

**JOHN H. JACKSON MOOT COURT COMPETITION
2019-2020**

**Taikon – Requirements on the
Importation of Prepared Foods and Live
Animals from Astor**

Astor
(Complainant)

vs

Taikon
(Respondent)

SUBMISSION OF THE COMPLAINANT

TABLE OF CONTENTS

LIST OF REFERENCES	iv
LIST OF ABBREVIATIONS	viii
SUMMARY OF ARGUMENTS	ix
STATEMENT OF FACTS	4
IDENTIFICATION OF THE MEASURES AT ISSUE	5
LEGAL PLEADINGS	5
I. The ESODEC crayfish measures and ECP as applied to live animals and prepared food products (“PFPs”) are SPS measures.	5
A. The purposes of the measures fall within the scope of SPS Annex A(1).	5
(1) The purpose of the measures falls under SPS Annex A(1)(a).	5
(2) The purpose of the measures falls under SPS Annex A(1)(b).	6
(3) The purpose of the measures falls under SPS Annex A(1)(c).	6
B. The form and nature of the measures fall within SPS Annex A(1).	7
II. Taikonese Law 14/2012 (“TL14”) is inconsistent with SPS Art 2.3 and Art 5.5.	7
A. TL14 is an SPS measure subject to the disciplines of the SPS Agreement.	7
(1) TL14 is an SPS measure under SPS Annex A(1).	7
(2) TL14 directly or indirectly affects international trade.	7
B. TL14 is inconsistent with the first sentence of SPS Art 2.3 because it discriminates between Astor and other WTO Members.	7
(1) Identical or similar conditions prevail in both Astor and Cosmia.	8
(2) TL14 discriminates between Astor and Cosmia.	9
(3) The discrimination is arbitrary or unjustifiable.	9
C. TL14 is inconsistent with the second sentence of SPS Art 2.3 because it is applied in a manner which constitutes a disguised restriction on international trade.	11
D. Taikon’s application of different ALOPs to the same products from Cosmia and Astor is inconsistent with SPS Art 5.5.	11
(1) Taikon has adopted different ALOPs in different yet comparable situations.	12
(2) The levels of protection adopted by Taikon exhibit differences which are arbitrary and unjustifiable.	12

(3) The difference in levels of protection adopted has resulted in discrimination or a disguised restriction on international trade. 13

III. Taikon should not apply the ECP to Astorian products. 14

A. Taikon’s application of Regulations Authority Note 7/2019 ("Note 7") is subject to the disciplines of the SPS Agreement. 14

B. Taikon’s application of Note 7 to Astorian products is inconsistent with SPS Art 4.1. 14

(1) Astor’s measures and regulations in relation to SPS measures have all the while complied with Taikon’s ALOP and continue to be firmly upheld. 14

(2) Taikon’s application of the ECP to Astorian products hence violates SPS Art 4.1..... 16

C. Taikon continues to have both the competence and obligation to negotiate equivalency with Astor. 16

(1) Taikon as a WTO Member may not delegate its obligation to recognise equivalence under SPS Art 4.1 to ESODEC, which is not a WTO Member. 16

(2) As a matter of fact, Taikon also continues to have both the competence and obligation to negotiate equivalence with Astor. 16

D. GATT Art XXIV cannot apply to excuse Taikon from its SPS Art 4.1 obligations. 17

(1) First, the SPS Agreement does not allow for a reading-in of GATT Art XXIV..... 18

(2) Second, even if GATT XXIV could justify a breach of the SPS, the elements of GATT XXIV are not met in this case..... 18

IV Taikon’s application of the ECP to Astor is inconsistent with GATT Art I:1 and cannot be justified by any GATT exceptions...... 18

A. Taikon’s application of the ECP to Astor is inconsistent with GATT Art I:1. 18

(1) First, the measure at issue is covered by GATT Art I:1..... 19

(2) Second, Astorian and Cosmian prepared foods should be considered “like”. 19

(3) Third, the ECP application confers a disadvantage on Astorian PFPs and corresponding “advantage, favour, privilege, or immunity” on Cosmian ones. . 20

(4) Such advantage is not extended “immediately” and “unconditionally” 20

B. The above breach of GATT Art I:1 is not justified by GATT Art XXIV. 20

(1) ESODEC is at most an FTA and not a customs union nor interim agreement for the purposes of establishing one in the future.	20
(2) The GATT Art XXIV defence is not available as neither level of the two-tier <i>Turkey – Textiles</i> test has been fulfilled.	21
(a) The first <i>Turkey – Textiles</i> requirement is not satisfied as the ECP was neither introduced upon ESODEC’s formation, nor meets the requirements of GATT Art XXIV.....	21
(b) The second <i>Turkey – Textiles</i> requirement is also not satisfied as the ECP is not “necessary” for the formation of ESODEC.	22
C. The above breach of GATT Art I:1 is also not justified by GATT Art XX	22
(1) First, the ECP Regulation leads to arbitrary and unjustifiable discrimination....	23
(2) The ECP Regulation cannot be justified by GATT Art XX(b).....	24
(3) The ECP Regulation cannot be justified by GATT Art XX(g).....	24
REQUEST FOR FINDINGS	26

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

Abbreviation	Long Form
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243
DSU	Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.Y.S 401, 33 I.L.M. 1226 (1994)
GATT	General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
General Interpretative Note	General interpretative note to Annex 1A, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
Lisbon Treaty	Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty Establishing European Community (TEC) now Treaty on the Functioning of the EU (TFEU), 2007/C 306/01
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
TFEU	Treaty on the Functioning of the European Union, 2012/C 326/01
Understanding on Article XXIV	Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

II. CASES

A. Appellate Body Reports

Short Title	Full Case Title and Citation
<i>Argentina – Footwear</i>	<i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000
<i>Australia – Apples</i>	<i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Australia – Salmon</i>	<i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Brazil – Retreaded Tyres</i>	<i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>China – Rare Earths</i>	<i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> , WT/DS431/AB/R, adopted 7 August 2014
<i>EC – Asbestos</i>	<i>European Communities – Measures affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bananas III</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Hormones</i>	<i>EC – Measures Concerning Meat and Meat Products</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Seal Products</i>	<i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014
<i>India – Agricultural Products</i>	<i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/AB/R, adopted 19 June 2015
<i>Korea – Radionuclides</i>	<i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/AB/R, adopted 11 April 2019
<i>Turkey – Textiles</i>	<i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> ,

	WT/DS34/AB/R, adopted 19 November 1999
<i>US – Animals</i>	<i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS447/AB/R, adopted 31 August 2015
<i>US – Reformulated Gasoline</i>	<i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp</i>	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Wool Shirts and Blouses</i>	<i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997

B. Panel Reports of the WTO

Short Title	Full Case Title and Citation
<i>Australia – Apples</i>	<i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010
<i>Australia – Salmon</i>	<i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R, adopted 6 November 1998
<i>EC – Bananas III</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, adopted 25 September 1997
<i>EC – Approval and Marketing of Biotech Products</i>	<i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, adopted 21 November 2006
<i>India – Agricultural Products</i>	<i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R, adopted 19 June 2015
<i>Japan – Alcoholic Beverages II</i>	<i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, adopted 4 October 1996.
<i>US – Animals</i>	<i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , WT/DS447/R, adopted 31 August 2015
<i>US – Poultry (China)</i>	<i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 29 September 2010

<i>US – Section 301 Trade Act</i>	<i>United States – Sections 301-310 of the Trade Act 1974, WT/DS152/R, adopted 27 January 2000</i>
-----------------------------------	--

III. ARTICLES AND CONTRIBUTIONS

Abbreviation	Long Form
Davies (2009)	Arwel Davies, “Interpreting the GATT Art XX Chapeau in the Light of the ‘New’ Approach under Brazil – Tyres” (2009) 43 <i>Journal of World Trade</i> 507-539
Lydgate and Winters (2019)	Emily Lydgate and L. Alan Winters, “Deep and Not Comprehensive? What the WTO Rules Permit for a UK-EU FTA” (2019) 18 <i>World Trade Review</i> 451-479
Mathis (2002)	J. Mathis (2002), <i>Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement</i> . The Hague: TMC Asser Press

IV. OTHER MATERIALS

Abbreviation	Long Form
Art 4 Guidelines	WTO Committee on Sanitary and Phytosanitary Measures, <i>Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures</i> , WTO Document G/SPS/19/Rev.2 (23 July 2004)
Art 5.5 Guidelines	WTO Committee on Sanitary and Phytosanitary Measures, <i>Guidelines to Further the Practical Implementation of Article 5.5</i> , WTO Document G/SPS/15 (18 July 2000)
ECJ Opinion 2/15	Opinion 2/15, ECLI:EU:C:2017:376, 16 May 2017; Opinion 2/15, ECLI:EU:C:2016:992, 21 December 2016
Shorter Oxford English Dictionary	Shorter Oxford English Dictionary, 6th edn (Oxford University Press, 2007)

LIST OF ABBREVIATIONS

Abbreviation	Long Form
AB	Appellate Body
ABR	Appellate Body Report
ALOP	Appropriate Level of Protection
Art / Arts	Article / Articles
CAP	Compliance Assessment Procedure
Crayfish Ban	ESODEC Regulation 13/2018 of 12 March 2018 Concerning the Ban of Marbled Crayfish and Products Containing Marbled Crayfish in the Territory of the Community and Establishing Enforcement Procedures
Directive 44	Directive 44/2018, issued by the ESODEC Regulations Authority on 10 July 2018
ECP	Enhanced Control Procedure
ECP Regulation	ESODEC Regulation 7/2015 of 10 March 2015 Establishing the Enhanced Control Procedure for Potentially Dangerous Products
ESODEC	East Stormy Ocean Development and Economic Community
ESODEC Agreement	Agreement Establishing the East Stormy Ocean Development and Economic Community
ESODEC Regulations	Regulations governing the production, marketing, offering for sale and sale of products throughout ESODEC territory
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HS	Harmonized Commodity Description and Coding System

MFN	Most-Favoured-Nation
Note 7	Regulations Authority Note 7/2019
ORC	Other regulations of commerce
ORRC	Other restrictive regulations of commerce
PR	Panel Report
Para. / Paras.	Paragraph / Paragraphs
PFPs	Prepared food products
RCA	ESODEC Regulatory Community Agreement of 2012
SPS	Sanitary and phytosanitary
TFEU	Treaty on the Functioning of the European Union
TL14	Taikonese Law 14/2012
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

SUMMARY OF ARGUMENTS

1. **The ESODEC crayfish measures and Enhanced Control Procedure (“ECP”) as applied to live animals and prepared food products (“PFPs”) are SPS measures.**
 - The measures are applied to protect against risks to human and animal life or health.
 - The measures satisfy the form and nature test.
2. **Taikonese Law 14/2012 (“TL14”) is an SPS measure subject to the disciplines of the SPS Agreement.**
 - TL14 is an SPS measure because it implements SPS measures.
 - TL14 directly or indirectly affects international trade.
3. **TL14 is inconsistent with the first sentence of SPS Art 2.3.**
 - Identical or similar conditions prevail in Astor and Cosmia because the relevant conditions (*i.e.*, the potential for contamination with marbled crayfish and the absence of marbled crayfish) are the same.
 - TL14 discriminates between Astor and Cosmia because it treats Astorian products and Cosmian products differently even though the same conditions prevail.
 - This discrimination is arbitrary or unjustifiable because the rationale given for the discrimination bears no rational connection to the objective of TL14.
4. **TL14 is inconsistent with the second sentence of SPS Art 2.3.**
 - TL14 constitutes arbitrary or unjustifiable discrimination.
 - TL14 was not based on a risk assessment.
5. **Taikon’s application of different appropriate levels of protection (“ALOPs”) to the same products from Cosmia and Astor is inconsistent with SPS Art 5.5.**
 - Even if the situations of Cosmia and Astor are different, the treatment of the same products from Cosmia and Astor can be comparable because they concern the same potential biological risk. The ALOPs being applied are different because the ECP applies to Astorian products but not to Cosmian products.
 - If the different situations are comparable then the difference in ALOPs cannot be arbitrary or unjustifiable. Here, because the risk to human and animal life and health is the same for imports from both countries, there is discrimination or a disguised restriction on international trade because the difference in ALOPs is arbitrary and unjustifiable.
 - *A fortiori*, a breach of SPS Art 5.5 also implies a breach of SPS Art 2.3.
6. **Taikon’s application of Regulations Authority Note 7/2019 (“Note 7”) is an SPS measure subject to the disciplines of the SPS Agreement.**

- Note 7 directs Taikon to apply the ECP, an SPS measure, to Astorian products covered by ESODEC Regulations.
 - The application of Note 7 directly or indirectly affects international trade.
- 7. Taikon should not apply the ECP to Astorian products.**
- As Astor’s regulations are the same, Taikon is obliged to continue recognising equivalence with Astor and should not apply the ECP to Astorian products.
 - Taikon as a WTO Member retains the obligation to recognise equivalence under SPS Art 4.1 and may not delegate it to ESODEC, which is not a WTO Member.
 - Taikon retains both the competence and obligation to negotiate equivalence with Astor.
 - GATT Art XXIV cannot apply to excuse Taikon from its obligations under SPS Art 4.1.
- 8. Taikon’s application of the ECP to Astorian prepared food products is in breach of GATT Art I:1.**
- GATT Art I:1 covers the ECP because it is a formality relating to imports.
 - Astorian prepared food products and Cosmian prepared food products are “like products”.
 - The application of the ECP to Astorian but not Cosmian prepared food products confers an advantage on Cosmian prepared food products.
 - The advantage is not immediately and unconditionally extended to Astorian like products.
- 9. Taikon’s breach of GATT Art I:1 cannot be justified by GATT Art XXIV.**
- The ECP Regulation was not introduced upon the formation of an FTA, as required by the text of GATT Art XXIV.
 - The ECP results in more “other restrictive regulations of commerce” (“ORRCs”) because it enacts new regulatory barriers for non-ESODEC countries.
 - The ECP Regulation is not necessary for the formation of ESODEC.
- 10. Taikon’s breach of GATT Art I:1 cannot be justified by GATT Art XX.**
- Taikon’s application of the ECP to Astorian products constitutes arbitrary or unjustifiable discrimination under the *chapeau*.
 - The application of the ECP is not necessary to protect human health because it is highly trade-restrictive and there are less trade-restrictive alternatives available.
 - The application of the ECP has no relation to the conservation of exhaustible natural resources, and, in the alternative, the Stormian crab is not an exhaustible natural resource. Furthermore, the ECP has not been made effect in conjunction with restrictions on domestic production or consumption because people in Taikon continue to eat the Stormian crab.

STATEMENT OF FACTS

Astor, Taikon and Cosmia are developing countries located in the East Stormy Ocean. They established the ESODEC FTA in 2012, while still applying independent tariff schedules to non-ESODEC countries. The RCA,¹ which automatically recognises mutual regulatory controls between ESODEC members, was also introduced. However, non-members must enter into “equivalence agreements” with ESODEC countries to obtain mutual recognition, though no such agreement has been negotiated nor signed to date. On 10 March 2015, the ECP was established. This involves testing of 5% of all relevant products, an embargo on the cargo pending the tests, and the imposition of export prohibitions if violations are found. However, such products from ESODEC members are exempted by virtue of the RCA.

The East Stormy Ocean is home to the Stormian crab, bred by Astorian and Cosmian companies. These crabs are made into prepared food products (“PFPs”) which are then exported and marketed as “Traditional Stormian Cuisine”. In the past, some producers bred and sold marbled crayfish as a substitute for the crab in PFPs as the two taste very similar. On 12 March 2018, the ESODEC Joint Committee issued the Crayfish Ban² for the purpose of “preserving the natural habitat of indigenous species and ensuring that all food products sold within ESODEC are safe for human consumption”. The ESODEC Regulations Authority also issued Directive 44,³ applying the ECP to all food products containing the meat of marine and aquatic animals. To date, there have only been six instances whereby imports into Taikon were found to contain marbled crayfish, all in 2018. No other violations have occurred since. To implement the Crayfish Ban, national authorities of ESODEC members conduct inspections for marbled crayfish on seaside farms and processing establishments which are only occasionally accompanied by ESODEC representatives.

Both the ESODEC Agreement and RCA have been incorporated into each ESODEC member’s domestic legislation. When Astor withdrew from ESODEC on 13 April 2019, it also incorporated the Crayfish Ban into its domestic legislation. Despite Astor continuing to apply the same measures to prevent the spread of marbled crayfish, the ECP has now been applied to Astorian PFPs and live animals exported to Taikon. Compounded by delays in testing, this has caused degradation in food quality and increased the final prices of products by 50%. Exports of Astorian PFPs to Taikon fell by 70%, while those from the only other remaining ESODEC Member, Cosmia, rose by 37%.

¹ Regulatory Community Agreement (“RCA”)

² ESODEC Regulation 13/2018 of 12 March 2018 (“Crayfish Ban”)

³ Directive 44/2018 (“Directive 44”)

IDENTIFICATION OF THE MEASURES AT ISSUE

Measure 1: The ESODEC crayfish measures, comprising the Crayfish Ban and Directive 44/2018 (“Directive 44”), as incorporated into Taikon’s national regulatory system and applied by Taikonese national authorities.

Measure 2: The Enhanced Control Procedure (“ECP”) as applied to live animals and PFPs to implement the Crayfish Ban.

Measure 3: Taikonese Law 14/2012 (“TL14”), incorporating the ESODEC Regulatory Community Agreement (“RCA”).

Measure 4: Taikon’s application of Regulations Authority Note 7/2019 (“Note 7”).

LEGAL PLEADINGS**I. THE ESODEC CRAYFISH MEASURES AND ECP AS APPLIED TO LIVE ANIMALS AND PREPARED FOOD PRODUCTS (“PFPS”) ARE SPS MEASURES.**

1. A measure constitutes an SPS measure if its (i) purpose, and (ii) form and nature fall within the scope of SPS Annex A(1).¹ We shall now demonstrate how the measures do so.

2. The ESODEC crayfish measures, as incorporated and applied by Taikon, and the ECP as applied to live animals and PFPs, are SPS measures under SPS Annex A(1) since they are applied to protect human and animal health and life from risks arising from marbled crayfish.

A. The purposes of the measures fall within the scope of SPS Annex A(1).

3. First, the measures must be applied to protect at least one of the listed interests or prevent the specified damage under SPS Annex A(1). The purpose of the measures should be ascertained based on objective considerations, including the way in which the measure is designed and applied, its surrounding regulatory context, and its text and structure. Hence, the purpose of the measures should not be determined only by Taikon.² This independent evaluation by the Panel prevents a self-serving explanation by Taikon of the measure’s purpose. Here, the measures fall under paras. (a), (b) and (c) of SPS Annex A.

(1) The purpose of the measures falls under SPS Annex A(1)(a).

4. The measures are clearly applied to protect animal life or health within Taikon from risks arising from the entry, establishment or spread of pests under SPS Annex A(1)(a). The marbled crayfish is a pest because it causes harm to the life and health of the Stormian crab³ as the presence of marbled crayfish can more than double the mortality rate of the Stormian

¹ PR, EC – Approval and Marketing of Biotech Products, [7.149]

² ABR, Australia – Apples, [172]-[173]

³ PR, EC – Approval and Marketing of Biotech Products, [7.240]

crab at the critical stages of its reproductive cycle.⁴

5. The Crayfish Ban recognises the risk posed by the marbled crayfish to Stormian crabs, and thus prohibits the presence of any live marbled crayfish within Taikon.⁵ This ban is enforced through Directive 44, which subjects imports potentially containing live marbled crayfish to the ECP before any part of the shipment can enter Taikon.⁶ The ECP then ensures that shipments containing live marbled crayfish will be identified and the offending shipment returned or destroyed before the live marbled crayfish can enter Taikon and pose a risk to the Taikonese Stormian crab population.⁷ Hence, the measures are clearly applied for this purpose.

(2) The purpose of the measures falls under SPS Annex A(1)(b).

6. The measures are also applied to protect human life and health within Taikon from risks arising from contaminants and additives in food under Annex A(1)(b). Where its presence in food is unintentional,⁸ marbled crayfish meat is a contaminant. Where its presence is intentional, it constitutes an additive. In effect, the measures protect against the risks arising from consuming marbled crayfish meat by ensuring that it will not be consumed within Taikon.

7. The Crayfish Ban not only prohibits the presence of marbled crayfish within Taikon, but also mandates the inspection of hotels and restaurants in Taikon which breed Stormian crabs, to ensure that food prepared there will not be contaminated with crayfish. Furthermore, under Directive 44, PFPs potentially containing marbled crayfish meat must be inspected under the ECP. Shipments found to contain marbled crayfish meat will be returned or destroyed before they enter Taikon, ensuring that they cannot be consumed in Taikon.

8. This is also supported by the text of the ECP Regulation, which refers to the objective of preserving the life and health of Stormian citizens, including Taikonese citizens. In fact, the Crayfish Ban explicitly recognises the importance of ensuring that all food products sold within ESODEC are safe for human consumption, while the ECP purports to be a procedure to control the safety of imported products.⁹ Therefore, the measures are evidently applied for this purpose.

(3) The purpose of the measures falls under SPS Annex A(1)(c).

⁴ Case, Annex III, Partuto et al

⁵ Crayfish Ban, Preamble, 2nd Recital and Art 1

⁶ Case, [3.1]

⁷ ECP Regulation, Art 2.6 and 4.2

⁸ PR, *EC – Approval and Marketing of Biotech Products*, [7.313]

⁹ Crayfish Ban, Preamble, 4th Recital; ECP Regulation, Preamble, 4th Recital

9. In addition, the measures are applied to protect human life or health within Taikon from risks arising from the entry, establishment or spread of pests under SPS Annex A(1)(c). Such risks must arise from exposure to pests other than as food.¹⁰ By ensuring that no marbled crayfish are present within Taikon, the measures completely prevent and protect against any human exposure to the marbled crayfish and any risk arising from this.

B. The form and nature of the measures fall within SPS Annex A(1).

10. The form and nature elements should be assessed holistically in order to determine whether a measure is an SPS measure under the second paragraph of SPS Annex A(1).¹¹ In addition, the second part of the last sentence of SPS Annex A(1) lists examples of measures which satisfy the form and nature test.¹² It is clear from the structure of the measures that the Crayfish Ban specifies end product criteria while Directive 44, read with the ECP Regulation, sets out testing, inspection and approval procedures and sampling methods, all of which fall within the list of examples. Hence, the measures fulfil the form and nature test.

11. Overall, the ESODEC crayfish measures and ECP as applied to live animals and PFPs are SPS measures.

II. TL14 IS INCONSISTENT WITH SPS ART 2.3 AND ART 5.5.

A. TL14 is an SPS measure subject to the disciplines of the SPS Agreement.

(1) TL14 is an SPS measure under SPS Annex A(1).

12. TL14 allows for application of the ECP to be waived if imports meet SPS standards set by ESODEC Regulations such as the Crayfish Ban. It is thus an SPS measure as it governs the implementation of both the ESODEC crayfish measures and the ECP, which are SPS measures.

(2) TL14 directly or indirectly affects international trade.

13. TL14 directly or indirectly affects international trade by imposing barriers to trade should recognition of equivalence not be granted. Hence, TL14 must conform to the requirements under the SPS Agreement, namely, SPS Art 2.3.

B. TL14 is inconsistent with the first sentence of SPS Art 2.3 because it discriminates between Astor and other WTO Members.

14. In order to establish a breach of SPS Art 2.3, first sentence, three cumulative elements must be demonstrated: (i) identical or similar conditions prevail in the territories of the Members compared; (ii) the measure discriminates between the territories of Members being

¹⁰ PR, *EC – Approval and Marketing of Biotech Products*, [7.350]-[7.351]

¹¹ PR, *Australia – Apples*, [7.153]

¹² ABR, *Australia – Apples*, [176]

compared; and (iii) the discrimination is arbitrary or unjustifiable.¹³

(1) Identical or similar conditions prevail in both Astor and Cosmia.

15. Conditions are relevant if they relate to the objectives pursued, the SPS risks addressed by the measures at issue and the particular circumstances of the case. This includes not only conditions found in the products at issue but also territorial conditions of exporting Members.¹⁴

16. The SPS risk addressed by the ECP as applied to live animals and PFPs is the risk to animal and human life resulting from marbled crayfish. Hence, the potential for products from the exporting Member to be contaminated by marbled crayfish is a relevant condition. In addition, territorial conditions which may affect the potential for contamination should be examined.¹⁵ We will show why, having regard to both these conditions, identical or similar conditions prevail in Astor and Cosmia.

17. First, the potential for contamination for products from Astor and Cosmia is the same, because the measures taken to enforce the ban on marbled crayfish in both countries are the same. Upon its withdrawal from ESODEC, Astor converted all ESODEC Regulations, including the Crayfish Ban, into domestic law, *mutatis mutandis*. Hence, Astor retains the same laws, regulations and administrative frameworks as ESODEC members like Cosmia, applying the ECP to non-Stormian countries and conducting inspections pursuant to the Crayfish Ban.¹⁶

18. Second, the territorial conditions which could affect the potential for contamination are the same in both Astor and Cosmia – in particular, no marbled crayfish have been found in both Astor and Cosmia since December 2018. Thus, the degree of potential for contamination arising from territorial conditions is the same for both Astor and Cosmia.

19. While it is acknowledged that Astor no longer submits to ESODEC institutions and procedures since its withdrawal from ESODEC in April 2019, it should be noted that even after its withdrawal from ESODEC, Astor has continued to maintain territorial conditions which are identical to those in ESODEC members, independent of any ESODEC institutions and procedures. Hence, the presence of ESODEC institutions and procedures in Cosmia does not lower the potential for contamination for Cosmian exports and does not detract from the fact that identical or similar conditions prevail in Astor and Cosmia.

¹³ PR, *India – Agricultural Products*, [7.389]

¹⁴ ABR, *Korea – Radionuclides*, [5.59], [5.63]-[5.64]

¹⁵ ABR, *Korea – Radionuclides*, [5.89]

¹⁶ Clarifications, [31]; Case, [5.2]

(2) TL14 discriminates between Astor and Cosmia.

20. The element of discrimination may be interpreted with reference to the interpretation of “discrimination” in the *chapeau* of GATT Art XX, given its similarity to SPS Art 2.3.¹⁷ Discrimination has been found where (i) Members in which the same conditions prevail are treated differently, (ii) application of the measure does not allow for inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country, or (iii) the measure alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure.¹⁸

21. First, even where identical or similar conditions prevail in their territories, TL14 *de jure* treats the only other ESODEC member, Cosmia, and other WTO Members like Astor differently. In such cases, other WTO Members such as Astor are still forced to enter into equivalence agreements before application of the ECP can be waived, while Cosmia is exempt from the ECP merely by virtue of its ESODEC membership.

22. Second, TL14 does not contain any mechanism to consider the conditions prevailing in the territories of other WTO Members before subjecting their exports to the ECP.

23. Third, the application of TL14 alters the conditions of competition to the detriment of products from other WTO Members like Astor, as compared to Cosmia, the only other ESODEC member.¹⁹ The application of the ECP substantially increases the costs of PFPs from other WTO Members by 50%.²⁰ This amounts to *de facto* discrimination, especially since the disproportionate costs have stalled exports from other WTO Members like Astor. Furthermore, even though TL14 allows for the entry into equivalence agreements with third countries, to date, no such equivalence agreement has been concluded.²¹

(3) The discrimination is arbitrary or unjustifiable.

24. The analysis of whether discrimination is arbitrary or unjustifiable under SPS Art 2.3 may also be guided by the similar analysis in the context of GATT Art XX. Discrimination is arbitrary or unjustifiable where there is no rational connection between the objective of the measure and the rationale for the discriminatory treatment.²² In addition, other factors may also contribute to the finding of arbitrary or unjustifiable discrimination.²³ Furthermore, the

¹⁷ PR, *India – Agricultural Products*, [7.400]; PR, *US – Animals*, [7.570]

¹⁸ PR, *India – Agricultural Products*, [7.400]; ABR, *US – Shrimp*, [165]

¹⁹ PR, *US – Animals*, [7.573]

²⁰ Case, [3.4]

²¹ Case, [1.5]

²² PR, *India – Agricultural Products*, [7.427]-[7.429]

²³ ABR, *EC – Seal Products*, [5.306]

same facts which inform whether identical or similar conditions prevail may also be relevant in determining whether discrimination is arbitrary or unjustifiable.²⁴

25. The objective of TL14 is to allow for the ECP to be waived if products have been shown to meet the SPS standard set by the relevant ESODEC Regulation – here, the Crayfish Ban. Meanwhile, Taikon’s rationale for always applying the ECP to non-ESODEC members is that non-ESODEC members are not subject to ESODEC institutions and procedures and thus the potential for contamination for their exports is always higher than that of ESODEC members.²⁵

26. However, this rationale bears no rational connection to the objective of TL14, because there are clearly instances where exports from non-ESODEC members have an identical or similarly low potential for contamination as Cosmia, as demonstrated in paras. 17 to 18. However, these exports are still unjustifiably subject to the stringent ECP. Hence, Taikon’s reliance on ESODEC membership as the sole determining factor to determine whether the ECP should be applied is arbitrary, because the presence of ESODEC institutions and procedures is inadequate in determining the potential for contamination.

27. Furthermore, discrimination is arbitrary or unjustifiable if a measure is applied in a rigid and unbending manner across Members without any regard for differences between those Members.²⁶ By conditioning the application of the ECP purely on ESODEC membership, TL14 does not allow for any inquiry into the conditions prevailing in Members’ territories. This constitutes arbitrary or unjustifiable discrimination.

28. In addition, Taikon’s insistence that the only way for exports from other WTO Members to meet the ESODEC standard is for them to submit to ESODEC procedures and institutions²⁷ – *i.e.*, for them to become ESODEC members – amounts to coercing other WTO Members to become ESODEC members to avoid application of the ECP. This also constitutes unjustifiable discrimination, similar to the AB’s finding in *US – Shrimp*, where an “economic embargo” was used to require other WTO Members to adopt the same regulatory program.²⁸

29. Furthermore, the failure to enter into serious, across-the-board negotiations for cooperative arrangements with exporting countries before the unilateral imposition of a

²⁴ PR, *India – Agricultural Products*, [7.460]

²⁵ Case, [6.2]

²⁶ ABR, *US – Shrimp*, [163], [177]

²⁷ Case, [6.2]

²⁸ ABR, *US – Shrimp*, [164]

measure also amounts to unjustifiable discrimination.²⁹ Prior to Astor's withdrawal from ESODEC, only Astor and Cosmia exported PFPs to Taikon, and Astor was in fact the larger exporter by volume of the two.³⁰ However, Taikon failed to enter into negotiations with Astor before it began to apply the ECP to Astorian PFPs, even though there was the opportunity to do so during the three months between Astor's notification of withdrawal and the date on which the notification took effect.³¹ This was in spite of the fact that Taikon ought to have recognised the severe trade-restrictiveness of the ECP, which had affected other WTO Members in the past.³² Hence, Taikon's failure to negotiate with Astor amounts to unjustifiable discrimination.

30. Accordingly, Taikon is in breach of its obligations under SPS Art 2.3, first sentence.

C. TL14 is inconsistent with the second sentence of SPS Art 2.3 because it is applied in a manner which constitutes a disguised restriction on international trade.

31. Since TL14 results in arbitrary or unjustifiable discrimination, it has been applied in a manner which constitutes a disguised restriction on international trade.³³

32. Furthermore, imposing an SPS measure without basing it on a risk assessment has also been taken to be a strong indication that it is a disguised restriction on international trade.³⁴ Therefore, as TL14 was applied without any risk assessment being conducted, it further constitutes a disguised restriction on international trade.

33. Hence, Taikon is in breach of its obligations under SPS Art 2.3, second sentence.

D. Taikon's application of different ALOPs to the same products from Cosmia and Astor is inconsistent with SPS Art 5.5.

34. TL14 mandates the application of different ALOPs to the same products from Cosmia as compared to Astor by virtue of Cosmia's ESODEC membership. This violates SPS Art 5.5.

35. Three elements must be cumulatively proven to show that a Member has breached its obligations under SPS Art 5.5: (i) the Member has adopted different ALOPs in different yet comparable situations, (ii) the levels of protection exhibit differences which are arbitrary or unjustifiable, and (iii) this results in discrimination or a disguised restriction on international trade.³⁵

²⁹ ABR, *US – Shrimp*, [172]; ABR, *US – Reformulated Gasoline*, pp. 27-28

³⁰ Case, Annex II

³¹ Case, [4.3]

³² Case, [3.4]

³³ PR, *India – Agricultural Products*, [7.475]-[7.476]

³⁴ *Ibid*

³⁵ ABR, *EC – Hormones*, [214]; ABR, *Australia – Salmon*, [140]

(1) Taikon has adopted different ALOPs in different yet comparable situations.

36. The first element comprises two aspects – that there are different yet comparable situations, and that different ALOPs are applied in such situations.³⁶

(a) The situations are different yet comparable.

37. Different situations are comparable if they involve a risk of same or similar associated potential biological or ecological consequences.³⁷ The two different situations here – ESODEC membership and no ESODEC membership – are comparable, because the same potential risks to human and animal life and health, as identified in paras. 4 to 9, may exist in products from both ESODEC members and non-ESODEC members.

(b) Different ALOPs have been applied in the two situations.

38. The ALOPs applied by the Respondent should be ascertained by the Panel based on the totality of the arguments and evidence, which may include evidence of the level of protection reflected in the SPS measures actually applied. Further, the Respondent should not be allowed to hide behind a generically stated ALOP in order to shirk its obligations under SPS Art 5.5.³⁸ Hence, Taikon should not be allowed to unilaterally determine that a single ALOP is applied to imports from both ESODEC and non-ESODEC members.

39. Since a Member's SPS measures are indicative of that Member's ALOP, substantial differences in the SPS measures in different yet comparable situations may demonstrate that the ALOPs being applied are different.³⁹ The essential difference here is the application of the ECP to shipments of live animals and PFPs from Astor (a non-ESODEC member) but not from Cosmia (an ESODEC member). The ECP requires the inspection of 5% of every relevant shipment, an embargo pending testing, and harsh sanctions for any violations.⁴⁰ The stringency of the ECP implies that the ALOP applied to Astorian imports is "zero risk of the presence of marbled crayfish". On the other hand, the non-application of the ECP to Cosmian imports implies that this level of protection is a non-zero risk, because absent the inspections, Cosmian imports potentially containing marbled crayfish will still be allowed to enter Taikon.

40. Hence, different ALOPs have been applied by Taikon to Cosmia and Astor.

(2) The levels of protection adopted by Taikon exhibit differences which are arbitrary and unjustifiable.

³⁶ PR, *US – Poultry (China)*, [7.225]

³⁷ ABR, *Australia – Salmon*, [146]

³⁸ ABR, *Korea – Radionuclides*, [5.34]; PR, *Australia – Apples*, [7.970]-[7.971]

³⁹ PR, *US – Poultry (China)*, [7.245]

⁴⁰ Case, [3.2]; ECP Regulation, Arts 2.4, 2.6, 4.2 and 4.3

41. SPS Art 5.5 prevents a WTO Member from relying merely on different yet comparable situations as an excuse to apply arbitrarily or unjustifiably different ALOPs. Whether there are arbitrary and unjustifiable distinctions between the levels of protection will depend on whether the justification for the distinction bears a rational relationship to the objective of the measures. Hence, the burden lies on Taikon to justify the substantial difference in the ALOPs applied to Astorian and Cosmian products. To do so, it must produce scientific evidence to show that there are differing levels of risk in the two situations,⁴¹ where “risk” refers to the likelihood of a pest being present and the magnitude of the associated potential consequences, or the potential for adverse effects arising from the presence of contaminants in food.⁴²

42. There is no scientific research that would call into question the safety of Astorian products. Furthermore, since the potential for contamination for products from Astor and Cosmia is the same,⁴³ the level of risk is the same for products from Astor and Cosmia and the difference in ALOPs cannot be justified.

43. Solely relying on ESODEC membership to determine which ALOP to apply is also arbitrary as ESODEC membership does not affect the level of risk inherent in Astorian products.

44. Hence, Taikon’s application of different ALOPs is arbitrary and cannot be justified.

(3) The difference in levels of protection adopted has resulted in discrimination or a disguised restriction on international trade.

45. SPS Art 5.5 also prevents WTO Members from relying merely on different yet comparable situations as an excuse to apply ALOPs in a manner that results in discrimination or a disguised restriction on international trade. Some “warning signals” that a Member has done so include: (i) that the difference in levels of protection is arbitrary or unjustifiable, (ii) that such difference is rather substantial, and (iii) that the measure is inconsistent with SPS Art 5.1 and SPS Art 2.2.⁴⁴

46. Here, the difference in levels of protection applied to Astor and Cosmia constitutes discrimination or a disguised restriction on international trade because (i) the difference in the levels of protection is arbitrary and unjustifiable; (ii) this difference is substantial; and (iii) Taikon cannot produce any risk assessment or scientific evidence to meet its obligations

⁴¹ PR, *US – Poultry (China)*, [7.263]

⁴² ABR, *Australia – Salmon*, [154]-[158]; Art 5.5 Guidelines, fn 2

⁴³ Complainant’s Submissions, [17]-[18]

⁴⁴ PR, *Australia – Salmon*, [8.149]-[8.151]

under SPS Art 5.1 and SPS Art 2.2. Hence, all three “warning signals” are present here.

47. These “warning signals” may also be supplemented with additional substantial factors derived from the structure of the measures embodying the different levels of protection.⁴⁵ First, similar to *Australia – Salmon*, the substantial difference in levels of protection is expressed in substantially different implementing measures – namely, the application of the ECP to Astorian products, and complete non-application to Cosmian products. Second, similar to *US – Poultry (China)*, substantially different conclusions were reached on the treatment of Astorian products within a short period of time; that the ECP should apply to Astorian products was determined in the course of only *one day* between 13 and 14 April 2019.⁴⁶ Third, Taikon unilaterally applied the ECP to Astorian PFPs despite knowing its extremely trade-restrictive effect. Hence, TL14 results in discrimination or a disguised restriction on international trade.

48. Even if the Panel takes the view that the “warning signal” approach is not determinative, discrimination will also exist where the different treatment is not justified.⁴⁷ Since the difference in ALOPs is unjustified, discrimination is clearly present here.

49. Hence, TL14 is inconsistent with SPS Art 5.5. Furthermore, since a breach of SPS Art 5.5 implies a breach of SPS Art 2.3,⁴⁸ this constitutes a breach of SPS Art 2.3.

III. TAIKON SHOULD NOT APPLY THE ECP TO ASTORIAN PRODUCTS.

A. Taikon’s application of Note 7 is subject to the disciplines of the SPS Agreement.

50. Note 7 directs Taikon to apply the ECP, an SPS measure, to Astor. Furthermore, it directly affects international trade by imposing trade barriers on Astor. Therefore, Note 7 is also an SPS measure subject to the SPS Agreement.

B. Taikon’s application of Note 7 to Astorian products is inconsistent with SPS Art 4.1.

(1) Astor’s measures and regulations in relation to SPS measures have all the while complied with Taikon’s ALOP and continue to be firmly upheld.

51. The SPS Agreement encourages harmonisation of measures across *all* countries – SPS Art 13 emphasises that regional bodies should not take SPS-inconsistent measures, while SPS Art 2.3 places a large emphasis on MFN treatment. In line with this, Taikon has a positive obligation under SPS Art 4.1 to accept SPS measures different from its own or from those used by other Members trading in the same product, provided the exporting Member

⁴⁵ PR, *Australia – Salmon*, [8.152]

⁴⁶ Case, [4.3]; Note 7

⁴⁷ PR, *US – Poultry (China)*, [7.291]

⁴⁸ ABR, *Australia – Salmon*, [178]

objectively demonstrates that it can meet the importing Member's ALOP.

52. Astor's present domestic regulations do precisely that, strictly adhering to standards demanded by the Crayfish Ban in both form and substance. Astor continues to apply the same rigorous testing as it did previously to its own crab farms and applies the same stringent ECP to non-Stormian countries. As stated, not a single law, regulation or administrative procedure has changed since its withdrawal from ESODEC. Furthermore, no marbled crayfish have been found in Astorian establishments since December 2018. While Taikon might argue that the lack of regulatory oversight could result in Astor's inability to meet its ALOP, this is not true as Astorian regulatory structures have not changed and Taikon could inspect the enforcement of these standards if it chose to do so.⁴⁹

53. Taikon's argument that Astor lacks regulatory oversight may be premised on the following: (i) ESODEC's Regulations Authority no longer oversees implementation of ESODEC regulations in Astor and (ii) the ESODEC Court lacks jurisdiction over Astor in enforcing penalties or sanctions if Astor is found to breach any provisions of the Crayfish Ban.⁵⁰ Both, however, are not valid reasons for withholding equivalence recognition. First, Astor recognises its international obligation, pursuant to SPS Art 4.1, to provide "reasonable access" to Taikon for inspection, testing and other relevant procedures. It would in fact have done so had Taikon been willing to negotiate. Such access would have guaranteed Taikon a level of protection *higher* than that of Cosmia, where "inspections" of farms and establishments pursuant to the Crayfish Ban are mostly carried out by domestic authorities – of 10 monthly inspections so far, less than half were accompanied by an ESODEC representative.⁵¹

54. Astor also converted all ESODEC Regulations into domestic law, demonstrating its confidence in upholding Taikon's ALOP. Given that the ESODEC Agreement and RCA are already incorporated into its domestic legislation,⁵² this should assuage Taikon's regulatory concerns. It further demonstrates Astor's sincerity and good faith in upholding shared Stormian practices and preserving Stormian citizens' health, even though it is no longer part of ESODEC.⁵³ In fact, this concern arose out of a social movement that had its very roots in Astor. Astor's willingness to incorporate ESODEC laws into its own, despite its firm belief in

⁴⁹ ABR, *US – Reformulated Gasoline*, p.16

⁵⁰ Case, [1.5]; ESODEC Agreement, Art 15

⁵¹ Case, Table 1 data

⁵² Clarifications, [27]

⁵³ Crayfish Ban, Preamble, 1st Recital

sovereignty, in fact goes over and beyond the requirements of SPS Art 4.1, which demands *only* an objective demonstration that Taikon's ALOP be met. Thus, lack of ESODEC oversight should not be an acceptable reason for Taikon's withdrawal of equivalence recognition.

(2) Taikon's application of the ECP to Astorian products hence violates SPS Art 4.1.

55. Since Astor has objectively demonstrated that its measures achieve Taikon's ALOP and continue to do so, Taikon must accept as equivalent Astor's measures as required by SPS Art 4.1. While establishing equivalence on a multilateral basis has in practice proved elusive due to authorities' attachments to their own national regulatory approaches, Astor is well ahead of Taikon's other trading partners in overcoming such obstacles,⁵⁴ as the two countries' SPS measures are seamlessly integrated given their common history of ESODEC membership.⁵⁵ Hence, Taikon's refusal to recognise equivalence clearly violates SPS Art 4.1.

C. Taikon continues to have both the competence and obligation to negotiate equivalency with Astor.

(1) Taikon as a WTO Member may not delegate its obligation to recognise equivalence under SPS Art 4.1 to ESODEC, which is not a WTO Member.

56. SPS Art 4.1, which Taikon is bound by as a WTO Member, provides that only WTO *Members* shall accept one another's SPS measures as equivalent. While RCA Art 12 states that ESODEC "may" enter equivalence agreements with third countries like Astor, ESODEC does not in fact have this obligation as it is not a *WTO Member*. This contrasts with the EU, which must and does negotiate WTO-compatible agreements given its WTO membership.⁵⁶ Given ESODEC's conspicuous absence from WTO membership, only Taikon has WTO obligations to fulfil, including recognising equivalence pursuant to SPS Art 4.1.

(2) As a matter of fact, Taikon also continues to have both the competence and obligation to negotiate equivalence with Astor.

57. Astor requests the Panel to find that ESODEC and Taikon share competence to negotiate and recognise equivalence with non-ESODEC countries per RCA Art 12. As Taikon retains competence, it must remain able to conclude equivalence agreements with Astor.

58. In the present context, Taikon asserts that only ESODEC has exclusive competence to negotiate equivalence. However, pursuant to DSU Art 11, a Panel must objectively assess the

⁵⁴ Lydgate and Winters (2019), 468 and 477

⁵⁵ Case, [6.2]

⁵⁶ The EU has been a WTO member since 1 January 1995.

matter before it: a party's assessment of an issue is not in and of itself dispositive.⁵⁷ Hence, the Panel must determine whether ESODEC does *factually* have exclusive competence to negotiate equivalence with non-ESODEC members. Astor notes that since Taikon alleges this, Taikon bears the burden of adducing evidence to prove this.⁵⁸ However, as demonstrated below, Taikon will not be able to discharge this burden.

59. First, RCA Art 12 states that the ESODEC Joint Committee “may” enter into reciprocal equivalence agreements with non-ESODEC members. “May” can indicate that one is either (i) allowed by authority or law, (ii) has the possibility or suitable conditions or (iii) “must” carry out an action.⁵⁹ This does not make it evident that ESODEC has *exclusive* competence to, and must, negotiate equivalence. Second, ESODEC Agreement Art 2.2 provides that the Community “shall have the competence to coordinate the trade policy of Member States”, which is ambiguous as to whether the Joint Committee has exclusive competence. This can be contrasted with Lisbon Treaty Art 3, which clearly states that the EU has *exclusive* competence to act on such matters. Hence, this is insufficient evidence of exclusive competence.

60. In fact, there is evidence to the contrary indicating that the Joint Committee does not have exclusive competence. ESODEC Agreement Art 2.2, reveals that ESODEC members *retain* competence to enter into *future* agreements designed to convert ESODEC into a customs union. This implies that Members will retain the discretion to conduct their own trade policy, which includes entering into equivalence agreements. As this is the case, Taikon cannot allege that ESODEC has exclusive competence to do so.

61. Instead, a finding of shared competence would be in line with EU law, where shared competence between the EU and its Member States is the default if the EU has not been granted express conferment.⁶⁰ This applies to FTAs conducted with non-EU countries – the ECJ held that though the EU enjoyed competence to conclude the EU-Singapore FTA, involvement of its Member States was nonetheless required.⁶¹ Hence, Taikon should not be relieved of its distinct responsibility under SPS Art 4.1.

D. GATT Art XXIV cannot apply to excuse Taikon from its SPS Art 4.1 obligations.

62. Taikon may argue that GATT Art XXIV should be read into the SPS Agreement to

⁵⁷ ABR, *Argentina – Footwear (EC)*, [74]

⁵⁸ ABR, *US – Wool Shirts and Blouses*, p. 14

⁵⁹ Shorter Oxford English Dictionary, “may”

⁶⁰ TFEU, Art 4(1)

⁶¹ ECJ Opinion 2/15, [244] and [292]

justify its substantive breach of SPS Art 4.1. However, this is not possible for two reasons.

(1) First, the SPS Agreement does not allow for a reading-in of GATT Art XXIV.

63. The SPS Agreement does not contain any equivalent of GATT Art XXIV, but mainly provides obligations for WTO Members to use international standards. This distinguishes it from the GATT. Further, as neither Art XXIV nor the SPS refers explicitly to each other, Art XXIV should not be allowed to excuse breach of the latter. The General Interpretative Note supports this, stating that a provision of the *lex specialis* SPS Agreement would prevail over the more general GATT. Hence, a breach of SPS Art 4 cannot be justified by GATT Art XXIV.

(2) Second, even if GATT XXIV could justify a breach of the SPS, the elements of GATT XXIV are not met in this case.

64. Taikon does not meet a key “necessity” requirement of the requisite two-tier *Turkey – Textiles* test, which will be elaborated on more fully in para. 76.⁶² The test applies regardless whether ESODEC is an FTA or customs union.

65. Taikon’s SPS obligations would not have prevented the formation of ESODEC – its violation of SPS Art.1 4 is hence not “necessary”. Even if ESODEC’s formation were truly conditioned upon common external standard harmonisation, such harmonisation could still be achieved without excusing Taikon from its obligation to recognise equivalence. This alternative option test was first proposed by the AB in *Turkey – Textiles*. For instance, ESODEC could have easily called for “open recognition”, which has been persuasively argued for in the EU context.⁶³ This entails having third countries like Astor, which desire equivalence recognition with ESODEC members including Taikon, implement an ESODEC *acquis* which would establish common ESODEC conditions for recognition. Astor could be permitted to meet those conditions before it was granted equivalence.

IV TAIKON’S APPLICATION OF THE ECP TO ASTOR IS INCONSISTENT WITH GATT ART I:1 AND CANNOT BE JUSTIFIED BY ANY GATT EXCEPTIONS.

A. Taikon’s application of the ECP to Astor is inconsistent with GATT Art I:1.

66. GATT Art I:1 states a fundamental MFN obligation, prohibiting discrimination among like products originating in different countries. Four elements must be established to demonstrate inconsistency – the measure must (i) be covered by Art I:1; (ii) concern “like”

⁶² ABR, *Turkey – Textiles*, [58]

⁶³ Lydgate and Winters (2019), 468

products within the meaning of Art I:1; (iii) confer an ‘advantage’ on a product from one country while (iv) not extended “immediately” and “unconditionally” to those from all Members.⁶⁴ Taikon’s application of the ECP will subsequently be shown to discriminate between Astorian and Cosmian products, thus violating Art I:1.

(1) First, the measure at issue is covered by GATT Art I:1.

67. GATT Art I:1 obliges MFN treatment in respect of “rules and formalities in connection with importation”, which has been broadly interpreted.⁶⁵ The ECP similarly establishes border testing to detect imports potentially containing a prohibited product, element or substance. On this basis, it is a “rule” or a “formality” relating to imports which is covered by GATT Art I:1.

(2) Second, Astorian and Cosmian PFPs should be considered “like”.

68. The products being compared for “likeness” are PFPs from Astor and Cosmia, each containing Stormian crab and marketed as traditional Stormian cuisine.

69. Where a difference in treatment is conditioned solely on the product’s origin, there is a rebuttable presumption that products are like.⁶⁶ Presently, Taikon imposes the ECP on all but Cosmian PFPs. As this distinction in treatment stems exclusively from whether PFPs originate from Cosmia or non-ESODEC Astor, they may be considered “like”.

70. Nonetheless, the PFPs may also be considered “like” under the traditional four-criteria test, which considers the following: (i) physical properties, (ii) end-uses, (iii) consumers’ perceptions and behaviour and (iv) tariff classifications.⁶⁷ Furthermore, likeness is fundamentally determined by the nature and extent of a competitive relationship between products, which informs the outcome of criteria (i) and (iii).⁶⁸ Here, the volume of PFPs imported into Taikon from Cosmia and Astor reveals a *clear competitive relationship* between the two – Astorian exports dropped by 70% since its withdrawal from ESODEC, while Cosmian ones gained 37% since. Criterion (ii) is also met given the similar end-uses of Astorian and Cosmian PFPs – consumption in Taikon’s hotels and restaurants. As for criterion (iv), a uniform tariff classification of products is relevant in determining product similarity. This is also the case as PFPs fall under digit 1605.10 of the HS Classification of Goods regardless of origin.⁶⁹ Furthermore, prior to Astor’s withdrawal from ESODEC, there

⁶⁴ ABR, *EC – Seal Products*, [5.86]

⁶⁵ PR, *EC – Bananas III*, [7.107]

⁶⁶ PR, *US – Poultry (China)*, [7.424]-[7.427]

⁶⁷ PR, *Japan – Alcoholic Beverages II*, [6.21]

⁶⁸ ABR, *EC – Asbestos*, [98]-[99]

⁶⁹ This HS Code classifies crabs – live, fresh or chilled.

was no question as to the “likeness” of PFPs from Astor and Cosmia – both were marketed and sold equally as “Traditional Stormian Cuisine”. Hence, PFPs from both countries are “like”.

(3) Third, the ECP application confers a disadvantage on Astorian PFPs and corresponding “advantage, favour, privilege, or immunity” on Cosmian ones.

71. The AB has noted that GATT Art I:1 prevents discrimination, which includes anything that may affect the commercial relationship between products of different origins, such as a “favourable market opportunity” afforded to relieve exports of onerous testing procedures.⁷⁰ Absence of such opportunity corresponds to a serious competitive *disadvantage*, affecting the commercial relationship between products of different origins. As the ECP’s application resulted in a drastic decrease in imports of Astorian PFPs and dramatic increase in Cosmian ones, Cosmia’s exemption from it amounts to an “advantage” pursuant to GATT Art I:1.

(4) Such advantage is not extended “immediately” and “unconditionally”.

72. Only Cosmian imports are exempt from the ECP, while “like” Astorian PFPs have not been granted the same advantage immediately and unconditionally.

B. The above breach of GATT Art I:1 is not justified by GATT Art XXIV.

73. The burden of proving that GATT Art I:1 breach is justified by GATT Art XXIV lies with Taikon. However, Taikon cannot rely upon GATT Art XXIV as a substantive defence.

(1) ESODEC is at most an FTA and not a customs union nor interim agreement for the purposes of establishing one in the future.

74. Under GATT Art XXIV:8(a)(ii), a customs union requires each member to apply substantially the same duties and other regulations of commerce *i.e.*, a “common external trade regime”.⁷¹ While external trade regimes need not be exactly the same, they must be substantially the same, approximating “sameness”.⁷² However, ESODEC clearly fails this, as Taikon and Cosmia each continue to maintain independent tariff schedules (18% and 12% respectively where trade in PFPs with non-ESODEC members is concerned). To the extent that ESODEC Agreement Art 2.2 only calls upon members to enter into future agreements designed to establish a common external trade tariff, with no further evidence that this was *in fact* ever negotiated, there is at most a mere *desire* for such arrangement.

75. Furthermore, as ESODEC lacks two key substantive requirements – (i) a “plan and

⁷⁰ PR, *US – Poultry (China)*, [7.416]-[7.417]

⁷¹ ABR, *Turkey – Textiles*, [49]

⁷² *Ibid*, [50]

schedule” per GATT Art XXIV:5(c) and (ii) notification to the WTO per GATT Art XXIV:7(a) – it cannot be characterised as an interim agreement relating to formation of a customs union.

76. To the extent that the ESODEC FTA was notified to the WTO, and all tariffs and quantitative restrictions eliminated among Members,⁷³ ESODEC is at most an FTA. As such, the threshold for a measure to be justified by GATT Art XXIV is significantly higher, given that there is no requirement, under an FTA, for a common external trade regime.

(2) The GATT Art XXIV defence is not available as neither level of the two-tier *Turkey – Textiles* test has been fulfilled.

77. To rely on GATT Art XXIV as a defence, Taikon must demonstrate that (i) the measure at issue was introduced upon the formation of a customs union that fully meets the requirements of GATT Art XXIV, and (ii) this would be prevented if it were not allowed to introduce the measure at issue *i.e.*, the measure is “necessary”. While no existing WTO jurisprudence deals directly with FTAs, this test should equally apply by analogy.

(a) The first *Turkey – Textiles* requirement is not satisfied as the ECP was neither introduced upon ESODEC’s formation, nor meets the requirements of GATT Art XXIV.

78. First, the ECP was introduced not *upon* the formation of the ESODEC FTA, only *after*. GATT Art XXIV incorporates a temporal element as GATT Art XXIV:5 refers only to the formation of an FTA, not the continuation of one. The very purpose of the ECP, which applies to non-ESODEC members, is to celebrate “the success of the ESODEC FTA in eliminating tariff barriers”.⁷⁴ This reveals that the ESODEC FTA, entailing the elimination of tariff barriers, had *already* been established upon the ECP’s introduction.

79. Second and in the alternative, the ESODEC FTA does not fully meet the requirements of GATT Art XXIV:5(b), which provides that other regulations of commerce (“ORCs”) applicable after the formation of an FTA shall not be higher or more trade-restrictive than those existing in constituent territories prior to such formation. As clarified by para. 2 of the Understanding on Article XXIV, the incidence of ORCs like the ECP may require the examination of individual measures and products covered. Here, the ECP’s testing on PFPs leads to exponential rises in final prices and significant deterioration of cargo. This virtually halted all PFP imports into Taikon from outside ESODEC. Hence, the ECP has clearly led to

⁷³ Case, [1.3]

⁷⁴ Case, ECP Regulation, Preamble, 2nd Recital

higher *and* more trade-restrictive ORCs than prior to ESODEC's formation, enacting new regulatory barriers between Taikon and non-ESODEC members. This is not allowed.

(b) The second *Turkey – Textiles* requirement is also not satisfied as the ECP is not “necessary” for the formation of ESODEC.

80. The necessity requirement arises from the “shall not prevent” phrase in the *chapeau* of GATT XXIV:5. The AB in *Turkey – Textiles* also indicated that the existence of less trade-restrictive alternatives could undermine the argument for necessity of a measure. Here, Taikon's application of the ECP cannot be “necessary” for ESODEC's formation as it is far from clear that preferential treatment relating to regulatory-type measures such as the ECP is a *sine qua non* of an FTA. Adopting a policy of discriminatory automatic exemption from the application of technical regulations, as the ECP does for Cosmia, is also not “necessary” to form an FTA.⁷⁵ Imposing a single regulatory standard open to non-ESODEC members, as raised in para. 64, would be an equally effective alternative in eliminating ORRCs on “substantially all the trade” between ESODEC Members, as required by GATT Art XXIV:8(a).

81. Moreover, application of the ECP cannot be “necessary” given that Taikon continues to apply ORRCs such as CAPs and SPS controls to Cosmian products which are not covered by ESODEC Regulations. Hence, Taikon should not be allowed to characterise an exemption of Cosmian PFPs from the ECP as “necessary”, given that (i) the ECP applies only to a limited range of PFPs and (ii) “other” restrictive regulations of commerce between the two countries remain. This clearly demonstrates that the ECP is not indispensable to ESODEC's formation.

82. Hence, GATT Art XXIV cannot apply to excuse Taikon's MFN breach.

C. The above breach of GATT Art I:1 is also not justified by GATT Art XX.

83. GATT Art XX sets out a two-tier test – the measure-at-issue must: (i) fall within any exceptions listed in paras. (a) to (j) of GATT Art XX and (ii) satisfy GATT Art XX's *chapeau*.⁷⁶ Here, neither GATT Art XX(b) and (g), which Taikon might attempt to justify its measures under, nor the *chapeau*, is satisfied.

84. As a breach of the *chapeau* immediately amounts to breach of GATT Art XX, *regardless* of whether any provisional justification enumerated is satisfied, Astor will first establish that such breach has occurred. We argue that Taikon's application of the ECP

⁷⁵ Mathis (2002), 252-3

⁷⁶ ABR, *US – Reformulated Gasoline*, [22]

constitutes, pursuant to the *chapeau* of GATT Art XX, “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”. As similar conditions prevail in Astor and Cosmia, the present analysis will focus on proving arbitrary and unjustifiable discrimination.

(1) First, the ECP Regulation leads to arbitrary and unjustifiable discrimination.

85. The threshold test for a finding of arbitrary and unjustifiable discrimination is whether there is a “rational connection” between a measure and its objective.⁷⁷ Furthermore, unjustifiable discrimination has been found where a Respondent refused to cooperate with Complainants to adequately explore methods of mitigating administrative difficulties arising from the measure.⁷⁸ Here, Taikon likewise failed to engage Astor, the most affected country, in serious, across-the-board negotiations⁷⁹ before imposing the ECP on its PFPs. Furthermore, application of a measure’s contents in practice, which the *chapeau* is concerned with,⁸⁰ also reveals unjustifiable discrimination. In detecting marbled crayfish under the ECP, Taikonese authorities detect proteins present in *most aquatic animals* absent only in the Stormian crab. First, the test is over-inclusive as it will detect the presence of most aquatic animals, resulting in positive tests even if no marbled crayfish is present. Second, as PFPs must be preserved by mixing with seaweed, which may contain traces of aquatic animals, these proteins would be likewise be present in PFPs. Even if this is not the case, the test would be positive if the PFPs do not comprise *exclusively* Stormian crab, like a Stormian crab and tuna fried rice dish. Under the test, a PFP could be barred from entering even without containing any marbled crayfish.

86. This is especially inequitable and at odds with Taikon’s articulated objective, the implementation of the *Crayfish Ban* – denying *non-crayfish* PFPs entry into Taikon amounts to unjustifiable discrimination. Further, application of the ECP also points to arbitrary discrimination as it is inconsistent, depending on unpredictable factors such as how busy testing facilities are on the day of importation. Finally, it is also disproportionate in practice – while the text of the ECP Regulation subjects just 5% of PFPs to the ECP, a much higher proportion is *in fact* rendered unfit for consumption – though just one of every twenty PFPs in a shipment is subject to protein testing under the ECP, the procedure that Taikon has chosen results in that *entire* shipment halted while awaiting testing of just several of those

⁷⁷ ABR, *Brazil – Retreaded Tyres*, [226]-[228]

⁷⁸ ABR, *US – Reformulated Gasoline*, pp. 28-29

⁷⁹ ABR, *US – Shrimp*, [166]

⁸⁰ ABR, *EC – Seal Products*, [5.302]

PFPs.

87. In light of the above, Taikon's implementation of the ECP results in arbitrary or unjustifiable discrimination and consequently cannot be justified by GATT Art XX. For completeness, potential arguments under GATT Art XX(b) and (g) and will be considered.

(2) The ECP Regulation cannot be justified by GATT Art XX(b).

88. An otherwise GATT-inconsistent measure may be provisionally justified under GATT Art XX(b) if it is necessary to protect human, animal or plant life or health. Here, the ECP cannot be considered "necessary" as the requisite test, which involves weighing and balancing several factors including the importance of the interests at stake, the measure's trade-restrictiveness, as well as its contribution to the objective fulfilled, is not satisfied.⁸¹

89. While Taikon is entitled to protect citizens' health against the potential risks posed by the marbled crayfish, the ECP contributes too little to this – its substantive trade-restrictiveness is unjustifiable. While banned crayfish meat was found in just *six* cases where the ECP was applied, with no cases in 2019 at all, losses to exporters have been so significant that importation of PFPs from outside ESODEC into Taikon virtually stopped. Further, its contribution to Taikon's articulated objective of eliminating *all* marbled crayfish is severely undermined by its treatment of Cosmian PFPs which are not subject to scrutiny by Taikonese authorities at all. There is thus still a non-zero risk of marbled crayfish entering Taikon. Consequently, the ECP does not go a long way in promoting food safety.

90. The ECP is also not "necessary" as reasonably available, less trade-restrictive and equally effective alternatives are available. For example, Taikon could have simply required Astorian authorities to carry out domestic inspections like those performed in Cosmia. Any difficulties with verification that Taikon may raise to refute this are not insurmountable⁸² as such inspections had been successfully done prior to Astor's withdrawal from ESODEC.

(3) The ECP Regulation cannot be justified by GATT Art XX(g).

91. An otherwise GATT-inconsistent measure may be provisionally justified under GATT Art XX(g) if it: (i) "relates to" (ii) the "conservation of exhaustible natural resources" and (iii) has been "made effective in conjunction with" restrictions on domestic production or consumption. While the ECP may be argued to promote Stormian crab conservation, this cannot be the case.

92. Element (i) cannot be satisfied as the ECP does not "relate to" conservation of the

⁸¹ ABR, *EC – Seal Products*, [5.213]-[5.214]

⁸² Davies (2009), 520-21

Stormian crab. To do so, a “close and genuine relationship of ends and means” between a measure and its rationale must exist; the measure cannot be “disproportionately wide in its scope and reach in relation to its policy objective”.⁸³ Here, the following complex chain of reasoning must apply to link the ECP with Taikon’s articulated objective – the marbled crayfish is shown by a *single* scientific study to pose a risk to the Stormian crab. Conservation of the crab entails introducing a strict ban on marbled crayfish. The ECP is applied to enforce the ban, calling for inspection of PFPs, which only contain (dead) crayfish meat that pose no threat to the Stormian crab. In particular, *all* products containing the meat of marine and aquatic animals, not merely those alleged to contain Stormian crab, are subjected to the ECP. It is immediately observed that the link between the ECP and conservation is extremely tenuous, imposing a disproportionately wide burden on exporters which does not satisfy GATT Art XX(g).

93. Element (ii) of the test also cannot be satisfied. First, in stark contrast to the sea turtle in *US – Shrimp*, then an Annex I CITES species requiring urgent protection as it faced threat of extinction by human activities, the Stormian crab is an Annex III species. As they are neither under severe threat nor require controlled trade in the same way as sea turtles, the Stormian crab should hence not be considered “exhaustible”. Second, that Stormian crabs have consistently been bred very successfully in seaside farms for large-scale consumption make it non-exhaustible. Finally, element (iii) is also not met. Taikon’s articulated goal of conserving the Stormian crab stands in stark contrast to its domestic measures – it promotes instead of limits consumption of the crab, arguing that its meat is highly appreciated by locals and in high demand by tourists. Taikon in fact imports the most Stormian crabs to feed its tourism industry. Allowing the unbridled consumption of Stormian crab hence suggests that Taikon does not consider the crab worthy of protection.

94. For these reasons, the ECP also cannot be provisionally justified by GATT Art XX(g).

⁸³ ABR, *China – Rare Earths*, [5.90]

REQUEST FOR FINDINGS

In light of the above, Astor requests that the Panel find:

1. That the Crayfish Ban and Directive 44/2018, as incorporated into Taikon's national regulatory system and applied by Taikonese national authorities, are SPS measures under Annex A(1) of the SPS Agreement;
2. That the ECP, as applied by Taikon to live animals and prepared food products to implement the Crayfish Ban, is an SPS measure under Annex A(1) of the SPS Agreement;
3. That, if either or both of the measures in paragraphs 1 and 2 above are SPS measures, Taikonese Law 14/2012, which implements the Crayfish Ban and the ECP, must by definition be an SPS measure and will be subject to the disciplines of the SPS Agreement;
4. Following from that, that Taikonese Law 14/2012 is inconsistent with Article 2.3 of the SPS Agreement;
5. That Taikonese Law 14/2012 is inconsistent with Article 5.5 of the SPS Agreement;
6. That Taikon's application of Regulations Authority Note 7/2019, which directs Taikon to apply the ECP to designated Astorian products, is an SPS measure; and
7. That Taikon's application of Regulations Authority Note 7/2019 is inconsistent with Article 4.1 of the SPS Agreement.
8. In the alternative, Astor requests that the Panel find:
 - a. That Taikon's application of the ECP Regulation to Astorian prepared food products is inconsistent with Article I:1 of the GATT; and
 - b. That Taikon's breach of Article I:1 of the GATT cannot be justified under Article XX of the GATT; and
 - c. That Taikon's breach of Article I:1 of the GATT cannot be justified under Article XXIV of the GATT.