guidelines to Further the Practical Implementation of Article 5.5*, 18 July 2000 (G/SPS/15), para. A.2.

⁶⁸ Panel Report, *US – Poultry (China)*, para. 7.236.

four situations ... where imports are allowed, often without control".⁶⁹ The Appellate Body concurred, stating that "appropriate levels of protection reflected in the SPS measures applied to other fish and fish products are ... different from the appropriate level of protection for ocean-caught Pacific salmon".⁷⁰ The Panel in *US – Poultry (China)* found that the regular US import procedures implied a certain ALOP, prohibiting importation of poultry products from a particular country only until that country had demonstrated that its SPS measures could achieve the ALOP expressed in the US measure. The effect of the China-specific section "was to prohibit the importation of poultry from China in any instance, regardless of whether China demonstrated that its own SPS measures could achieve the ALOP expressed in the [US measure]".⁷¹ The panel stated that, in order "to prove that such substantially different measures were needed to achieve the same ALOP, the United States would have to demonstrate that poultry products from China presented a greater risk than poultry products from other WTO Members".⁷²

6.46. With respect to the second element of Article 5.5, i.e. whether there is arbitrary or unjustifiable distinction in levels of protection, in *Australia – Salmon* the Appellate Body agreed with the panel that this element was present because Australia applied a higher level of protection to ocean-caught salmon (the product at issue) than it did to other fish and fish products that posed at least as high, if not higher risk, than the risk associated with ocean-caught salmon.⁷³ The Appellate Body rejected the argument that Australia's "right to a cautious approach to determine its own appropriate level of protection" should allow it to adopt measures beyond those required to address "those disease agents positively detected".⁷⁴ The Appellate Body observed that, were the level of protection adjusted to include diseases of concern which have not been positively detected, this level of protection would have led to measures targeted at addressing such potential diseases in all products subject to such diseases, and not just the product at issue.⁷⁵

6.47. The panel in *US – Poultry (China)* grounded its findings with respect to arbitrary or unjustifiable discrimination on the jurisprudence of the Appellate Body with respect to Article XX of the GATT 1994 in *Brazil – Tyres*. The Appellate Body had found that the assessment of whether discrimination is "arbitrary or unjustifiable" in the context of Article XX "should be made in the light of the objective of the measure" and must "bear [a] rational connection to th[is] objective".⁷⁶ The panel in *US – Poultry (China)* reasoned that, similarly, "in the context of Article 5.5 to show that the distinction in ALOPs is not arbitrary or unjustifiable, a Member must demonstrate that there are differing levels of risk between the comparable situations" and that "such a demonstration requires scientific evidence".⁷⁷ The panel recalled its finding that the US's China-specific measure was "not based on a risk assessment and was maintained without sufficient scientific evidence", and concluded "that there is no justification based on scientific principles and founded in scientific evidence for the distinction in ALOPs, as reflected in the differences between the measures used to tackle the risk of potentially unsafe poultry", one for poultry products from China and another for poultry products from other WTO Members.⁷⁸

6.48. With respect to the third element of Article 5.5, i.e. that the arbitrary or unjustifiable distinctions in levels of protection result in "discrimination or a disguised restriction on international trade", the panel in *Australia – Salmon* identified three "warning signals" that, taken together with other factors, can be considered relevant in a decision on the third element of Article 5.5.⁷⁹ These were: (a) the arbitrary and unjustifiable character of differences in the levels of protection; (b) the

⁶⁹ Panel Report, *Australia – Salmon*, para. 8.129.

⁷⁰ Appellate Body Report, *Australia – Salmon*, para. 232.

⁷¹ Panel Report, *US – Poultry (China)*, para. 7.249.

⁷² Panel Report, *US – Poultry (China)*, para. 7.250.

⁷³ Appellate Body Report, *Australia – Salmon*, para. 158.

⁷⁴ Appellate Body Report, *Australia – Salmon*, para. 150.

⁷⁵ Appellate Body Report, *Australia – Salmon*, para. 157.

⁷⁶ Appellate Body Report, *Brazil – Tyres*, para. 227.

⁷⁷ Panel Report, *US – Poultry (China)*, para. 7.263.

⁷⁸ Panel Report, *US – Poultry (China)*, para. 7.264-7.268.

⁷⁹ Panel Report, *Australia – Salmon*, para. 8.151. The panel noted that none of these signals "is ... conclusive in its own right" (*Ibid*).

"rather substantial" difference in the levels of protection; and (c) the inconsistency of the SPS measure at issue with Articles 5.1 and 2.2 of the SPS Agreement.⁸⁰

6.49. The panel in *US – Poultry (China)* considered relevant for its conclusion that there was discrimination the finding of the Appellate Body in *US – Shrimp* that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries".⁸¹ This panel concurred with the panel in *Australia – Salmon* that an "additional factor" indicating discrimination or a disguised restriction on international trade were the "substantially different conclusions" on how to deal with the specific risk over a short period of time.⁸² It noted the view of the panel in *Australia – Salmon* the "decisive reason" for its finding with respect to the third element of Article 5.5 was its view that the imposition of additional restrictions on importation "might well have been inspired by domestic pressures to protect the Australian salmon industry against import competition".⁸³

6.3.2.2 Consequential violation of Article 2.3

6.50. Panels and the Appellate Body have found that a violation of Article 5.5 leads to a consequential violation of Article 2.3. In *EC – Hormones*, the Appellate Body stated that Article 2.3 of the SPS Agreement is an important part of the context of Article 5.5 and held that Article 5.5 "elaborat[es] a particular route leading to the same destination set out in Article 2.3".⁸⁴ In light of this relationship, the panel in *Australia – Salmon* reasoned that a finding of violation of the more specific Article 5.5, particularly a conclusion that there is arbitrary or unjustifiable discrimination or a disguised restriction on international trade, would imply a violation of the more general Article 2.3.⁸⁵ The panel in *US – Poultry (China)* found that a measure that is inconsistent with Article 5.5 "by virtue of a distinction in ALOPs which results in discrimination between Members ... is also inconsistent with the first sentence of Article 2.3 of the SPS Agreement".⁸⁶

6.3.2.3 Arguments of the parties

6.3.2.4 Astor

6.51. Astor may argue that, by exempting Cosmian products from regulatory controls that remain applicable to Astor, Taikon applies a different ALOP to products imported from Astor than to products imported from Cosmia. When it leads to the application of the ECP to Astorian imports, the RCA results in substantially different measures being applied to imports from Astor and to imports from Cosmia. This difference in the measures applied to products imported from the two countries is unjustifiable, given that prepared foods and live animals from Astor do not present a greater risk than prepared foods and live animals from Cosmia. This arbitrary distinction results in discrimination against products from Astor, evidenced by the fact that the application of the ECP has resulted in a drop in imports of these products from Astor. Astor may also argue that the RCA is designed to discriminate in favour of ESODEC Member States without any connection to the conditions that prevail in these Member States and those that prevail in third states, and that the requirement that third countries enter into agreements with ESODEC to obtain equivalence is further evidence of the disconnect between the measures applied and the conditions that prevail in each Member.

6.52. Astor may finalize by arguing that a violation of Article 5.5 entails a consequential violation of Article 2.3. Although Astor may limit its claim under Article 2.3 to the claim of consequential violation, in this case a finding that there is no inconsistency with Article 5.5 would also lead to a finding of no inconsistency with Article 2.3. If Astor seeks to establish an independent violation of Article 2.3, a

⁸⁰ Panel Report, *US – Poultry (China)*, para. 7.277, referring to Panel Report, *Australia – Salmon*, para. 8.151. See Appellate Body Report, *Australia – Salmon*, paras. 159, 161, 163 and 165 (citing the Panel Report).

⁸¹ Panel Report, *US – Poultry (China)*, para. 7.268 (quoting Appellate Body Report, *US – Shrimp*, para. 165).

⁸² Panel Report, *US – Poultry (China)*, para. 7.290.

⁸³ Panel Report, *Australia – Salmon*, para. 8.154.

⁸⁴ Appellate Body Report, *EC – Hormones*, para. 212.

⁸⁵ Panel Report, *Australia – Salmon*, para. 8.109; upheld by Appellate Body Report, *Australia – Salmon*, para. 252.

⁸⁶ Panel Report, *US – Poultry (China)*, 7.318.

finding of no inconsistency with Article 5.5 does not prejudice the claim of inconsistency with Article 2.3.

6.3.2.5 Taikon

6.53. Taikon may argue that the different control regime the RCA establishes for ESODEC Member States does not imply a difference in levels of protection but merely a distinction between the methods used to achieve Taikon's ALOP. With respect to food products and live animals, the common regulatory framework, the control and verifications procedures carried out on site by the ESODEC Regulations Authority, an international body in which Taikon participates, and the possibility of enforcement through the ESODEC Court, all contribute to achieve with respect to ESODEC Member States the same ALOP that the application of the ECP achieves with respect to non-Member States. Taikon may argue that its measures allow Astor to seek equivalence and the application of the same measures applied to ESODEC Member States by entering into an equivalence agreement with ESODEC. Taikon may also argue that the RCA and the possibility of equivalence agreements do not discriminate against Astor, restricting international trade. Instead, these instruments establish means to facilitate international trade by building up mutual trust and permitting Members that agree to common control and verification procedures to avoid duplication of procedures.

Suggested Questions to the Parties	
Astor	Taikon
<ol style="list-style-type: none"> 1. Are the different inspection and verification applied by Taikon to ESODEC and non-ESODEC Members not simply two different routes to achieve the same level of protection? 2. Isn't a distinction based on whether a state submits to the controls of ESODEC Regulatory Authority and enforcement by the ESODEC Court a distinction rationally related to the objective of the measure? 3. How can Astor argue that the RCA is discriminatory when it is open to Astor to sign up to its terms, which it did until recently, or to enter into an equivalence agreement? 	<ol style="list-style-type: none"> 1. How can Taikon argue that its procedures achieve the same level of protection when one of these procedures results in a virtual halt of imports? 2. Is membership of an economic union not an arbitrary distinction in light of the objective of achieving Taikon's ALOP? 3. Don't the significant trade effects of RCA, both when it was first applied and when it was applied to Astor, show that it operates as a disguised restriction on international trade?

6.4 Whether the withdrawal of Astor's equivalence through Note 7/2019 is inconsistent with Article 4.1 of the SPS Agreement

6.4.1 Relevant legal provisions

6.54. Article 4 of the SPS Agreement provides:

Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

6.55. Annex A(5) of the SPS Agreement defines the appropriate level of SPS protection as follows:

Appropriate level of sanitary or phytosanitary protection — The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6.56. At its meeting of 26 October 2001, the SPS Committee adopted a Decision on the Implementation of Article 4 ("Decision on Equivalence"), last revised on 23 July 2004.⁸⁷ The Committee also adopted a procedure and format for the notification of recognition of equivalence.⁸⁸

6.57. The Decision on Equivalence establishes requirements and recommendations regarding the procedure to be followed for the recognition of equivalence. It provides in particular:

1. Equivalence can be accepted for a specific measure or measures related to a certain product or categories of products, or on a systems-wide basis. Members shall, when so requested, seek to accept the equivalence of a measure related to a certain product or category of products. An evaluation of the product-related infrastructure and programmes within which the measure is being applied may also be necessary.⁸⁹ Members may further, where necessary and appropriate, seek more comprehensive and broad-ranging agreements on equivalence. The acceptance of the equivalence of a measure related to a single product may not require the development of a systems-wide equivalence agreement.
2. In the context of facilitating the implementation of Article 4, on request of the exporting Member, the importing Member should explain the objective and rationale of the sanitary or phytosanitary measure and identify clearly the risks that the relevant measure is intended to address. The importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve.⁹⁰ The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation. The importing Member should also provide any additional information which may assist the exporting Member to provide an objective demonstration of the equivalence of its own measure.
3. An importing Member shall respond in a timely manner to any request from an exporting Member for consideration of the equivalence of its measures, normally within a six-month period of time.
4. The exporting Member shall provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member. This information may include, inter alia, reference to relevant international standards, or to relevant risk assessments undertaken by the importing Member or by another Member. In addition, the exporting Member shall provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence.
- ...
7. When considering a request for recognition of equivalence, the importing Member should analyze the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures.

⁸⁷ G/SPS/19/Rev.2.

⁸⁸ G/SPS/7/Rev.2/Add.1, incorporated in G/SPS/7/Rev.4, paras. 2.40-2.43.

⁸⁹ Footnote 2 in the original: "Product-related infrastructure and programmes is in reference to testing, inspection and other relevant requirements specific to product safety."

⁹⁰ Footnote 3 in the original: "In doing so, Members should take into account the Guidelines to Further the Practical Implementation of Article 5.5 adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 21-22 June 2000 (document G/SPS/15, dated 18 July 2000)."

6.4.2 Review of the jurisprudence

6.58. No panel has had to consider a claim under Article 4. The panel in *Korea – Radionuclides* described this provision as "requir[ing] in essence an importing Member to accept as equivalent the SPS measures applied internally by another Member to the same product, if the exporting Member objectively demonstrates that such measures achieve the importing Member's ALOP".⁹¹

6.59. Article 4 was invoked twice by respondents, in *Japan – Apples* and *US – Poultry (China)*, to argue that it provided a defence against claims under other provisions. The panel in *Japan – Apples* rejected this argument, stating that Article 4 could form part of the context in the interpretation of other provisions but did not constitute "a defence" with respect to violations of other provisions.⁹² The panel in *US – Poultry (China)* stated that Article 4 should not be applied either "to the exclusion of other relevant provisions of the SPS Agreement"⁹³ or "in a vacuum, isolated from other relevant provisions of the SPS Agreement".⁹⁴

6.60. As regards the Decision on Equivalence, the panel in *US – Poultry (China)* stated that it "expands on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it is to be implemented".⁹⁵ While the panel found that the decision is "not binding" and "does not determine the scope of Article 4",⁹⁶ it also noted that, contrary to other decisions of the SPS Committee, the Decision on Equivalence does not state that it is non-binding or that it does not modify the rights and obligations of Members under the SPS Agreement.⁹⁷

6.61. As regards the effects of the Decision, the panel in *US – Poultry (China)* noted that it "states that the importing Member should explain its SPS measures by identifying the risk and provide a copy of the risk assessment or technical standard on which the measure is based".⁹⁸ This panel also found that the Decision "requires the importing Member to analyse the science-based and technical information provided by the exporting Member with respect to that Member's own SPS measure(s) to examine if the measure achieves the importing Member's ALOP".⁹⁹

6.62. From the texts of Article 4 and the Decision, the panel in *US – Poultry (China)* concluded that neither suggest that Article 4 is "the only provision in the SPS Agreement which regulates the operation of equivalence regimes, including their 'procedural requirements'".¹⁰⁰ The panel saw the references in the Decision to Articles 2, 3 and 5 of the SPS Agreement as signs that "measures taken as part of an equivalence regime, subject to Article 4, should also comply with other relevant provisions of the SPS Agreement".¹⁰¹

6.63. The application of Article 4 depends on the ability of an exporting Member's SPS measures to achieve an importing Member's ALOP. In *Australia – Salmon*, the Appellate Body stated that "Articles 4.1 and 4.2 imply ... a clear obligation of the importing Member to determine its appropriate level of protection".¹⁰² The Appellate Body distinguished the ALOP from the SPS measure by stating that "[t]he first is an *objective*, the second is an *instrument* chosen to attain or implement that objective".¹⁰³

6.64. Levels of protection have been described in various manners. In *India – Agricultural Products*, the panel described India's ALOP as "very high or very conservative".¹⁰⁴ In *US – Animals*, the panel

⁹¹ Panel Report, *Korea – Radionuclides*, para. 7.275.

⁹² Panel Report, *Japan – Apples*, para. 8.107.

⁹³ Panel Report, *US – Poultry (China)*, paras. 7.139.

⁹⁴ Panel Report, *US – Poultry (China)*, paras. 7.138.

⁹⁵ Panel Report, *US – Poultry (China)*, paras. 7.136.

⁹⁶ Panel Report, *US – Poultry (China)*, paras. 7.136.

⁹⁷ Panel Report, *US – Poultry (China)*, footnote 345. Documents featuring this language include the Guidelines to further the practical implementation of Article 5.5 (G/SPS/15) and the Guidelines to further the practical implementation of Article 6 (G/SPS/48).

⁹⁸ Panel Report, *US – Poultry (China)*, paras. 7.136.

⁹⁹ Panel Report, *US – Poultry (China)*, paras. 7.136.

¹⁰⁰ Panel Report, *US – Poultry (China)*, paras. 7.136.

¹⁰¹ Panel Report, *US – Poultry (China)*, paras. 7.137.

¹⁰² Appellate Body Report, *Australia – Salmon*, footnote 161.

¹⁰³ Appellate Body Report, *Australia – Salmon*, para. 200.

¹⁰⁴ Panel Report, *India – Agricultural Products*, para. 7.570.

described the US's ALOP as "to prevent the introduction or dissemination of foot-and-mouth disease within the United States".¹⁰⁵ In *Korea – Radionuclides*, the Appellate Body noted the panel's acceptance of Korea's "multi-faceted ALOP", containing three elements, all of which "concern[] radioactivity levels in food consumed by Korean consumers: (i) the levels that exist in the ordinary environment; (ii) exposure 'as low as reasonably achievable'; and (iii) the quantitative dose exposure of 1 mSv/year". The Appellate Body faulted the panel for focusing its analysis "on the quantitative element of 1 mSv/year", which "subordinated the elements of ALARA and radioactivity levels 'in the ordinary environment' to the quantitative element of exposure below 1 mSv/year".¹⁰⁶

6.65. The application of Article 4 also depends on the ability of an exporting Member to "objectively demonstrate" to an importing Member that its measures achieve the importing Member's ALOP. Although this element has not been elaborated upon in the context of Article 4, panels have discussed the meaning of this term in the context of Article 6.3 of the SPS Agreement, which imposes, as a requirement for Members claiming that an area within their territory is "pest- or disease-free", that the Member seeking this recognition "objectively demonstrate" this element to the importing Member. In *Russia – Pigs (EU)*, the Appellate Body found that "an exporting Member is expected to provide particularized evidence with respect to the pest or disease and the area concerned"¹⁰⁷ and that the evidence necessary for this demonstration "must be of a nature, quantity, and quality sufficient for an objective determination by the importing Member as to the pest or disease status of the relevant area".¹⁰⁸ The Appellate Body clarified that the panel's task under Article 6.3 was "to assess whether the evidence provided by the European Union to Russia was of a nature, quantity, and quality sufficient to enable the Russian authorities ultimately to make a determination as to the pest or disease status of the relevant areas within the European Union",¹⁰⁹ and highlighted that the importing Member's authorities, rather than the panel, are "the proper addressee of the ... objective demonstration" of the pest or disease status of the relevant areas by the exporting Member.¹¹⁰

6.66. The present dispute also raises the question whether the importing Member's obligation to recognize equivalence can be violated only following a specific request from the exporting Member. The Appellate Body has developed on this matter in the context of Article 6 of the SPS Agreement. In Article 6, Articles 6.1 and 6.2 impose obligations on the importing Member, while Article 6.3 elaborates on the requirement the exporting Member must fulfil in order to trigger this obligation. In *India – Agricultural Products*, the Appellate Body clarified the relationship between the obligations in Articles 6.1 and 6.2 and the requirement in Article 6.3. The Appellate Body stated as follows:

in the context of WTO dispute settlement proceedings, an exporting Member claiming, for example, that an importing Member has failed to determine a specific area within that exporting Member's territory as "pest- or disease-free" – and ultimately adapt its SPS measures to that area – will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3.

This is not to suggest, as India does, that a Member adopting or maintaining an SPS measure can *only* be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3. Indeed, as noted above, even in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1 in a situation where, for example, the concept of pest- and disease-free areas is relevant, but such Member's regulatory regime precludes the recognition of such concept.¹¹¹

6.67. The panel may have in mind that Article 4 and Article 6 are not structured in the same manner. In Article 4.1, the obligation of the importing Member is connected by conditional language ("if") to

¹⁰⁵ Panel Report, *US – Animals*, para. 7.387.

¹⁰⁶ Appellate Body Report, *Korea – Radionuclides*, para. 5.38.

¹⁰⁷ Appellate Body Report, *Russia – Pigs (EU)*, para. 5.63.

¹⁰⁸ Appellate Body Report, *Russia – Pigs (EU)*, para. 5.70.

¹⁰⁹ Appellate Body Report, *Russia – Pigs (EU)*, para. 5.72.

¹¹⁰ Appellate Body Report, *Russia – Pigs (EU)*, para. 5.74.

¹¹¹ Appellate Body Report, *India – Agricultural Products*, paras 5.156-5.157.

the fulfilment of the requirement by the exporting Member. As noted by the panels in *India – Agricultural Products* and *US – Animals*, Articles 6.1 and 6.2 do not contain such conditional language.¹¹² Whereas the Appellate Body in *India – Agricultural Products* found that the three paragraphs of Article 6 nonetheless "need to be read together", it also pointed to the existence of an "overarching requirement under Article 6.1 to ensure the adaptation of SPS measures [as] an ongoing obligation that applies upon adoption of an SPS measure as well as thereafter".¹¹³ At least explicitly, Article 4 does not feature a similar overarching obligation for Members to ensure that other Members' SPS measures are accepted as equivalent. Neither Article 4.2 nor the Decision on Equivalence establish an obligation to recognize equivalence in the absence of a request from the exporting Member.

6.4.3 Arguments of the parties

6.4.3.1 Astor

6.68. Astor may argue that Article 4.1 precludes a Member from withdrawing recognition of equivalence merely because another Member's measures have become different from its own measures or from those used by another Members, without presenting science-based or technical information indicating that an exporting Member's measures no longer satisfy its ALOP. In support of this argument, Astor may note that an importing Member has an obligation under Article 4.1 to "accept ... as equivalent" SPS measures of exporting Members that "objectively demonstrate[]" to it "that its measures achieve the importing Member's [ALOP]". Astor may also note that Article 4.1 specifically requires Members to accept as equivalent "measures [that] differ from their own or from those used by other Members trading in the same product". Astor may argue that there is nothing in Article 4.1 requiring an exporting Member to file a specific request with importing Members and that it has "objectively demonstrate[d]" the equivalence of its SPS measures to Taikon over the years in which the two Members cooperated under ESODEC.

6.69. With respect to equivalence agreements, Astor may observe that Article 4.2 provides for the possibility of "bilateral and multilateral agreements on recognition", and Paragraph 1 of the Decision refers to the possibility of "a systems-wide equivalence agreement", for acceptance of equivalence of SPS measures "on a systems-wide basis". Astor may argue that a Member's participation in an equivalence agreement implies acceptance that the SPS measures of other parties to the agreement achieve this Member's ALOP.

6.70. Astor may argue that the RCA constitutes "a systems-wide equivalence agreement" of the type envisaged in Paragraph 1 of the Decision on Equivalence. The signing of the RCA and its implementation over the years have entailed a process by which ESODEC Member States objectively demonstrated to each other that their measures achieved the other RCA parties' ALOPs. The existence of this demonstration triggers an obligation under Article 4.1 of the SPS Agreement for RCA parties to continue to accept as equivalent each other's SPS measures, even once the RCA ceases to apply between them, unless (a) there is a new risk assessment that demonstrates that a former RCA party's measures have ceased to achieve the importing Member's ALOP; (b) new science-based or technical information indicates that a party's measures no longer achieve the importing Member's ALOP; or (c) the importing Member changes its ALOP. Withdrawing Astor's recognition of equivalence in the absence of any of these conditions amounts to a violation of Article 4.1 of the SPS Agreement.

6.71. At the rebuttal stage, if Taikon argues that Astor should have entered into an agreement with ESODEC, Astor may point that Article 4.2 imposes upon *WTO Members* the obligation to enter into consultations with exporting Members. Since Astor attempted to enter into consultations, Taikon would have been under an obligation to negotiate individually rather than instructing Astor to negotiate with an economic block. Taikon cannot use Astor's refusal to negotiate with ESODEC as justification for its lack of compliance with Article 4.1.

6.4.3.2 Taikon

6.72. Taikon may argue that the RCA does not constitute an acceptance of equivalence for the purposes of Article 4 and that the regulatory community established by the RCA is different from the

¹¹² Panel Report, *India – Agricultural Products*, para. 7.675; Panel Report, *US – Animals*, para. 7.662.

¹¹³ Appellate Body Report, *India – Agricultural Products*, paras 5.155, 5.157.

equivalence regime established by the SPS Agreement. Taikon may note that Astor has never requested equivalence under Article 4.2 of the SPS Agreement and paragraph 4 of the Decision. The duty of WTO Members to enter into "bilateral and multilateral *agreements* on recognition of the equivalence", implies that Members may set the terms for such agreements, and are allowed to condition the recognition of equivalence to a WTO Member's continued participation in the bilateral or multilateral agreement entered into.

6.73. Additionally, Taikon may argue that Astor's measures no longer achieve its ALOP. The set of measures required to achieve its ALOP consists not only of substantive SPS measures but also of SPS conformity procedures that are verifiable by an ESODEC agency. Astor's withdrawal from ESODEC means that, even if it had previously "objectively demonstrate[d]" to Taikon that its SPS measures achieved Taikon's ALOP, the moment it withdrew from ESODEC its SPS measures ceased to achieve Taikon's ALOP. In order for its SPS measures to achieve this ALOP, allowing the removal of regulatory checks at the border, Astor would have to either re-join ESODEC or enter into an equivalence agreement with ESODEC.

Suggested Questions to the Parties	
Astor	Taikon
<ol style="list-style-type: none"> 1. On what basis does Astor argue that there is a right of WTO Members to continued recognition of the equivalence of their SPS measures? 2. Isn't the ESODEC regulatory community a mechanism highly distinct from the procedure established under Article 4 and the Decision of Equivalence, which sets up a specific regime for equivalence? 3. Isn't Taikon allowed to establish that, in order to meet its ALOP, a Member's SPS measures must meet a certain standard of control, inspection and approval procedures? 4. ESODEC's representatives are responsible for establishing entering into equivalence agreements on Taikon's behalf. Isn't Astor's refusal of their offer of consultations a failure to give "reasonable access ... upon request, to the importing Member for inspection, testing and other relevant procedures" as Article 4.2 requires from Members seeking equivalence? 	<ol style="list-style-type: none"> 1. How can Taikon argue that its granting of equivalence to Astor should not be considered by this panel under the rules on equivalence established in the SPS Agreement? 2. Isn't the ESODEC "regulatory community" precisely the type of "systems-wide equivalence agreement" to which Paragraph 1 of the Decision on Equivalence refers? 3. Annex 4.1 uses the word "shall". Doesn't this imply an obligation for Members that have recognized the equivalence of another Member's SPS measures to ground the withdrawal of such recognition on pertinent evidence that the exporting Members' measures no longer achieve its ALOP? 4. Doesn't the argument that a Member may condition recognition upon adherence to a specific institutional arrangement make this recognition arbitrary, rendering Article 4.1 inutile? 5. Pursuant to Article 4.2, wouldn't Taikon be required to enter into consultations with Astor individually rather than redirecting it to ESODEC?

7 CLAIMS UNDER THE GATT 1994

7.1 Whether Taikon's application of the ECP Regulation to Astor is inconsistent with Article I:1 of the GATT 1994

7.1.1 Relevant legal provisions

7.1. Article I:1 of the GATT 1994, entitled "General Most-Favoured-Nation Treatment", provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or

immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.¹¹⁴

7.2. Article III:4 of the GATT 1994 provides, in relevant part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

7.1.2 Review of the jurisprudence

7.1.2.1 Object and purpose, elements and legitimate bases for distinction

7.3. Article I:1 of the GATT requires that a Member that grants any advantage to any product originating in the territory of another country extend such advantage "immediately and unconditionally" to like products originating from all WTO Members. In *EC – Seal Products*, the Appellate Body adopted as the controlling criterion for a breach of Article I:1 the disturbance of the equality of competitive conditions between like products. It found that, "where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1".¹¹⁵ In *US – Tuna (Mexico) (Article 21.5 – United States / Article 21.5 II – Mexico)*, the Appellate Body stated that Article I:1 is "concerned with protecting expectations of equal competitive opportunities for like imported products ... upon importation or exportation".¹¹⁶ And, in *Canada – Autos*, the Appellate Body stated that the prohibition of discrimination in Article I:1 "serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis".¹¹⁷

7.4. For a violation of Article I:1 to exist, four elements are required: (i) the measure at issue must fall within the scope of application of Article I:1; (ii) the imported products whose treatment is being compared must be "like"; (iii) the measure must confer an "advantage, favour, privilege, or immunity" on products originating in the territory of a country; and (iv) this advantage must not be extended "immediately" or "unconditionally" to the like products originating in the territory of a WTO Member.¹¹⁸ The Appellate Body in *EC – Seal Products* stated:

... as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching *any* conditions to the granting of an "advantage" within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.¹¹⁹

7.5. In the same dispute, the Appellate Body found that there was no basis under Article I:1 for "requiring an inquiry into whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction".¹²⁰

7.1.2.2 Scope of the provision

7.6. The panel in *EC – Bananas III* stated that "in connection with importation" in Article I:1 had been interpreted broadly in GATT practice and found that it applied to rules relating to import

¹¹⁴ Asterisk omitted.

¹¹⁵ Appellate Body Report, *EC – Seal Products*, para. 5.90.

¹¹⁶ Appellate Body Report, *US – Tuna (Mexico) (Article 21.5 – United States / Article 21.5 II – Mexico)*, para. 7.338.

¹¹⁷ Appellate Body Report, *Canada – Autos*, para. 84.

¹¹⁸ Appellate Body Report, *EC – Seal Products*, para. 5.86.

¹¹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.88.

¹²⁰ Appellate Body Report, *EC – Seal Products*, para. 5.92.

licensing procedures.¹²¹ The panel in *US – Poultry (China)* concluded that this expression as used in Article I "not only encompasses measures which directly relate to the process of importation but could also include those measures [...] which relate to other aspects of the importation of a product or have an impact on actual importation".¹²² The panel in *Argentina – Financial Services* warned against applying Article I:1 to measures that may have a "tenuous" or "hypothetical" connection with importation, noting that the measure at issue in *US – Poultry (China)* should nonetheless be covered because "although it did not directly regulate imports of poultry products from China, [the measure] had an impact on the actual imports since its immediate effect was to prohibit them".¹²³

7.7. A measure restricting recognition may also be considered to be covered by Article I:1 as a matter "referred to in" Article III:4 of the GATT. The panel in *Russia – Railway Equipment* described Russia's measure at issue as a "requirement not to recognize certificates issued in other [Eurasian Economic Union (EAEU) Customs Union] countries if the certified products were not produced in a[n EAEU Customs Union] country". Since the requirement was applied to both imported and Russian products, the panel found that "the non-recognition requirement ... forms part of an internal measure that is enforced in the case of imported products at the time or point of importation", and, as a matter covered by Article III:4, was subject to Article I:1.¹²⁴

7.1.2.3 "Like products"

7.8. The jurisprudence of WTO adjudicators foresees three avenues for complainants to establish that the products to which their claims refer are "like" another set of products, permitting the application of Article I:1. In *EC – Bananas III*, the Appellate Body addressed the issue of "two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas".¹²⁵ The Appellate Body found that "the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements" could not "apply only within regulatory regimes established by [a] Member", as this would allow that Member to circumvent these provisions.¹²⁶

7.9. The traditional approach for determining "likeness" consists of employing four so-called *Border Tax Adjustments* criteria: "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products".¹²⁷

7.10. In addition to the traditional four-elements avenue, panels may determine likeness through a hypothetical analysis, in cases in which discrimination exists exclusively based on the origin of the product¹²⁸ or in which circumstances (such as an import ban) prevent comparison.¹²⁹

7.11. In *Colombia – Ports of Entry*, the Panel found that because Colombia's measure explicitly required importers of products that had circulated through Panama to submit a declaration not required from importers of products that had not so circulated, it could presume likeness, without "determin[ing] through lengthy analysis whether textiles, apparel or footwear arriving from other countries are in fact like products to those goods originating in and arriving from Panama".¹³⁰ The panel in *Russia – Railway Equipment* found that Russia's measures, which prohibited the recognition of certificates of technical conformity granted to Ukrainian-produced railway equipment, including certificates issued by countries in the EAEU, when products originating in the EAEU with the same

¹²¹ Appellate Body Report, *EC – Bananas III*, para. 7.107 and 7.189.

¹²² Panel Report, *US – Poultry (China)*, para. 7.410.

¹²³ Panel Report, *Argentina – Financial Services*, paras 7.994-7.999.

¹²⁴ Panel Report, *Russia – Railway Equipment*, para. 7.893.

¹²⁵ Appellate Body Report, *EC – Bananas III*, para. 189.

¹²⁶ Appellate Body Report, *EC – Bananas III*, para. 190.

¹²⁷ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22, DSR 1996:I, 97, at 114. The fourth criterion, tariff classification, was not mentioned by the GATT Working Party on *Border Tax Adjustments*, but was included by subsequent panels.

¹²⁸ Panel Report, *Indonesia – Autos*, para. 14.113; Panel Report, *Argentina – Hides and Leather*, paras. 11.168-11.170; Panel Report, *Canada – Autos*, para. 10.74; Panel Report, *India – Autos*, paras. 7.174-7.176.

¹²⁹ Panel Report, *Canada – Periodicals*, paras 5.22-5.23, upheld in Appellate Body Report, *Canada – Periodicals*, p. 12.

¹³⁰ Panel Report, *Colombia – Ports of Entry*, para. 7.355.

certificates had this recognition ensured, drew a "distinction based on the origin of the imported products" resulting, in certain situations, in different treatment being applied even if the Ukraine-produced product was "identical in all respects to a product produced in [EAEU countries] Belarus or Kazakhstan".¹³¹ In this case, the panel found,

it is not necessary for the complaining party to establish likeness by reference to the likeness criteria that have likewise been developed in the jurisprudence, or to identify specific imported railway products covered by [Russia's measure] that are like ... the likeness of the products can be presumed. Russia has not adduced argument or evidence sufficient to rebut this presumption".¹³²

7.12. In *EC – Asbestos*, the Appellate Body found, in the context of an analysis under Article III:4 of the GATT, that health risks associated with a product may affect the determination of likeness if they impact the competitive relationship between the products.¹³³ The panel in *US – Poultry (China)*, noting that the United States had not provided "specific evidence relating to [its claim of] different safety levels between poultry products From China and other WTO Members", adopted the "'hypothetical' like products analysis" on the basis that the US measure distinguished among imported chicken "solely because of their origin".¹³⁴ In *Argentina – Financial Services*, the Appellate Body noted that the panel had not established that Argentina's measures drew a distinction exclusively based on the origin of services and services providers. Rather, Argentina grounded its distinction, between financial services and services providers originating in cooperative and those originating in non-cooperative countries, on the regulatory framework "inextricably linked" to their origin. In light of this argument, the Appellate Body found that the panel could not have drawn a presumption of likeness that would have been permissible in case of an exclusively origin-based distinction. Instead, the panel was required to engage in an analysis of likeness using the four traditional criteria and examining the extent to which the invoked element affects competitive conditions.¹³⁵

7.1.2.4 "any advantage, favour, privilege or immunity"

7.13. In *Canada – Autos*, the Appellate Body interpreted the word "advantage" broadly, highlighting that the Article I:1 refers "not to *some* advantages ... but to '*any advantage*'; not to *some* products, but to '*any product*'".¹³⁶ In *EC – Seal Products*, the Appellate Body highlighted that the focus of Article I:1 on equality of competitive conditions means that there is no need to demonstrate actual trade effects of a specific measure.¹³⁷ The Appellate Body upheld the panel's finding that an advantage existed because, "in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affects the conditions of competition on the market" of seal products of Canadian and Norwegian origin as compared to those of Greenlandic origin.¹³⁸

7.14. In *US – Poultry (China)*, China was excluded from US procedures which, as a requirement to allow importation of poultry products, permitted recognition of the country of origin's poultry inspection system as equivalent to US procedures. The panel considered that the opportunity to complete these procedures was an "advantage" within the meaning of Article I:1, since completing these procedures was "the only way that an importer can enter the United States market for poultry products", constituting "a very favourable market opportunity ... not having such an opportunity would mean a serious competitive disadvantage, or rather would amount to an exclusion from competition in the US market".¹³⁹

7.1.2.5 "shall be accorded immediately and unconditionally"

7.15. The word "unconditionally" is interpreted as meaning "without conditions". In *Canada – Autos*, the panel highlighted that this provision does not prohibit the establishment of conditions for importation: "[t]he word 'unconditionally' in Article I:1 does not pertain to the granting of an

¹³¹ Panel Report, *Russia – Railway Equipment*, paras. 7.897-7.898,

¹³² Panel Report, *Russia – Railway Equipment*, paras. 7.920-7.921.

¹³³ Appellate Body Report, *EC – Asbestos*, paras 113-118.

¹³⁴ Panel Report, *US – Poultry (China)*, para. 7.429.

¹³⁵ Appellate Body Report, *Argentina – Financial Services*, paras 6.45-6.61.

¹³⁶ Appellate Body Report, *Canada – Autos*, para. 79.

¹³⁷ Appellate Body Report, *EC – Seal Products*, para. 5.82.

¹³⁸ Panel Report, *EC – Seal Products*, para. 7.597. See also Appellate Body Report, *EC – Seal Products*, para.

5.96.

¹³⁹ Panel Report, *US – Poultry (China)*, para. 7.416.

advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country".¹⁴⁰ In *EC – Seal Products* the Appellate Body noted that Members may draw "regulatory distinctions ... between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member".¹⁴¹ In *US – Poultry (China)*, the panel found that the US failed to extend an advantage "immediately and unconditionally" to China because the challenged measure prohibited the importation into the United States of Chinese products "even if Chinese poultry production system is found to provide equivalent food safety standards as those applied in the United States",¹⁴² a prohibition that did not affect any other country.

7.1.3 Arguments of the parties

7.1.3.1 Astor

7.16. Astor may structure its claim under Article I as follows:

- (a) Scope: The prohibition on the importation of marbled crayfish and products containing marbled crayfish, the ECP, and the application of the ECP to Astorian products are all "rules and formalities in connection with importation and exportation", thus falling within the scope of Article I:1;
- (b) Like products: Prepared foods from Astor and prepared foods from Cosmia are like products, as are living Stormian crab from Astor and living Stormian crab from Cosmia. Astor may ground this argument on the four criteria for likeness, on the argument that Taikon's measures draw a distinction based exclusively on origin, or on the hypothetical import method.
- (c) "advantage, favour, privilege, or immunity": Not having its products subjected to the ECP is an advantage Cosmia enjoys over Astor. As evidence of this advantage, Astor may point to the significant drop in imports into Taikon of prepared food products from countries subject to the ECP, first non-Stormian countries and then Astor. Although the quantitative evidence with respect to live animals points in the opposite direction, this is due to producers adjusting to the difficulty of exporting prepared food products. In any case, not being subject to a control procedure is an "advantage".
- (d) Advantage not extended "immediately" and "unconditionally" to like product from Astor: Both Taikon and the ESODEC Secretary-General mentioned that, to avoid the application of the ECP, Astor would have to enter into an equivalence agreement with ESODEC. This requirement is a condition. Thus, the advantage is not extended "unconditionally" to Astor.

7.1.3.2 Taikon

7.17. Taikon may accept that the measure is inconsistent with Article I:1 of the GATT and seek to justify it under GATT Articles XX and XXIV. If Astor seeks to establish likeness on the basis of the alleged origin-based distinction, Taikon could argue that the distinction it makes is not exclusively based on origin but is grounded on the different regulatory and institutional regimes the products are subject to, which may affect the competitive relationship between them. Taikon could also argue that the increase in imports of live animals indicates that being subject to the ECP is not a disadvantage for Astor's exporters of live animals. Finally, Taikon may argue that its measures set up a regulatory regime for equivalence which does not grant advantages on the basis of origin, but instead establishes a procedure that is available to all WTO Members, including Astor – which took advantage of this procedure until the beginning of 2019 and can still take advantage of it. In other words, Cosmia is not being granted any advantage that is not available to Astor; it simply decided to exercise the option, available to Astor as well, to enter into an arrangement with Taikon that grants its products recognition of regulatory equivalence and exemption from the ECP.

Suggested Questions to the Parties

¹⁴⁰ Panel Report, *Canada – Autos*, para. 10.23.

¹⁴¹ Appellate Body Report, *EC – Seal Products*, para. 5.88.

¹⁴² Panel Report, *US – Poultry (China)*, paras. 7.439.

Astor	Taikon
<ol style="list-style-type: none"> 1. What are the criteria for likeness? 2. Couldn't the different regulatory regimes in Cosmia and Astor mean that products from Cosmia and products from Astor are not like? 3. Doesn't the increase in the exports of live animals from Astor to Taikon contradict the claim that the application of the ECP puts Astorian products at a disadvantage? 4. Given that the application of the ECP to live animals has not produced a negative impact in Astor's exports of live animals to Taikon, can we say that the non-application of the ECP is an "advantage" granted to Cosmian live animals? 5. Given that Astor benefited from the same advantages as Cosmia until it decided to withdraw from ESODEC, can Astor claim that there is an advantage available to Cosmia that is not available "immediately and unconditionally" to itself? 6. Wouldn't Astor's argument allow WTO exporting Members to demand that importing Members grant them immediate recognition of equivalence as soon as it was granted to another country, without the demanding Member having to demonstrate the actual equivalence of their rules and inspection regimes to those of the importing Member? 7. Doesn't Article I:1 allow Members to establish conditions for importation, as long as they make the same conditions available to other WTO Members? 	<ol style="list-style-type: none"> 1. How does being subject to a different regulatory regime make products not like? 2. If a difference in regulatory regimes could justify a finding of non-likeness, wouldn't Members then be able to decide unilaterally which products imported from other Members are "like"? 3. Isn't the increase in importation of live animals due not to the absence of impact of the application of the ECP on live animals but to the far greater impact this application has on the imports of prepared food products? 4. Isn't requiring a Member to enter into an agreement for its products to obtain an advantage a "condition" for the exercise of such advantage? 5. Even if Astor could obtain equivalence outside of ESODEC, doesn't the establishment of different regimes for ESODEC and non-ESODEC countries secure to the former an "advantage" not available unconditionally to the latter?

7.2 Whether Taikon's application of the ECP Regulation to Astor is justified under Article XXIV of the GATT 1994

7.2.1 Relevant legal provisions

7.2.1.1 Article XXIV of the GATT 1994

7.18. Article XXIV of the GATT 1994 reads, in relevant part:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:

...

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be;

...

8. For the purposes of this Agreement:

...

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

7.2.1.2 Understanding on the Interpretation of Article XXIV

Members,

...

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

...

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

7.2.1.3 Subsequent Practice

7.19. Article 31 of the Vienna Convention on the Law of Treaties provides, in relevant part:

3. There shall be taken into account, together with the context:

...

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

7.2.1.4 Decision of the General Council on a Transparency Mechanism for Regional Trade Agreements

7.20. The Decision of the General Council on a Transparency Mechanism for Regional Trade Agreements of 14 December 2006 provides, in relevant part:

D. Subsequent Notification and Reporting

14. The required notification of changes affecting the implementation of an RTA, or the operation of an already implemented RTA, shall take place as soon as possible after the changes occur. Changes to be notified include, inter alia, modifications to the preferential treatment between the parties and to the RTA's disciplines. The parties shall provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in electronically exploitable format.

15. At the end of the RTA's implementation period, the parties shall submit to the WTO a short written report on the realization of the liberalization commitments in the RTA as originally notified.

7.2.1.5 Procedures on Reporting on Regional Trade Agreements

7.21. The Procedures on Reporting on Regional Trade Agreements, approved by the Council for Trade in Goods on 30 November 1998, provide, in relevant part:

The following procedures recommended by the Committee on Regional Trade Agreements have been approved by the Council for Trade in Goods as general guidelines with respect to biennial reports/information on regional trade agreements submitted to it:

...

2. Where appropriate, the reports should include a description of developments in the agreements not contained in the information previously presented to the GATT/WTO² and trade statistics covering the last representative period, for both trade among parties to the agreements and trade with third parties.

Footnote original: ² Particular attention should be given to the internal process of liberalization; to changes introduced with respect to the treatment of third parties; and to modifications to the rules of the agreements.

7.2.2 Review of the jurisprudence

7.22. In *Peru – Agricultural Products*, the Appellate Body asserted that the purpose of customs unions (CUs) and free trade areas (FTAs), set out in Article XXIV:4 and confirmed in the *Understanding on Article XXIV*, is "closer integration between the economies of the countries parties to such agreements", "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries.¹⁴³ The panel in *US – Line Pipe* reasoned that the elimination of duties and other restrictive regulations of commerce is "the very raison d'être of any free-trade area".¹⁴⁴

7.23. In *Turkey – Textiles*, the Appellate Body found that Article XXIV:4 "sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV" and that "the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV".¹⁴⁵ In the context of examining the customs union between the European Communities and Turkey, the Appellate Body noted that the objective expressed in Article XIV:

demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.¹⁴⁶

7.24. With respect to how this balance must be struck, the Appellate Body in *Turkey – Textiles* stated that "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions",¹⁴⁷

¹⁴³ Appellate Body Report, *Peru – Agricultural Products*, para. 5.116.

¹⁴⁴ Panel Report, *US – Line Pipe*, para. 7.148.

¹⁴⁵ Appellate Body Report, *Turkey – Textiles*, para. 57.

¹⁴⁶ Appellate Body Report, *Turkey – Textiles*, para. 57.

¹⁴⁷ Appellate Body Report, *Turkey – Textiles*, para. 58.

provided that certain conditions are met. These conditions, all of which must be demonstrated by the Member invoking Article XXIV,¹⁴⁸ are:

- a. the CU or FTA justifying the measure must "fully meet[] the requirements" in the relevant subparagraphs of Articles XXIV:8 and XXIV:5;
- b. the measure justified must have been "introduced upon the formation" of such CU or FTA; and
- c. the Member must demonstrate that the formation of the CU or FTA "would be prevented if [the Member] were not allowed to introduce the measure at issue".¹⁴⁹

7.25. With respect to the first condition, Articles XXIV:8(a)(i) and XXIV:8(b) require the constituent members of a CU or FTA to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them. The Appellate Body in *Turkey – Textiles* found that this expression "is not the same as *all* the trade [but] is something considerably more than merely *some* of the trade".¹⁵⁰ Article 5(b) prohibits each constituent party of an FTA from imposing on other WTO Members, upon the formation of the FTA, "duties and other regulations of commerce ... higher or more restrictive" than the "corresponding" duties and other regulations of commerce that existed in that party "prior to the formation of the free-trade area".

7.26. With respect to the second condition, the panel in *US – Line Pipe* (in findings declared moot by the Appellate Body) found that Article XXIV can justify safeguards excluding FTA partners adopted after the formation of the FTA, as long as long as "the mechanism providing for the exclusion of free-trade area partners ... is established upon formation of the free-trade area".¹⁵¹ It may be added that this second condition was formulated in *Turkey – Textiles*, a dispute which concerned the establishment by Turkey of new restrictions on trade from third countries upon the formation of a CU with the European Communities. If applied to new trade-liberalizing measures as well, it would preclude WTO Members that are already in a CU or parties to an FTA from adopting new measures for reciprocal liberalization, since these measures would by definition not be introduced "upon the formation" of the CU or FTA. It may be noted that the Understanding on Article XXIV provides that at the "formation *or enlargement*" of an FTA or CU "the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members". Enlargement, however, may be seen as referring to the inclusion of a new member into an FTA or CU rather than the removal of outstanding trade barriers with in an existing FTA or CU.

7.27. With respect to the third condition, the panel in *US – Line Pipe* (in findings declared moot by the Appellate Body) considered that the test formulated by the Appellate Body in *Turkey – Textiles* (i.e. whether the formation of the CU or FTA would have been prevented if the measure in question had not been adopted) could not be applied with respect to a measure creating reciprocal liberalization without leading to "absurd results". Since parties to an FTA or CU may achieve liberalization of "substantially all the trade" while excluding from liberalization one or more sectors of the economy, virtually every sector can in theory be left out of an FTA or CU without preventing its formation. In this scenario, the panel stated, "it is difficult to imagine how a necessity requirement could ever be fulfilled".¹⁵²

7.28. With respect to measures providing benefits to third countries, the panel in *Canada – Autos* reasoned that Article XXIV could not "justify a measure which grants WTO-inconsistent duty-free

¹⁴⁸ While in *Turkey – Textiles* the Appellate Body implied that the panel could determine whether a measure would prevent the formation of a customs union without verifying whether the customs union complied with the requirements of Articles XXIV:5 and XXIV:8 (para. 59), in *Argentina – Footwear (EC)* it implied that the panel would be required to determine that the customs union fully meets the requirements in these provisions before accepting the respondent's defence (para. 110).

¹⁴⁹ Appellate Body Report, *Turkey – Textiles*, para. 58; Appellate Body Report, *Argentina – Footwear (EC)*, para. 109; Appellate Body Report, *Peru – Agricultural Products*, para. 5.115. The Appellate Body merges conditions (i) and (ii).

¹⁵⁰ Appellate Body Report, *Turkey – Textiles*, para. 48.

¹⁵¹ Panel Report, *US – Line Pipe*, para. 128.

¹⁵² Panel Report, *US – Line Pipe*, footnote 137.

treatment to products originating in third countries not parties to a customs union or free trade agreement".¹⁵³

7.29. If Article 31.3(b) of the Vienna Convention on the Law of Treaties (VCLT), governing subsequent practice in relation to a treaty, is invoked, the parties could discuss the extent to which the practice within the organization constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", meaning that pursuant to Article 31.3(b) it "shall be taken into account" in the interpretation of Article XXIV.

7.30. In *Japan – Alcoholic Beverages II*, the Appellate Body found that "subsequent practice" in the sense of Article 31(b) of the VCLT exists if there is a "'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation".¹⁵⁴ In *US – Gambling*, the Appellate Body described subsequent practice as having two elements: "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision".¹⁵⁵ In *EC – Chicken Cuts*, the Appellate Body stated that "the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice".¹⁵⁶ As regards how to establish agreement of those parties that have not engaged in a practice, in *EC – Chicken Cuts* the Appellate Body found that "in general, agreement may be deduced from the affirmative reaction of a treaty party". As for the effects of silence, the Appellate Body stated:

in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it. However, we disagree with the Panel that "lack of protest" against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members.¹⁵⁷

7.31. In this regard, the 1998 Procedures on Reporting on Regional Trade Agreements, the 2006 Decision of the General Council on a Transparency Mechanism for Regional Trade Agreements, and the various notifications of RTAs and modifications thereto could, be argued to be instances of subsequent practice.

7.2.3 Arguments of the parties

7.2.3.1 Astor

7.32. Astor may argue that, pursuant to the jurisprudence of the Appellate Body with respect to Article XXIV, Taikon cannot rely on Article XXIV:5 to justify its violation of Article I:1. First, the ECP was not introduced at the formation of the ESODEC Free Trade Area. The ECP itself was introduced more than two years after the ESODEC FTA was notified to the WTO, and the application of the ECP to Astor began more than six years after the formation of the ESODEC FTA. Second, the formation of ESODEC would not have been prevented if the ECP did not exist. Even if the relevant element to be assessed is not the ECP but the RCA, the RCA was not introduced at the formation of the FTA either, which is sufficient to demonstrate that the formation of ESODEC would not have been prevented if the RCA had not been signed.

7.33. Astor may also anticipate Taikon's argument that the object and purpose of the CU or FTA is to permit closer integration and reciprocal trade liberalization. In this regard, Taikon may insist on the legal test established by the Appellate Body in *Turkey – Textiles* and reaffirmed in *Argentina – Footwear* and *Peru – Agricultural Products*. It may also invoke the provisions and jurisprudence that

¹⁵³ Panel Report, *Canada – Autos*, para. 10.55

¹⁵⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:1, 97, p. 106.

¹⁵⁵ Appellate Body Report, *US – Gambling*, para. 192.

¹⁵⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 273.

¹⁵⁷ Appellate Body Report, *EC – Chicken Cuts*, para. 272.

indicate that CUs and FTAs may not result in higher barriers to the trade of third countries, pointing to the barriers to non-ESODEC members that have emerged with the adoption of the ECP and its subsequent application to Astor.

7.2.3.2 Taikon

7.34. Taikon may argue that the relevant element to be justified under Article XXIV is not the ECP but the RCA. In this respect, Taikon may argue that the RCA is in fact the manifestation of a committed already included in the original ESODEC Agreement, by which the parties to the agreement already committed "enter into future agreements designed to eliminate non-tariff barriers to the trade among them, through mutual recognition of each other's laws, regulations and standards for products as well as through the adoption of common rules and standards applicable in all Member States". Its future operation was therefore "introduced" and notified to all WTO Members during the formation of ESODEC.

7.35. Taikon may also challenge the jurisprudence of the Appellate Body with respect to the requirements for a Member to justify under Article XXIV measures otherwise inconsistent with provisions of the GATT. Taikon may argue that the exception established in Article XXIV:5 must be interpreted pursuant to its object and purpose, established in Article XXIV:4, which is to allow the "development, through voluntary agreements, of closer integration" between Members' economies, and to "facilitate trade" between signatories. The "closer integration" between economies is often attained incrementally, with the result that there is no one point of "formation" of an integration agreement. a number of decisions of the General Council on regional trade agreements and the various notification of deepened liberalization under existing FTAs and CUs consistute subsequent practice, implying the permissibility of modifications of CUs and FTAs leading to further reciprocal liberalization among the parties. The signature and implementation of the RCA are a new step in the "closer integration" between the economies of ESODEC Member States, and the provisions of the GATT should therefore not "prevent" this integration.

7.36. Taikon may also argue that there has been common, concordant and consistent practice by a variety of WTO Members, including Astor, in entering into equivalence agreements as part of free trade areas and customs unions. This practice reveals an understanding by the Membership that Article XXIV:5 does include, within the scope of the exception it creates, the possibility of agreements for mutual recognition of regulations and conformity assessment procedures. If it does so, Taikon should mention agreements covering at least a sizeable portion of Members, as well as the jurisprudence on subsequent practice.

Suggested Questions to the Parties

Astor	Taikon
<ol style="list-style-type: none"> 1. Is the panel required to follow the interpretation of Article XXIV:5 made by the Appellate Body in <i>Turkey – Textiles</i>? 2. How does Astor interpret the function of Article XXIV:4 in the interpretation of Article XXIV:5? 3. There are now a number of agreements establishing FTAs and CUs that contain mutual recognition obligations. Is Astor claiming that these agreements are all applied in violation of WTO law? 4. Should the existence of mutual recognition provisions in FTAs and CUs affect our interpretation of what Article XXIV permits? 5. With respect to the requirement that all the deviations from WTO law take place at the "formation" of an FTA or CU, would Astor argue that two Members that form an FTA or CU and 	<ol style="list-style-type: none"> 6. What are the "cogent reasons" that Taikon believes should lead us to interpret Article XXIV:5 differently from how the Appellate Body interpreted it in <i>Turkey – Textiles</i>? 7. Isn't the text of Article XXIV:5 clear that the exception is limited to not preventing the "formation" of free trade areas? Isn't Taikon's suggestion tantamount to asking the panel to interpret into Article XXIV:5 the words "and subsequent development", which the Members have not used? 8. How do we know that the subsequent practice Taikon refers to is "concordant, common and consistent" across the WTO Membership? 9. Why does Taikon presume that this subsequent practice is evidence of a common interpretation of Article XXIV:5? Are regulatory equivalence agreements necessarily connected to

initially do not reduce their mutual tariffs in a sector of the economy – say, agriculture – would not be covered by Article XXIV:5 if they were to subsequently agree to liberalize this sector?	free trade areas or customs unions?
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7.3 Whether Taikon's application of the ECP Regulation to ASTOR is justified under Article XX of the GATT 1994

7.3.1 Relevant legal provisions

7.37. Article XX of the GATT 1994, provides, in relevant part:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

7.3.2 General jurisprudence

7.38. Article XX has been the subject of significant jurisprudence. In *Indonesia – Import Licensing Regimes*, the Appellate Body summarized its operation:

Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations. Article XX is made up of two main parts: (i) ten paragraphs, which enumerate the various categories of "governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization"; and (ii) the *chapeau*, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX.¹⁵⁸

7.39. Since its report in *US – Gasoline*, the Appellate Body has insisted that the appropriate order of analysis in a panel's assessment of a justification under Article XX is to determine first whether a measure is "provisionally justified" under one of the subparagraphs, only then to examine whether its application passes the test of the *chapeau*.¹⁵⁹ In *Indonesia – Import Licensing Regimes*, however, the

¹⁵⁸ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5,94, citing Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, p. 16, and Appellate Body Reports, *EC – Seal Products*, para. 5.296.

¹⁵⁹ Appellate Body Report, *US – Gasoline*, p. 22; See Appellate Body Reports, *EC – Seal Products*, para. 5.185; Appellate Body Report, *US – Shrimp*, paras. 119-120. 8 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139;

Appellate Body stated that "a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of chapeau".¹⁶⁰

7.40. In a number of disputes, the Appellate Body confirmed that the burden of proving that a measure found to violate a provision of the GATT is justified under Article XX rests on the respondent.¹⁶¹ In *EC – Seal Products*, the Appellate Body stated that "a complaining party must identify any alternative measures that, in its view, the responding party should have taken" and that would attain the same objective as the original measure, to the same degree, while being less trade-restrictive.¹⁶²

7.41. In *EC – Seal Products*, the Appellate Body stated that Article XX applies to "measures" that are to be analyzed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. From this it inferred that it is not the GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994. Citing its report in *Thailand – Cigarettes (Philippines)*, the Appellate Body stated that the analysis of the Article XX(d) defence in that case should focus on the "differences in the regulation of imports and of like domestic products" giving rise to the finding of less favourable treatment under Article III:4. Thus, "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994".¹⁶³

7.42. Applied to this dispute, this reasoning would imply that the element to be justified under Article XX is the difference in the procedures applied to verify compliance with the Crayfish Ban, depending on whether a Member is an ESODEC Member State.

7.3.3 Analysis under the subparagraphs

7.3.3.1 Relevant jurisprudence

7.43. The respondent has a choice of which subparagraph to invoke as a justification for the Crayfish Ban and corresponding procedures. Plausible justifications for the measure, and the corresponding subparagraphs, would exist under Articles XX(a), XX(b), XX(d) and XX(g):

Subparagraph XX(a) – In an interpretation not questioned by the Appellate Body, the panel in *US – Gambling* found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".¹⁶⁴ The Panel in *China – Publications and Audiovisual Products* recalled that "the content and scope of the concept of 'public morals' can vary from Member to Member, as they are influenced by each Members' prevailing social, cultural, ethical and religious values".¹⁶⁵ Pursuant to its preamble, the Crayfish Ban aims to preserve "the Stormian crab and as a consequence [...] traditional Stormian cuisine and culture". The panel in *EC – Seal Products*, accepted "that the 'moral concern with regard to the protection of animals' is regarded as a value of high importance in the European Union" and therefore permitted justifying the EC's ban on seal products on ground of public morals.¹⁶⁶

Subparagraph XX(b) – In addressing the term "to protect" in Article XX(b), the panel in *EC – Asbestos* noted that "the notion of 'protection' ... impl[ies] the existence of a health risk".¹⁶⁷ The panel followed the approach used by the Panel in *US – Gasoline* and indicated that it "must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health".¹⁶⁸ In *Brazil – Tyres*, the Appellate Body found that the panel was correct to assess, under Article XX(b),

¹⁶⁰ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.100.

¹⁶¹ Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Reports, *EC – Seal Products*, para. 5.169.

¹⁶² Appellate Body Reports, *EC – Seal Products*, para. 5.169.

¹⁶³ Appellate Body Reports, *EC – Seal Products*, para. 5.185.

¹⁶⁴ Panel Report, *US – Gambling*, para. 6.465; Appellate Body Report, *US – Gambling*, para. 299.

¹⁶⁵ Panel Report, *China – Publications and Audiovisual Products*, para. 7.763.

¹⁶⁶ Panel Reports, *EC – Seal Products*, para. 7.632.

¹⁶⁷ Panel Report, *EC – Asbestos*, para. 8.170.

¹⁶⁸ Panel Report, *EC – Asbestos*, para. 8.184.

whether the the measure "is capable of making a contribution and can result in a reduction of exposure to the targeted risks".¹⁶⁹

Subparagraph XX(d) – In *Thailand – Cigarettes (Philippines)*, the Appellate Body stated that:

A Member will successfully discharge that burden and establish its Article XX(d) defence upon demonstration of three key elements, namely: (i) that the measure at issue secures compliance with 'laws or regulations' that are themselves consistent with the GATT 1994; (ii) that the measure at issue is 'necessary' to secure such compliance; and (iii) that the measure at issue meets the requirements set out in the chapeau of Article XX. Furthermore, when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary' to secure compliance with 'laws or regulations' that are not GATT-inconsistent.¹⁷⁰

In *India – Solar Cells*, the Appellate Body analysed the meaning of the terms "laws" and "regulations" and the illustrative list in Article XX(d):

Beginning with the ordinary meaning of the terms 'laws' and 'regulations', we note that the term 'law' is generally understood to refer to 'a rule of conduct imposed by authority', while the term 'regulation' is defined as '[a] rule or principle governing behaviour or practice; esp. such a directive established and maintained by an authority'. In *Mexico – Taxes on Soft Drinks*, the Appellate Body said that the terms 'laws or regulations' in Article XX(d) refer to 'rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.' As to the illustrative list contained in Article XX(d), the Appellate Body observed that the matters listed as examples in Article XX(d) – namely, customs enforcement, the enforcement of monopolies, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices – involve the regulation by a government of activity undertaken by a variety of economic actors (e.g. private firms and State enterprises), as well as by governmental agencies. The illustrative list contained in Article XX(d) reinforces the notion that 'laws or regulations' refer to rules of conduct and principles governing behaviour or practice that form part of the domestic legal system of a Member.¹⁷¹

Subparagraph XX(g) – In *China – Rare Earths*, the Appellate Body stated:

Article XX(g) permits the adoption or enforcement of trade measures that have 'a close and genuine relationship of ends and means' to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted, or applied and 'work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource'. In order to justify a measure pursuant to Article XX(g), a WTO Member must show that it satisfies all the requirements set out in that provision. Indeed, the text of Article XX(g), particularly its use of the conjunctive 'if', suggests a holistic assessment of its component elements, as the Panel rightly recognized.¹⁷²

7.3.3.2 "Necessary" / "Relating to"

7.44. Subparagraphs (a), (b) and (d) involve an assessment of whether the measures in question are "necessary" for the objective they ostensibly pursue. The necessity test may be subdivided into two subtests. In the threshold test, in order to determine the existence of a relationship between the measure and the objective, the panel must establish, on the basis of the measure's structure, design

¹⁶⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 149.

¹⁷⁰ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.

¹⁷¹ Appellate Body Report, *India – Solar Cells*, para. 5.106.

¹⁷² Appellate Body Report, *China – Rare Earths*, para. 5.94.

and expected operation, that the measure is "not incapable of" contributing to its stated objective.¹⁷³ In *Colombia – Textiles*, the Appellate Body stated:

an express reference to such objective may not, in and of itself, be sufficient to establish that the measure is "designed" to protect public morals for purposes of substantiating the availability of the defence under Article XX(a). Conversely, a measure that does not expressly refer to a "public moral" may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation.¹⁷⁴

7.45. If the measure is not incapable of contributing to the objective, the panel may proceed to a further examination of whether the measure is "necessary". Necessity exists within a spectrum ranging from "indispensable" to "making a contribution to".¹⁷⁵ The necessity test involves with an assessment of three elements: the relative importance of the objective of the measure; the contribution of the measure to this objective; and the measure's restrictive effects on international trade.¹⁷⁶ It also involves a comparison with alternative measures, which must be proposed by the complainant, and which disprove the necessity of the challenged measure if they make (at least) an equivalent contribution to the objective pursued, while being less restrictive to international trade. The alternative measure proposed must be reasonably available to the Member taking the challenged measure, including in terms of its costs and the availability of technology to that Member.¹⁷⁷

7.46. As for subparagraph (g), in *China – Rare Earths*, the Appellate Body held that the term "relating to" requires "a close and genuine relationship of ends and means" between that measure and the conservation objective of the Member maintaining the measure. The Appellate Body stated that "a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the 'relating to' requirement of Article XX(g)". It also stated that the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, may be relevant to an assessment of whether the challenged measure 'relates to' conservation.¹⁷⁸

7.47. In *Colombia – Textiles*, the Appellate Body held that the panel is required to examine "with sufficient clarity" the degree of contribution of a measure to the objective as well as the degree of trade-restrictiveness of the measure.¹⁷⁹

7.3.3.3 Arguments of the parties [complainant and respondent are reversed]

7.3.3.3.1 Taikon

7.48. Taikon could seek to justify the Crayfish Ban and the procedures for controlling compliance with it as measures "necessary to protect public morals" under Article XX(a), on the basis that:

- a. Objective: pursuant to its preamble, the Crayfish Ban aims to preserve "the Stormian crab and as a consequence [...] traditional Stormian cuisine and culture".
- b. Contribution: the Crayfish Ban contributes to this objective both by precluding the importation into Taikon of live crayfish and by creating disincentives for commercial breeding of crayfish outside of Taikon.
- c. Trade-restrictiveness: The Crayfish Ban itself is highly trade-restrictive. The procedures for controlling compliance with it are no more trade-restrictive than necessary to enforce compliance with its requirements.

¹⁷³ Appellate Body Report, *Colombia – Textiles*, para. 5.68.

¹⁷⁴ Appellate Body Report, *Colombia – Textiles*, para. 5.69.

¹⁷⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

¹⁷⁶ Appellate Body Report, *Brazil – Tyres*, para. 142.

¹⁷⁷ Appellate Body Report, *Brazil – Tyres*, para. 175.

¹⁷⁸ Appellate Body Report, *China – Rare Earths*, para. 5.90.

¹⁷⁹ Appellate Body Report, *Colombia – Textiles*, para. 5.115.

7.49. Although this would not be recommended,¹⁸⁰ Taikon could seek to justify the Crayfish Ban and the procedures for controlling compliance with it as measures "necessary to protect human, animal or plant life or health", under Article XX(b), on the basis that:

- a. Objective: pursuant to its preamble, the Crayfish Ban aims to preserve "the Stormian crab", which is a fragile species endemic to the East Stormy Ocean area added by the parties to Annex III of CITES, as well as to protect the health of the Taikonese population from the unknown health effects of eating the Stormian crab.
- b. Contribution: the Crayfish Ban contributes to this objective by precluding the importation into Taikon of live crayfish, by creating disincentives for commercial breeding of crayfish outside of Taikon, and by preventing the entry into Taikon of crayfish meat.
- c. Trade-restrictiveness: The Crayfish Ban itself is highly trade-restrictive. The procedures for controlling compliance with it are no more trade-restrictive than necessary to enforce compliance with its requirements.

7.50. Taikon could seek to justify the procedures for controlling compliance with the Crayfish Ban as measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]" under Article XX(d), on the basis that:

- a. Objective: the ECP and the other enforcement procedures are aimed at securing compliance with the Crayfish Ban, which is a norm directly applicable within Taikon and not inconsistent with the provisions of the GATT.¹⁸¹
- b. Contribution: the ECP contributes to this objective by preventing the importation into Taikon of the products prohibited by the Crayfish Ban.
- c. Trade-restrictiveness: The procedures for controlling compliance with it are no more trade-restrictive than necessary to enforce compliance with its requirements.

7.51. Taikon could seek to justify the Crayfish Ban and the procedures for controlling compliance with it as measures "relating to the conservation of exhaustible natural resources" under Article XX(g), on the basis that:

- a. Objective: pursuant to its preamble, the Crayfish Ban aims to preserve "the Stormian crab", which is a fragile species endemic to the East Stormy Ocean area added by the parties to Annex III of CITES.
- b. Contribution: the Crayfish Ban contributes to this objective both by precluding the importation into Taikon of live crayfish and by creating disincentives for commercial breeding of crayfish outside of Taikon.

¹⁸⁰ See Section 5.3 .

¹⁸¹ In *Mexico – Soft Drinks*, the Appellate Body held that "the terms 'laws or regulations' cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system" (Appellate Body Report, *Mexico – Soft Drinks*, para. 79). In *India – Solar Cells*, the Appellate Body found that, in order to constitute "laws of regulations", such instruments should undergo the same test as domestic legal instruments: "in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule" (Appellate Body Report, *India – Solar Cells*, paras 5.113, 5.141).

- c. Restrictions on domestic production or consumption: the Crayfish Ban applies domestically and is accompanied by highly constraining procedures to secure compliance with it.
- d. Trade-restrictiveness: The Crayfish Ban itself is highly trade-restrictive. The procedures for controlling compliance with it are no more trade-restrictive than necessary to enforce compliance with its requirements.

7.3.3.3.2 Astor

7.52. To challenge the measure under the subparagraphs, Astor will need to identify alternative measures that Taikon could have taken instead of adopting the ECP. These alternative measures must...

- ... be less trade restrictive than the ECP, e.g., they could involve entering into an agreement with Taikon to continue cooperation with respect to technical regulation. An agreement to continue cooperating with respect to technical regulations would be less restrictive of trade than the application of the ECP to Astorian products.
- ... achieve at least the same level of contribution to the objectives pursued by Taikon as the ECP. Astor will need to argue that cooperation outside of the framework of ESODEC will achieve the same level of contribution as the ECP.
- ... be reasonably available. Astor may have to argue that the measure it proposes is reasonably available even though it has rejected an offer to conclude an agreement with ESODEC institutions.

7.3.4 Analysis under the chapeau

7.3.4.1 Relevant jurisprudence

7.53. The Appellate Body has described the function of the chapeau of Article XX as "to prevent abuse of the exceptions specified in the paragraphs of that provision",¹⁸² and "to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994".¹⁸³ The chapeau requires that measures that fall under the exceptions in one of the subparagraphs of Article XX also satisfy its requirements, namely that they "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

7.54. With regard to discrimination, the Appellate Body noted in *EC – Seal Products* that, while the legal standard under the non-discrimination obligations of the GATT 1994 differs from the legal standard under the chapeau, this does not mean that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of one of the non-discrimination obligations of the GATT 1994.¹⁸⁴

7.55. In *US – Shrimp*, the Appellate Body provided an overview regarding the three constitutive elements of the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail":

In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in discrimination. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be

¹⁸² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (referring to Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 21).

¹⁸³ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.95.

¹⁸⁴ Appellate Body Report, *EC – Seal Products*, para. 5.298.

arbitrary or unjustifiable in character. We will examine this element of arbitrariness or unjustifiability in detail below. Third, this discrimination must occur between countries where the same conditions prevail. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.¹⁸⁵

7.56. With respect to requirement that the same conditions prevail, in *EC – Seal Products* the Appellate Body concluded that the identification of the relevant conditions must be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 whose violation has been found. It stated that "'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau [...] the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which 'conditions' prevailing in different countries are relevant in the context of the chapeau".¹⁸⁶

7.57. With respect to what characterizes arbitrary or unjustifiable discrimination, in *Brazil – Tyres* the Appellate Body rejected the argument that a decision of a MERCOSUR arbitral tribunal could make discrimination between MERCOSUR countries and non-MERCOSUR countries justifiable. Although the Appellate Body agreed that such discrimination could not "be viewed as "capricious" or "random"", it found that "discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective".¹⁸⁷ In *US – Tuna II (Mexico)*, Art. 21.5, the Appellate Body referred to this jurisprudence, but also nuanced it by referring to possible "additional factors" in the analysis:

The Appellate Body has stated that the analysis of whether discrimination is arbitrary or unjustifiable 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence'. The Appellate Body has explained that such an analysis 'should be made in the light of the objective of the measure', and that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'. Thus, '[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. This factor is 'particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination'. The Appellate Body has explained, however, that this is not the sole test, and that, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Prior Appellate Body jurisprudence therefore underscores the importance of examining the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. In addition, however, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors could also be relevant to the analysis.¹⁸⁸

7.58. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body confirmed the panel's finding that, because the US measure was found under the analysis under Article 2.1 of the TBT Agreement to be "'tailored to', and 'commensurate with', the different risks to dolphins caused by different fishing methods in different parts of the ocean", this was also sufficient to demonstrate that the discrimination under the measure could not "be said to be applied in a manner that constitutes a means of 'arbitrary or unjustifiable discrimination' within the meaning of Article XX".¹⁸⁹

7.59. One element that the panel may consider under the chapeau of Article XX is whether there are different degrees of willingness to negotiate with different countries. In *US – Shrimp*, the Appellate Body found that an "aspect" that led to the characterization of arbitrary or unjustifiable discrimination

¹⁸⁵ Appellate Body Report, *US – Shrimp*, para. 150.

¹⁸⁶ Appellate Body Report, *EC – Seal Products*, para. 5.300.

¹⁸⁷ Appellate Body Report, *Brazil – Tyres*, para. 232.

¹⁸⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316.

¹⁸⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316 (citing Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.739).

was that the US measures "established a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States", and "require[d] other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels". Additionally, the US had adopted phase-in periods for fourteen countries "during which their respective shrimp trawling sectors could adjust to the requirement" imposed immediately by the United States on other countries. The Appellate Body found that "the United States [had] negotiated seriously with some, but not with other Members" the means of implementation of its measure. The "failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members", contrasted with its negotiation with countries in the Americas of an Inter-American Convention for the Protection and Conservation of Sea Turtles. Together, these elements led to the finding that the US measure was applied in a manner that amounted to arbitrary or unjustifiable discrimination between Members where the same conditions prevail.¹⁹⁰

7.3.4.2 Arguments of the Parties

7.3.4.2.1 Astor

7.60. With respect to the chapeau, Astor could invoke the jurisprudence according to which there must be a rational relationship between discrimination and the objective of the measure. Astor may argue that there is no rational relationship between a State being an ESODEC Member State and the application of a more favourable measure to verify compliance of its products with the Crayfish Ban. It would therefore argue that the distinction between ESODEC and non-ESODEC countries in the application of the ECP to control compliance with the Crayfish Ban is explained by a rationale that bears no relationship to the objective of the measure. Astor could also point to the possibility of equivalence agreements between ESODEC and third states as evidence that the rationale employed by Taikon is not related to the objective of the measure but to reciprocal recognition.

7.3.4.2.2 Taikon

7.61. Taikon may argue that the regulatory framework and institutional setting are part of the conditions that are relevant for the application of regulatory controls. As Member States of ESODEC, Cosmia and Taikon adopt a common rulebook, are subject to common regulatory institutions, and submit to common procedures for the enforcement of ESODEC regulations. Astor no longer subscribes to this regulatory and institutional framework. The conditions in Astor with respect to the enforcement of rules and standards are therefore no longer "the same" as the conditions that prevail in Cosmia or Taikon. The same difference in conditions that allows a WTO Member to submit imports into its territory to regulatory controls – regulatory differences and differences in regulatory enforcement between itself and other WTO Members – should logically apply to distinguish the conditions in a Member whose regulatory framework is dynamically aligned to that of the importing Member from the conditions in a Member whose regulatory framework is no longer thus dynamically aligned.

7.62. Taikon may also argue that, if the panel finds that the difference in conditions does not prevent a comparison between Astor and Cosmia for the purposes of Article XX, the distinction between ESODEC and non-ESODEC Member States in the application of the ECP is still not arbitrary or unjustifiable because it is based on the different institutional and regulatory frameworks in these two countries. In a procedure applied to verify compliance of products with regulations, a distinction made on the basis of the extent to which the regulatory and institutional framework that exists in the exporting Member approaches that of the importing Member is rationally related to the rationale for applying the procedure itself. Through the normative and institutional instruments of ESODEC, Taikon can ensure that Cosmian products are subject to a degree of verification, control and compliance procedures equivalent to its own. With respect to the possibility of equivalence agreements, Taikon may argue that these agreements (if they were signed one day) would involve ensuring that the exporting Member has equivalent regulations to those that apply in ESODEC and is subject to rigorous verification of the control and compliance procedures, verified or approved by ESODEC institutions.

¹⁹⁰ Appellate Body Report, *US – Shrimp*, paras. 161-176.

The distinction, although superficially based on an agreement, is ultimately based on the same rationale that explains the measure itself.

Suggested Questions to the Parties	
Astor	Taikon
<ol style="list-style-type: none"> 1. Does Astor propose an alternative measure that Taikon could adopt instead of the Crayfish Ban and ECP? 2. Does the alternative measure fulfil the same objective as the crayfish measures to (at least) an equivalent degree? Is it less trade-restrictive? 3. Isn't the alternative measure [recognition of equivalence] a possibility that Taikon already makes available to Astor? 4. What are the relevant conditions for the purposes of the comparability of two countries under Article XX? 5. Given the different institutional settings that Astor and Cosmia now find themselves in, couldn't we say that the conditions that prevail in one and in the other are now different? 6. What weight should we assign in our interpretation to the difference in wording between Article 2.3 of the SPS Agreement ("identical or similar conditions") and Article XX of the GATT ("same conditions")? Doesn't this suggest that Article XX permits discrimination on the basis of different, even if similar, conditions? 7. Isn't the existence of common rules, a common institutional framework and common enforcement of regulations a justifiable criterion for distinguishing between products produced in different countries? Is it not rationally related to the rationale for applying the ECP? 	<ol style="list-style-type: none"> 1. Is Taikon's measure necessary to attain this objective? 2. A trade ban is a highly trade-restrictive measure. Could it ever be justified? 3. Isn't the extreme impact of the ECP on Astor an indication that, although the Crayfish Ban might be necessary to attain this objective, the ECP is not? 4. What are the relevant conditions for the purposes of the comparability of two countries under Article XX? 5. Doesn't considering [institutional/regulatory] conditions as relevant conditions for the purposes of Article XX give Members the power to unilaterally determine which other Members meet their favoured institutional conditions? 6. Isn't membership of an international organization an arbitrary distinction from the viewpoint of the fulfilment of a substantive objective? 7. What is the rational relationship between being a Member of ESODEC and being exempted from the ECP? 8. The RCA sets up the possibility for ESODEC to enter into equivalence agreements with other countries, ostensibly without any requirement for these countries to adopt ESODEC rules, join its institutions or submit to its enforcement procedures. How does this possibility square with the argument that the institutional/regulatory framework provides the justification for discriminating among WTO Members?