

**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 RESPONDENT

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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)
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. (1994)
Treaty Establishing the African Economic Community	Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241, reprinted in <i>Documents Of The Organization Of African Unity</i> 203 (Gino J. Naldi ed., 1992)
VCLT	United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994)

II. CASES**A. Appellate Body Reports**

Short Title	Full Case Title and Citation
<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
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation</i>

	<i>of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<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
<i>China – Certain Publications and Audiovisual Entertainment Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R, adopted 22 June 2016
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, adopted 13 February 1998
<i>EC – Seal Products</i>	Appellate Body Report, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS401/AB/R, adopted 16 June 2014
<i>India – Agricultural Products</i>	Appellate Body Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/AB/R, adopted 19 June 2015
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, adopted 1 November 1996
<i>Korea – Radionuclides (Japan)</i>	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/AB/R, adopted 26 April 2019
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999
<i>US – Gambling</i>	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
<i>US – Reformulated Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R, adopted 6 November 1998

B. Panel Reports of the WTO

Short Title	Full Case Title and Citation
<i>Australia — Salmon (Article 21.5 — Canada)</i>	Panel Report, <i>Australia — Measures Affecting Importation of Salmon: Recourse to Article 21.5 by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>Canada — Herring and Salmon</i>	Panel Report, <i>Canada — Measures Affecting the Exports of Unprocessed Herring and Salmon</i> , 35S/98, adopted 22 March 1988
<i>China — Certain Publications and Audiovisual Entertainment Products</i>	Panel Report, <i>China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010
<i>EC — Approval and Marketing of Biotech Products</i>	Panel Report, <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>	Panel Report, <i>India — Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R, adopted 19 June 2015
<i>Turkey — Textiles</i>	Panel Report, <i>Turkey — Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999
<i>US — Tuna (Canada)</i>	Panel Report, <i>United States — Prohibition of Imports of Tuna and Tuna Products from Canada</i> , 29S/91, adopted 22 February 1982
<i>US — Line Pipe</i>	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

<i>US — Poultry (China)</i>	Panel Report, <i>United States — Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted on 25 October 2010
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C. Other Cases

Short Title	Full Case Title and Citation
<i>Reparations Opinion</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion</i> (1949) ICJ Reports 174
<i>The Lotus</i>	<i>S.S. "Lotus", France v Turkey</i> , Judgment, (1927) PCIJ Series A No. 10

III. ARTICLES AND CONTRIBUTIONS

Abbreviation	Long Form
Bartels (2009)	Lorand Bartels, “‘ <i>Interim agreements’ under GATT Art XXIV</i> ” <i>World Trade Review</i> (2009), 8: 2, 339—350
Lockhart & Mitchell (2005)	Nicolas Lockhart & Andrew D. Mitchell, <i>Regional Trade Agreements Under GATT 1994: An Exception and its Limits</i> in Nicolas Lockhart & Andrew D. Mitchell, <i>Challenges and Prospects for the WTO</i> (2005, Cameron May Ltd.), 217
Lydgate & Winters (2019)	Emily Lydgate And L. Alan Winters, “ <i>Deep and Not Comprehensive? What the WTO Rules Permit for a UK—EU FTA</i> ” (2019) 18 <i>World Trade Review</i> 451—479.
Marceau & Trachtman (2014)	Gabrielle Marceau & Joel P. Trachtman, “ <i>A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade</i> ” (2014) 48 <i>Journal of World Trade</i> 351
Mathis (2002)	James H. Mathis, <i>Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement</i> (T.M.C. Asser Press, 2002)
Mathis (2006)	James H. Mathis, <i>Regional Trade Agreements and Domestic Regulation: What Reach for ‘Other Restrictive Regulations of Commerce’?</i> , in Lorand Bartels & Federico Ortino (eds), <i>Regional</i>

	Trade Agreements and the WTO Legal System (2006, OUP), 79-108
Matsushita et al. (2017)	Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, & Michael Hahn, <i>The World Trade Organization: Law, Practice, and Policy</i> (2017, Oxford, United Kingdom: Oxford University Press)
Pauwelyn (2004)	J. Pauwelyn, “ <i>The Puzzle of WTO Safeguards and Regional Trade Agreements</i> ”, 7 JIEL (2004) 109— 421
Peel (2006)	Jacqueline Peel, “ <i>A GMO by Any Other Name... Might Be an SPS Risk: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement</i> ” (2006) European Journal of International Law 1009
Prevost & Van den Bossche (2004)	Denise Prevost & Peter Van den Bossche, <i>The Agreement On The Application Of Sanitary And Phytosanitary Measures</i> (2005) in Patrick F.J. Macrory, Arthur E. Appleton, Michael G. Plummer, <i>The World Trade Organization: Legal, Economic and Political Analysis</i> , 231-370
Van den Bossche & Zdouc (2017)	Peter Van den Bossche & Werner Zdouc, <i>The Law and Policy of the World Trade Organization: Text, Cases and Materials</i> (2017) Cambridge: Cambridge University Press

IV. OTHER MATERIALS

Abbreviation	Long Form
Shorter Oxford English Dictionary	Shorter Oxford English Dictionary (6 th Ed.) (Oxford University Press, 2007)
CITES, Press Release	CITES, "Governments not ready for trade ban on bluefin tuna", press release (18 March 2010) < https://cites.org/eng/news/pr/2010/20100318_tuna.shtml >
IUCN, <i>Trade Measures</i>	International Union for Conservation of Nature, <i>Trade Measures in Multilateral Environmental Agreements</i> , IUCN Report (09/11/00)

LIST OF ABBREVIATIONS

Abbreviation	Long Form
AB	Appellate Body
ABR	Appellate Body Report
ALOP	Appropriate Level of Protection
Art / Arts	Article / Articles
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
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
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HS	Harmonized Commodity Description and Coding System
Note 7	Regulations Authority Note 7/2019
ORC	Other regulations of commerce
ORRC	Other restrictive regulations of commerce
PFPs	Prepared food products containing Stormian crab meat, and potentially marbled crayfish meat, cooked and mixed with seaweed and local spices and herbs, and sold as “Traditional Stormian Cuisine”
PR	Panel Report
RCA	ESODEC Regulatory Community Agreement of 2012
SPS	Sanitary and phytosanitary
TL14	Taikonese Law 14/2012
TSCs	Prepared food products <i>exclusively</i> containing Stormian crab meat

Abbreviation	Long Form
	cooked and mixed with seaweed and local spices and herbs, and sold as “Traditional Stormian Cuisine”
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organization
WTO	World Trade Organization

SUMMARY OF ARGUMENTS

1. **The ESODEC Crayfish Ban,¹ the Enhanced Control Procedure Regulation (“ECP Regulation”) as applied to implement the Crayfish Ban, and Taikonese Law 14/2012 (“TL14”) are not SPS measures.**
 - The measures are not SPS measures because they are not directly aimed at, nor do they relate to, the protection of health. Therefore, they fall outside the category of measures intended by WTO Members to be covered by the SPS Agreement.
 - Even if the scope of the SPS Agreement covers measures other than those relating to the protection of health, the measures do not come within the definition of an SPS measure under SPS Annex A(1).
2. **Even if the ESODEC Crayfish Ban, the ECP Regulation, and TL14 are SPS measures, TL14 is not inconsistent with SPS Art 2.3.**
 - TL14 is not inconsistent with the non-discrimination obligation contained in the first sentence of SPS Art 2.3 because ESODEC Members and Astor are not territories with identical or similar conditions. Furthermore, exempting the products of ESODEC Members from the application of the ECP is neither arbitrary nor unjustifiable.
 - TL14 is not inconsistent with the obligation contained in the second sentence of SPS Art 2.3 because it is a calibrated approach to protecting Stormian crabs and does not arbitrarily or unjustifiably discriminate between ESODEC Members and Astor.
3. **Even if the ESODEC Crayfish Ban and the ECP Regulation are SPS measures, Taikon is not in breach of its obligation under SPS Art 5.5.**
 - Taikon is not in breach of its obligation under SPS Art 5.5 because Taikon has adopted the same level of protection in relation to Astorian and Cosmian products. The Panel should give due weight to Taikon’s expressed level of protection, because: (i) Taikon has not defined the adopted level of protection in vague or equivocal terms and (ii) the level of protection actually applied does not differ from that which is defined by Taikon.
 - Even if the Panel takes the view that different ALOPs are applied, this is not an arbitrary or unjustifiable difference, since the risk of marbled crayfish present in Cosmia is lower than that in Astor.

¹ 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

4. **Taikon's application of Regulations Authority Note 7/2019 ("Note 7") is not inconsistent with its obligation under SPS Art 4.1.**
 - Taikon is not obliged to recognise the equivalence of Astor's regulations since Astor has not negotiated with the ESODEC Joint Committee, the proper negotiating party.
 - Even if Taikon is the proper negotiating entity, and Astor negotiates with Taikon, it cannot guarantee that it can meet Taikon's ALOP and hence be granted equivalence.
5. **Taikon's application of the ECP to Astorian prepared food products ("PFPs") does not violate GATT Art I:1.**
 - The application of the ECP to Astorian PFPs does not violate GATT Art I:1 as Astorian PFPs and Cosmian Traditional Stormian Cuisine ("TSC") are not like products.
 - Even if these are like products, the advantage accorded to Cosmian TSCs is extended immediately and unconditionally to Astorian PFPs.
6. **In any case, Taikon's application of the ECP to Astorian PFPs is justified under GATT Art XXIV.**
 - The measure is justified under GATT Art XXIV because it was introduced upon the formation of a GATT-compliant FTA.
 - In the alternative, the measure is justified under GATT Art XXIV because it was introduced under a GATT-compliant interim agreement towards the formation of a customs union.
7. **In any case, Taikon's application of the ECP Regulation to Astorian PFPs is justified under GATT Art XX.**
 - The ECP is justified under GATT Art XX(b), since it is necessary to protect the life of the Stormian crab.
 - Further and in the alternative, the ECP is justified under GATT Art XX(g), since it relates to the conservation of an exhaustible natural resource, the Stormian crab.
 - Further and in the alternative, the ECP is justified under GATT Art XX(a), since it is necessary to protect Taikon's public morals, which concern the sustainability of the Stormian crab.
 - The application of the ECP satisfies the *chapeau* of Art XX, since it is neither arbitrary and unjustifiable discrimination between countries where identical or similar conditions prevail, nor a disguised restriction on international trade.

STATEMENT OF FACTS

Astor, Taikon and Cosmia are developing countries located in the East Stormy Ocean. They entered into the ESODEC Agreement² to establish an FTA towards the formation of a customs union. Tariffs and quantitative restrictions on all products were eliminated among them. The FTA was notified to the WTO in October 2012. In October 2012, the ESODEC Members also entered into the RCA³ which included mutual recognition of regulations. The ECP was established pursuant to the RCA, but non-ESODEC Members could also obtain mutual recognition by entering into equivalence agreements with ESODEC.

The East Stormy Ocean is home to the Stormian crab. It has a fragile reproductive cycle, requiring access to freshwater for reproduction. Astorian and Cosmian companies breed the crab. They export live crabs as well as prepared meals containing the crab marketed as “Traditional Stormian Cuisine”. Concerned with the crab’s sustainability, ESODEC Members jointly requested for the Stormian crab to be added to Appendix III of CITES.⁴

To meet the high demand for Stormian crab, many producers have begun using the easier-to-produce marbled crayfish as a substitute. No marbled crayfish previously existed in the Stormian region. In November 2017, a scientific study was published indicating that the marbled crayfish threatened Stormian crab survival. Following which, ESODEC enacted the Crayfish Ban to protect the Stormian crab, by requiring national authorities to apply the ECP to imports potentially containing marbled crayfish. To date, Taikonese authorities applying the ECP have found crayfish meat in prepared food products on six instances.

Having reaped the benefits of ESODEC membership, Astor subsequently withdrew from ESODEC on 13 April 2019. Consequent to its withdrawal, Astor knowingly subjected itself to the ECP and the 15% tariff on its live animal and prepared food products. Astor is now no longer obligated to maintain and apply ESODEC Regulations, nor is it subject to ESODEC oversight and inspections. Astor is also no longer under the jurisdiction of the ESODEC Court. To date, Astor has not approached the Joint Committee to negotiate any equivalence agreement.

The maximum duration for Astorian prepared food products to be shipped to Taikon and subjected to the ECP is 28 hours⁵, well within the 72-hour expiration period.

² Agreement Establishing the East Stormy Ocean Development and Economic Community

³ ESODEC Regulatory Community Agreement of 2012

⁴ Convention on International Trade in Endangered Species of Wild Flora and Fauna

⁵ Assuming a minimum cargo ship speed of 12 knots (38.9 km/h) (*McNicholas* (2016), 49), it takes 16 hours for PFPs to be shipped from Astor to Taikon (which are 625 km apart). Including the ECP inspection period of 12 hours, the total time taken before Astorian PFPs can be sold in Taikon is 28 hours.

IDENTIFICATION OF THE MEASURES IN ISSUE

- (i) The prohibition on the possession, breeding and sale of marbled crayfish in Taikon (*Crayfish Ban Art 1 and Directive 44/2018 ("Directive 44")*)
- (ii) The inspections on Taikonese establishments potentially involving the production, trade or consumption of marbled crayfish, conducted by Taikonese authorities and the ESODEC Regulations Authority (*Directive 44 Art 3*)
- (iii) The application of the ECP to all Astorian products potentially containing marbled crayfish (*Crayfish Ban Art 4 and Regulations Authority Note 7/2019 ("Note 7")*)
- (iv) The exemption of all products subject to ESODEC Regulations and lawfully marketed in ESODEC Members from the application of the ECP (*ESODEC Regulatory Community Agreement of 2012 ("RCA") Art 2 and Taikonese Law 14/2012 ("TL14")*)

The above measures shall be wholly referred to as the "measures in dispute".

Measures (i), (ii) and (iii) shall be wholly referred to as the "Anti-Crayfish measures".

Measure (iv) shall be referred to as the "ECP exemption".

LEGAL PLEADINGS**I. THE MEASURES IN DISPUTE ARE NOT SPS MEASURES SUBJECT TO THE SPS AGREEMENT**

1. A measure is subject to the disciplines of the SPS Agreement if (i) it is an SPS measure, and (ii) may, directly or indirectly, affect international trade.¹

A. The measures in dispute are not SPS measures

2. The measures in dispute are not SPS measures for the purposes of the SPS Agreement. First, they are not directly aimed at, nor do they relate to, the protection of health. Therefore, they fall into a category of measures not intended by the WTO Members to be covered by the SPS Agreement at the time it entered into force. Second, and in the alternative, the purposes for which the measures in dispute are applied do not come within any of the interests specified in SPS Annex A(1).

(1) The measures in dispute fall outside the scope of the SPS Agreement

3. On a proper interpretation of the SPS Agreement, measures not directly aimed at or

¹ PR, *EC – Hormones*, [8.39]

relating to health protection do not come within its operative ambit.² As the name of the SPS Agreement would suggest, the SPS Agreement is concerned only with measures implemented for sanitary and phytosanitary protection. Even in the absence of textual clarity, this position is supported by the negotiating history of the SPS Agreement, which demonstrates that at the time it entered into force, the common intention of the WTO Members was for the SPS Agreement to focus primarily on quarantine and food safety measures.³ Pursuant to the VCLT, these *travaux préparatoires* may form the relevant context which must be taken into account when interpreting a treaty like the SPS Agreement.⁴ Therefore, there must be a genuine relationship between the measures and the objective of protecting human and/or animal health before they can be properly characterised as SPS measures.

4. To proceed with the above analysis, the regulatory objective of the measures in dispute must first be established. This is to be ascertained based on objective considerations, *inter alia*, the measure's surrounding regulatory context, as well as its design, architecture and structure.⁵

5. Considering the above, the Anti-Crayfish measures clearly share a common objective – to protect *all* Stormian crabs within the East Stormy Ocean area from the invasive presence of marbled crayfish.

6. As the regulatory context demonstrates, the Anti-Crayfish measures were implemented for the conservation of the Stormian crab. The measures were implemented in light of Taikon's obligation to enforce the Crayfish Ban.⁶ Accordingly, the measures serve to further the overarching objective of the Crayfish Ban – that is, to protect Stormian crabs from the invasive presence of marbled crayfish. The Crayfish Ban's preamble states that the Crayfish Ban seeks to further the objective of preserving “the richness of Stormian traditions”⁷ by “preserving the natural habitat of indigenous species”.⁸ Since the indigenous Stormian crab has become a symbol of the East Stormy Ocean, particularly as a traditional food, its conservation lies at the heart of the Crayfish Ban.

7. Further, the measures' design, architecture and structure show that the measure is targeted at the protection of not only Stormian crabs within Taikon's territory, but *all*

² Prevost & Van den Bossche (2004), 245

³ Peel (2006), 1016

⁴ VCLT, Arts 31 & 32

⁵ ABR, *Australia – Apples*, [172]-[173]

⁶ RCA, Art 1.2

⁷ Crayfish Ban, Preamble, 1st Recital

⁸ Crayfish Ban, Preamble, 3rd Recital

Stormian crabs within the East Stormy Ocean area. This is evident as the measures are applied to prohibit not just marbled crayfish *per se*, but all products containing marbled crayfish. For example, the ECP is applied not only to imports of live animals, but also to imported prepared food products. Extending the coverage of the measures in this manner clearly reflects Taikon's intention to discourage the commercial breeding of marbled crayfish in *all* other parts of the world, so as to protect Stormian crabs in the East Stormy Ocean generally.

8. Therefore, the sole object of the Anti-Crayfish measures is to safeguard the biodiversity and heritage of the East Stormy Ocean area by promoting the conservation of Stormian crabs. In this regard, the above measures do not relate to health protection, but should be properly characterised as environmental protection regulations.

9. Similarly, the purpose of the ECP exemption is to eliminate all non-tariff barriers to trade amongst ESODEC Members so as to promote the free flow of goods amongst ESODEC Members.⁹ The measure was introduced for the purpose of establishing the ESODEC FTA and is completely unrelated to any health protection objective.

10. Therefore, as the measures in dispute do not relate to health protection, they fall outside the intended scope of the SPS Agreement. Pursuant to its obligations under DSU Art 3.2, the Panel cannot add to Taikon's agreed WTO obligations by subjecting these measures to the disciplines of the SPS Agreement.

(2) In any case, the measures in dispute do not come within the definition of an SPS measure under SPS Annex A(1)

11. Pursuant to SPS Annex A(1), a measure is an SPS measure if, having regard to its purpose, legal form and nature,¹⁰ the measure is a law, decree, regulation, requirement or procedure applied to achieve any of the specific objectives expressly listed in SPS Annex A(1). The fundamental element of an SPS measure is that it must be applied to protect at least one of the listed interests or to prevent or limit damage specified in SPS Annex A(1).¹¹ Notably, Annex A(1) covers only measures which pursue the listed interests or the prevention of specified damage "within the territory of the [implementing] Member". In other words, measures aimed at extra-territorial protection are not SPS measures.¹² In circumstances where the measure has mixed territorial and extra-territorial motivations, it is an SPS measure

⁹ RCA, Preamble, 4th Recital

¹⁰ PR, *EC- Approval and Marketing of Biotech Products*, [7.149]

¹¹ ABR, *Australia-Apples*, [172]

¹² Van den Bossche & Zdouc (2017), 940

within the definition of SPS Annex A(1) only if it is sufficiently intended to protect life or health within the implementing Member's territory.¹³ This is not the case here.

12. Even if the Panel takes the view that the scope of the SPS Agreement must be interpreted more broadly than as above,¹⁴ to encompass environmental protection measures, the measures in dispute are not applied for any of the purposes listed in SPS Annex A(1).

13. As stated above, the ECP exemption was introduced for the purpose of establishing the ESODEC FTA.¹⁵ In itself, it is wholly unrelated to considerations pertaining to the protection of life and health, and therefore does not relate to any of the listed interests under Annex A(1).

14. While the Anti-Crayfish measures relate to the protection of "animal life", the measures were introduced to protect *all* Stormian crabs in the East Stormy Ocean area, including those outside of Taikon's territory, from the invasive presence of marbled crayfish.¹⁶ As a matter of fact, the measures are aimed primarily at protecting Stormian crabs in Astor and Cosmia. This is because commercial breeding of Stormian crabs takes place primarily in Astor and Cosmia.¹⁷ The high concentration of Stormian crabs in the Astorian and Cosmia seaside farms render them far more vulnerable to the threat posed by marbled crayfish. Further, the Taikonese food industry relies far more heavily on imports of these commercially-bred Stormian crabs than on the domestic supply of Stormian crabs.¹⁸ Therefore, as the measures are aimed at extra-territorial protection of Stormian crabs, they are not applied for any of the objectives specifically listed in SPS Annex A(1)(a) or (b).

II. EVEN IF THE MEASURES IN DISPUTE ARE SPS MEASURES, TL14 IS NOT INCONSISTENT WITH SPS ART 2.3

15. The two sentences in SPS Art 2.3 sets out two distinct obligations: (i) WTO Members shall ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, and (ii) WTO Members shall ensure that their SPS measures are not applied in a manner which constitutes a disguised restriction on international trade.¹⁹

¹³ Marceau & Trachtman (2014), 417-418

¹⁴ Respondent's Submissions, [3]

¹⁵ Respondent's Submissions, [9]

¹⁶ Respondent's Submissions, [5]

¹⁷ Case, [1.7] – [1.8]

¹⁸ *Ibid.*

¹⁹ PR, *India-Agricultural Products*, [7.388]

16. Even if the Panel takes the view that the measures in disputes are SPS measures, the exemption of ESODEC Members' products from the application of the ECP by way of TL14 does not violate either of the obligations in SPS Art 2.3.

A. TL14 is not in breach of the non-discrimination obligation contained in the first sentence to SPS Art 2.3

17. A WTO Member is in breach of the non-discrimination obligation in SPS Art 2.3 if three elements are present: (i) The measure discriminates between the territories of WTO Members; (ii) the discrimination is arbitrary or unjustifiable; and (iii) identical or similar conditions prevail in the territories.²⁰ Although the text of SPS Art 2.3 does not mandate a particular order of analysing these elements, it must be shown as a threshold matter that identical or similar conditions prevail between the relevant WTO Members.²¹

18. By virtue of their ESODEC membership, ESODEC Members are not territories with identical or similar conditions to Astor. Since this threshold requirement has not been met, there is no breach under SPS Art 2.3. Further or in the alternative, ESODEC membership provides a rational explanation for the differential treatment, so as to dispel any aspersions of arbitrary or unjustifiable discrimination.

(1) Identical or similar conditions do not prevail in the territories of ESODEC Member States and Astor

19. For the purposes of SPS Art 2.3, the relevant conditions which must be examined are informed by the regulatory objective of the SPS measure in dispute. In other words, all conditions relating to the particular objective pursued and the risks addressed by the SPS measure in question are relevant to the determination of whether identical or similar conditions prevail between the WTO Members.²²

20. As stated above, the regulatory objective of the Anti-Crayfish measures is to protect *all* Stormian crabs from the invasive presence of marbled crayfish.²³ Therefore, should the Panel decide that these measures are SPS measures, the relevant risk addressed by these measures is the risk of marbled crayfish present in the territory of the exporting Member.

21. ESODEC membership is a relevant condition as there is a genuine and proximate relationship between ESODEC membership and the risk of marbled crayfish being present in the territory of the exporting Member. This is because ESODEC creates a regulatory regime

²⁰ PR, *Australia – Salmon (Article 21.5 – Canada)*, [7.111]

²¹ ABR, *Korea – Radionuclides (Japan)*, [5.58]

²² ABR, *Korea – Radionuclides (Japan)*, [5.59]

²³ Respondent's Submissions, [5]

which eliminates the risk of marbled crayfish present in the territories of all ESODEC Members.

22. Generally, ESODEC Members have an obligation to apply all ESODEC Regulations.²⁴ Accordingly, as a result of the Crayfish Ban, ESODEC Members must incorporate within their domestic regulatory systems specific measures targeted at the complete elimination of marbled crayfish from their territories.²⁵ Non-compliance with this would be subject to review from the ESODEC Court at the request of any ESODEC Member, and any subsequent failure to comply with the Court judgement would result in compulsory remedial measures instituted by the ESODEC Joint Committee.²⁶ Conversely, non-ESODEC Members are not subject to such a regulatory regime and do not have any obligation to implement such measures. Even if a non-ESODEC Member does in fact implement the same measures as those set out under the Crayfish Ban, as Astor claims to do, they are nevertheless not subject to regulatory oversight by the ESODEC Joint Committee. Effectively, this permits them to unilaterally withdraw or alter such measures at any time without any supervision or control from the ESODEC Joint Committee. They need not account to any supra-national institutional body on the enforcement of these measures. Therefore, the risk of marbled crayfish present in the territories of non-ESODEC Members is much higher than that in the territories of ESODEC Members.

23. Since Astor is no longer an ESODEC Member,²⁷ Astor and ESODEC Members can be distinguished based on ESODEC membership. As ESODEC membership is a relevant condition, this distinction is sufficient to prove that identical or similar conditions do not prevail between Astor and ESODEC Members. Therefore, the threshold requirement is not met and correspondingly, there is no breach of SPS Art 2.3.

(2) Further or in the alternative, the exemption of ESODEC Members' products from the application of the ECP is neither arbitrary nor unjustifiable

24. The analysis of whether discrimination is arbitrary or unjustifiable under SPS Art 2.3 parallels the analysis under the *chapeau* of GATT Art XX.²⁸ This requires an examination of whether the reason put forward to explain the discrimination is rationally connected to the

²⁴ RCA, Art 1.2

²⁵ Crayfish Ban, Arts 2; 3.2; 4

²⁶ RCA, Art 7

²⁷ Note 7

²⁸ PR, *India –Agricultural Products*, [7.427]; ABR, *Australia- Salmon*, [251]

objective of the measure.²⁹ Even though the AB in *EC – Seals* considered other factors to be relevant in the assessment of whether there is arbitrary or unjustifiable discrimination, it was emphasised that the existence of a rational connection between the discrimination and the regulatory objective of the measure remains the most important factor.³⁰ Therefore, the examination of other factors should be properly understood as merely part of the analysis under the rational connection test,³¹ or at best, only supplementary to the rational connection test.

25. As examined above, there is a lower risk of marbled crayfish present in the territory of ESODEC Members than in the territory of non-ESODEC Members.³² Exempting ESODEC Members' products from the ECP on this basis is rationally connected to the overarching objective of the measures – that is, to protect all Stormian crabs from the invasive presence of marbled crayfish. Therefore, the exemption of the ESODEC Members' products from the ECP is not arbitrary or unjustifiable.

B. TL14 is not a disguised restriction on international trade in breach of the obligation contained in the second sentence to SPS Art 2.3

26. In its request for the establishment of the Panel, Astor pleaded only a violation of the non-discrimination obligation under SPS Art 2.3.³³ In any case, the ECP exemption is not in breach of the obligation contained in the second sentence of SPS Art 2.3.

27. As “arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction on international trade” impart meaning to one another, the considerations pertinent to deciding whether a measure constitutes “arbitrary or unjustifiable discrimination” are likewise relevant in determining whether it is a disguised restriction on international trade.³⁴

28. As demonstrated above, the exemption of ESODEC Members' products from the application of the ECP does not amount to unjustifiable or arbitrary discrimination,³⁵ but is instead an attempt to calibrate the measures to the differing levels of risk of marbled crayfish present in the respective territories. Therefore, rather than being a disguised restriction on international trade, TL14 was implemented in good faith to avoid unfair trade barriers and to promote free trade within ESODEC.

²⁹ ABR, *India-Agricultural Products*, [5.253]

³⁰ ABR, *EC-Seal Products*, [5.305]–[5.306]; ABR, *US-Shrimp*, [165]; ABR, *Brazil-Retreated Tyres*, [227]–[228]

³¹ ABR, *Brazil-Retreated Tyres*, [225]

³² Respondent's Submissions, [22]

³³ Case, [6.1]

³⁴ ABR, *US – Reformulated Gasoline*, 25

³⁵ Respondent's Submissions, [25]

III. EVEN IF THE MEASURES IN DISPUTE ARE SPS MEASURES, TAIKON'S CHOSEN LEVEL OF PROTECTION, AS APPLIED TO ASTOR AND COSMIA, IS NOT INCONSISTENT WITH SPS ART 5.5

29. SPS Art 5.5 prohibits WTO Members from discriminating against other Members by making arbitrary or unjustifiable distinctions in their application of appropriate levels of sanitary and phytosanitary protection. A WTO Member is in breach of this obligation if the following elements are present: (i) The implementing Member has adopted its own ALOPs in several different situations; (ii) these levels of protection exhibit arbitrary or unjustifiable differences in their treatment of different situations, and (iii) the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on trade. These three elements are cumulative in nature and must be present before a breach of SPS Art 5.5 is made out.³⁶

30. Taikon has applied the same ALOP to both Astor and Cosmia. Consequently, the first element cannot be made out. Even if the Panel takes the view that Taikon has applied a lower ALOP to Cosmia than to Astor, this is neither arbitrary nor unjustifiable in light of the different levels of risk of marbled crayfish in their products. Therefore, the second element likewise cannot be made out.

A. Taikon has not adopted its own ALOP in different situations

31. A WTO Member has adopted its own ALOP in different situations if: (i) different situations exist, and (ii) the Member has applied different ALOPs to these situations.³⁷

32. The different situations here refer to the respective treatment accorded to Cosmian and Astorian products. Notwithstanding that different situations exist, Taikon applies the same ALOP in relation to both situations. *Vis-à-vis* all its trading partners, Taikon applies a common ALOP; that is, *zero* risk of marbled crayfish and products containing marbled crayfish imported into Taikon. Therefore, in the absence of different ALOPs, it is impossible to make any meaningful comparison necessary for the analysis under SPS Art 5.5 to proceed.³⁸

33. It is emphasised that it is the prerogative of the implementing Member to define the chosen ALOP. Jurisprudence suggests that panels should not substitute the ALOP expressly defined by the implementing Member with its own implied ALOP, except where (i) the ALOP is defined in such vague or equivocal terms that the application of SPS Art 5.5

³⁶ ABR, *EC – Hormones*, [215]

³⁷ PR, *US – Poultry (China)*, [7.225]

³⁸ ABR, *EC – Hormones*, [217]

becomes impossible, or (ii) the ALOP actually being applied differs from that which is defined.³⁹

34. Here, the ALOP defined is neither vague nor equivocal, and is sufficiently precise as to allow the Panel to examine if it has in fact been applied.

35. Further, there is no incongruence between the ALOP defined above and the ALOP which is actually being applied to Astor and Cosmia. Admittedly, different measures are applied to Astorian and Cosmian products. However, the application of different measures, *in itself*, does not necessarily mean that different ALOPs are being applied.⁴⁰ This is because SPS measure are ultimately only instruments chosen to implement a given ALOP.⁴¹ Here, the different measures applied to Astorian and Cosmian products would nevertheless achieve the same ALOP, given the different levels of risk of marbled crayfish present in Astorian and Cosmian products.⁴²

36. Therefore, Taikon should be allowed to define the ALOP in the manner set out above.⁴³ This ALOP is applied to both Astor and Cosmia.

B. Even if the Panel takes the view that a lower ALOP is applied to Cosmia than to Astor, this does not exhibit arbitrary or unjustifiable differences in the treatment of Astorian and Cosmian products

37. An application of different ALOPs is arbitrary or unjustifiable if this distinction bears no rational connection to the overarching objective pursued.⁴⁴ As discussed above, the rational connection test is the primary approach in assessing whether arbitrary or unjustifiable discrimination exists.⁴⁵ In the context of SPS Art 5.5, this distinction in ALOPs must be explained by the existence of differing levels of risks between the comparable situations, the risks being those which are addressed by the relevant SPS measures.⁴⁶

38. Even if the Panel takes the view that Taikon applies a lower ALOP to Cosmia than to Astor, this distinction is nevertheless justified by the different levels of risks of marbled crayfish present in Cosmia and in Astor. The differing levels of risk may be explained by their relevant membership in ESODEC. As examined above, only ESODEC Members are subject to a regulatory regime over marbled crayfish as set out under the Crayfish Ban.

³⁹ ABR, *Australia – Salmon*, [199], [206]-[207]

⁴⁰ PR, *US – Poultry (China)*, [7.245]

⁴¹ ABR, *Australia – Salmon*, [200]

⁴² Respondent's Submissions, [38]

⁴³ Respondent's Submissions, [32]

⁴⁴ PR, *US-Poultry (China)*, [7.262]

⁴⁵ Respondent's Submissions, [24]

⁴⁶ PR, *US-Poultry (China)*, [7.263]

Accordingly, there is a lower risk of marbled crayfish present in ESODEC Members, *i.e.* Cosmia, as compared to non-ESODEC Members, *i.e.* Astor.⁴⁷ This is the relevant risk pursued by the measures in dispute.⁴⁸ Therefore, a rational connection is established between the application of different ALOPs and the overarching objective pursued by the measures in dispute, such that it is neither arbitrary nor unjustifiable.

IV. TAIKON'S APPLICATION OF NOTE 7 IS NOT INCONSISTENT WITH ITS SPS ART 4.1 OBLIGATION

39. SPS Art 4.1 obliges an importing WTO Member to accept the sanitary regulations of an exporting Member as equivalent, only if the exporting Member objectively demonstrates that its measures achieve the importing Member's ALOP. Astor has not done so because Astor has not negotiated the equivalence agreement with the proper negotiating entity, *i.e.*, the ESODEC Joint Committee. Even if Taikon is the proper negotiating entity, and Astor has negotiated with Taikon, Astor cannot achieve Taikon's ALOP. Hence, Taikon is not obliged to recognise Astor's measures as equivalent.

A. Astor has not objectively demonstrated that it achieves Taikon's ALOP, since Astor has not negotiated with the proper negotiating party, i.e., the Joint Committee

40. Astor cannot objectively demonstrate that it has achieved Taikon's ALOP, since it has not negotiated any equivalence agreement with the ESODEC Joint Committee.

41. First, the Joint Committee has the competence to negotiate equivalence agreements on behalf of Taikon, since it has the competence to coordinate the trade policy of ESODEC Members,⁴⁹ and "may"⁵⁰ enter into equivalence agreements with non-ESODEC Members (as "may" implies permissibility).⁵¹

42. Second, Taikon is entitled to, and has chosen the Joint Committee as the proper negotiating party to discharge its SPS Art 4.1 obligation. Taikon is not expressly prohibited from doing so under the WTO Agreements, and Taikon's right to choose its procedure is consistent with its right to determine its own ALOP,⁵² which includes choosing the procedure to achieve this ALOP. Moreover, since international law does not prohibit Taikon from choosing the procedure to discharge its SPS Art 4.1 obligations,⁵³ the Panel should not

⁴⁷ Respondent's Submissions, [21]-[22]

⁴⁸ Respondent's Submissions, [20]

⁴⁹ ESODEC Agreement Arts 2(2) and 14(1)

⁵⁰ ESODEC Regulations Art 12(1)

⁵¹ *Short Oxford English Dictionary*, "May", [4(a)]

⁵² SPS Agreement Art 2.1; ABR, *EC – Hormones*, [172]; ABR, *Australia – Salmon*, [199]

⁵³ *The Lotus*, [46]; *Reparations Opinion*, [179]

interpret SPS Art 4.1 to prohibit Taikon from doing so.⁵⁴ Astor has not entered into any equivalence agreements with ESODEC only because it is unwilling to negotiate with the Joint Committee, not because it is barred from doing so.

B. Even if Taikon is the proper negotiating entity, and Astor had negotiated with Taikon, it would not be able to objectively demonstrate that it achieves Taikon's ALOP

43. Even if Taikon is the proper negotiating entity, and Astor had negotiated with Taikon, it would still fail to objectively demonstrate that it has achieved Taikon's ALOP, since it cannot guarantee that its measures will remain equivalent to Taikon's. First, Astor lacks a procedure to ensure Astor's regulation and certification regimes remain equivalent in the future.⁵⁵ Astor is not obligated to discuss amendments with Taikon,⁵⁶ and is not subject to enforcement mechanisms to ensure equivalence. Second, there is no legal obligation on Astor to maintain equivalent regulation and certification regimes.⁵⁷ It is likely that Astor would amend its regulations subsequently given Astor's insistence on its right to decide its own laws.⁵⁸ Without these elements in place to ensure equivalence, Taikon does not have to provide equivalence recognition to Astor.

V. TAIKON'S APPLICATION OF THE ECP TO ASTORIAN PREPARED FOOD PRODUCTS ("PFPs") IS NOT INCONSISTENT WITH GATT ART I:1

44. Taikon's application of the ECP to Astorian prepared food products ("PFPs") is not inconsistent with GATT Art I:1 since Cosmian Traditional Stormian Cuisines ("TSCs") and Astorian PFPs are not "like products". Even if the products are "like", the advantage accorded to Cosmian TSCs is extended immediately and unconditionally to Astorian PFPs.

A. The application of the ECP to Astorian PFPs is not inconsistent with GATT Art I:1 because Astorian PFPs and Cosmian TSCs are not "like" products

45. The assessment of whether products are "like" typically involves four criteria: (i) the properties, nature and quality of the products, (ii) the end-uses of the products, (iii) consumers' perceptions and behaviour, and (iv) the tariff classification of the products.⁵⁹ The Panel must examine all four criteria and other relevant evidence and make an "overall

⁵⁴ VCLT Art 31(3)(c); DSU Art 3.2

⁵⁵ *Ibid.*

⁵⁶ *Id.*, at 463

⁵⁷ Respondent's Submissions, [22]

⁵⁸ Case, [3.6]

⁵⁹ ABR, *EC – Asbestos*, [101]; Report of the Working Party on *Border Tax Adjustments*, 5

determination”.⁶⁰ Astorian PFPs and Cosmian TSCs are not “like products” because they differ in physical properties, tariff classification and consumer perception.

46. First, the products have different physical characteristics since Cosmian TSCs do not contain any marbled crayfish while Astorian PFPs might, because Cosmian TSCs are subject to stringent regulatory requirements while Astorian PFPs are not, as demonstrated above.⁶¹

47. Second, the products possess different tariff nomenclatures under the HS.⁶² Cosmian TSCs are classified under “1605.10”, the WCO classification for crab, while Astorian PFPs are classified under “1605.40”, the WCO classification for “other crustaceans”, as they could contain crayfish.⁶³

48. Third, consumers do not regard Astorian PFPs and Cosmian TSCs as substitutes since the former *may* contain marbled crayfish whereas the latter do not, and consumers view marbled crayfish and Stormian crab differently.⁶⁴ Tourists in Taikon wish to consume Stormian crab and not marbled crayfish, since the “traditional Stormian cuisine” they demand contains exclusively Stormian crab.⁶⁵ Similarly, Taikonese locals highly enjoy Stormian crab meat.⁶⁶ In contrast, general consumers have petitioned to ban the marbled crayfish.⁶⁷

49. Fourth, the products have different end-uses. Because Astorian PFPs potentially contain marbled crayfish, they cannot be used as a genuine representation of the East Stormy Ocean tradition and heritage, whereas Cosmian TSCs, which contain only Stormian crabs, can. Accordingly, the overall end-uses of Astorian PFPs differ from those of Cosmian TSCs. To conclude, the products are not “like”, and Note 7 is not inconsistent with GATT Art I:1.

B. Even if these are like products, the advantage accorded to Cosmian TSCs is extended immediately and unconditionally to Astorian PFPs

50. Even if Astorian PFPs and Cosmian TSCs are “like”, exemption from the ECP is extended immediately and unconditionally to Astorian PFPs, since Astor can be exempted from the ECP by entering into an equivalence agreement with Taikon.

51. The advantage is extended immediately because Astor can enter into an equivalence agreement with Taikon at any time, subject to successful negotiations.

⁶⁰ ABR, *EC – Asbestos*, [109]

⁶¹ Respondent’s Submissions, [22] & [44]

⁶² ABR, *Japan – Alcoholic Beverages II*, 21-22

⁶³ HS, Chapter 16 (Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates)

⁶⁴ ABR, *EC – Asbestos*, [117]

⁶⁵ Case, [1.8]

⁶⁶ Case, [1.7]

⁶⁷ Case, [2.3]

52. The advantage is extended unconditionally as GATT Art I:1 does not prohibit the imposition of *any* conditions, but only conditions that deny “equal competitive opportunities” to WTO Members.⁶⁸ Astor is not denied equal competitive opportunity since it can obtain equivalence by eliminating the risk of marbled crayfish in its PFPs. The fall in the volume of Astorian PFPs exported to Taikon is irrelevant since it does not show that Astor’s competitive opportunities are reduced.⁶⁹ Astor has not proven that this drop is *not* due to the 15% increase in tariffs or other causes.⁷⁰ The 15% tariff is likely significant since Astorian PFPs deteriorate less than non-ESODEC PFPs, as the maximum duration for Astorian PFPs to be shipped to Taikon and subjected to the ECP is 28 hours, well within the 72-hour expiry deadline.⁷¹

VI. EVEN IF THERE IS A BREACH OF GATT ART I:1, THIS IS JUSTIFIED BY GATT ART XXIV

53. The application of the ECP to Astorian PFPs under Note 7 is justified by GATT Art XXIV, since Note 7 is implemented under: (i) a GATT-compliant FTA or (ii) a GATT-compliant interim agreement establishing a customs union.

A. Note 7 was implemented under a GATT-compliant FTA

54. Note 7 is justified under GATT Art XXIV for being implemented under a GATT-compliant FTA, since: (i) it was introduced upon the formation of the ESODEC FTA, (ii) the ESODEC FTA meets the requirements of GATT Art XXIV:8(b) and GATT Art XXIV:5(b), and (iii) Note 7 was necessary for the formation of the FTA.⁷²

(1) Note 7 was introduced upon the formation of the ESODEC FTA

55. The GATT Art XXIV:5 *chapeau* requires the measure to be introduced upon the formation of the FTA. Note 7 satisfies this since the general framework supporting the measure, *i.e.* the ESODEC Agreement, was implemented at the formation of the ESODEC FTA.⁷³ This interpretation is consistent with the reality that FTAs continue developing post-formation,⁷⁴ since FTA parties may be unable to predict future conditions at the time of formation,⁷⁵ and it would be unreasonable to expect FTA parties to anticipate future measures.

⁶⁸ ABR, *EC – Seal Products*, [5.88]

⁶⁹ ABR, *Japan – Alcohol*, 16

⁷⁰ Case, [1.9]

⁷¹ Assuming a minimum cargo ship speed of 21 knots (38.9 km/h) (*McNicholas* (2016), 49), it takes 16 hours for PFPs to be shipped from Astor to Taikon (which are 625 km apart). Including the ECP inspection period of 12 hours, the total time taken before Astorian PFPs can be sold in Taikon is 28 hours.

⁷² ABR, *Turkey – Textiles*, [58]-[59]

⁷³ PR, *US – Line Pipe*, [7.141], footnote 128

⁷⁴ Mathis (2002), 104, footnote 59

⁷⁵ Lockhart & Mitchell (2005), 225

(2) The ESODEC FTA meets the requirements of GATT Art XXIV:5(b) and 8(b)

56. First, the ESODEC FTA satisfies GATT Art XXIV:5(b), which requires that duties and other regulations of commerce (“ORCs”) (*i.e.* regulations having an impact on trade)⁷⁶ applied by an ESODEC Member to a non-ESODEC Member after the FTA is formed shall not be higher or more restrictive than those applied before the FTA was formed. This requirement is met since duties applied to non-ESODEC Members remain unchanged after FTA formation,⁷⁷ and ORCs remain unchanged since non-ESODEC Members can be exempted from the ECP through concluding equivalence agreements with Taikon.

57. Even if ORCs increased, there is no violation of GATT Art XXIV:5(b), since GATT Art XXIV:5(b) does not prohibit the implementation of regulatory measures which are justified under GATT Art XX. GATT Art XXIV:8(b) permits other restrictive regulations of commerce (“ORRCs”) (trade measures that must be eliminated to create a normally functioning FTA)⁷⁸ that are justified under GATT Art XX. For instance, in *EC – Asbestos*, Canada did not challenge the legitimacy of European Communities’ status of a customs union under GATT Art XXIV, despite a *de facto* rise in ORCs post-formation due to the ban on asbestos.

58. Second, the ESODEC FTA satisfies GATT Art XXIV:8(b), which requires the FTA to eliminate duties and ORRCs on substantially all the trade between ESODEC Members (considerably more than merely some of the trade).⁷⁹ The FTA eliminates duties on substantially all the trade since it removes all tariffs between ESODEC Members, and eliminates ORRCs on substantially all the trade since it removes quantitative restrictions, individual conformity assessment procedures and sanitary and phytosanitary controls *inter se*.⁸⁰

(3) Note 7 is necessary for the formation of the FTA

59. The measure must be necessary for the formation of the ESODEC FTA.⁸¹ The ESODEC FTA seeks to harmonise internal standards through the Regulatory Community and thereby reduce ORCs as required by GATT Art XXIV:8(b). The Regulatory Community can only exist if ESODEC Members’ import regulations are harmonised. Otherwise, imports from non-ESODEC Members can enter ESODEC via the ESODEC Member with the lowest

⁷⁶ PR, *Turkey – Textiles*, [9.120]

⁷⁷ Clarification, [8]

⁷⁸ Mathis (2006), 87

⁷⁹ ABR, *Turkey – Textiles*, [48]

⁸⁰ Case, [1.3]; Clarification [9]; RCA Art 2

⁸¹ ABR, *Turkey – Textiles*, [46]

regulatory requirements. ESODEC Members would then need to raise ORCs between themselves to prevent the spread of marbled crayfish. Therefore, Note 7, which applies the ECP to Astor, a non-ESODEC Member, is necessary for the formation of the ESODEC FTA.

(4) The FTA satisfies GATT Art XXIV:7(a)

60. The FTA was notified to the WTO in accordance with GATT Art XXIV:7(a).

B. Note 7 is implemented under a GATT-compliant interim agreement to form a customs union

61. Note 7 is justified under GATT Art XXIV as it is implemented under a GATT-compliant interim agreement to form the ESODEC customs union. This is because: (i) Note 7 is implemented under an interim agreement, and the measure satisfies (ii) the GATT Art XXIV:5 *chapeau*, (iii) GATT Art XXIV:5(a), (iv) GATT Art XXIV:5(c) and (v) GATT Art XXIV:7(a).

(1) Note 7 is implemented pursuant to an interim agreement to form the ESODEC customs union

62. Note 7 is implemented pursuant to an interim agreement to form the ESODEC customs union. The agreement comprises the ESODEC Agreement, RCA and ECP Regulation. These instruments aim to satisfy: (i) the GATT Art XXIV:8(a)(i) requirement of eliminating duties and ORRCs on substantially all the trade *inter se*, as mentioned above,⁸² and (ii) the GATT Art XXIV:8(a)(ii) requirement of applying substantially the same duties and ORCs to non-ESODEC Members,⁸³ *i.e.* closely approximating sameness.⁸⁴ There is no express prohibition against the interim agreement being comprised of multiple instruments, consistent with the reality that customs unions develop gradually over successive stages.⁸⁵

(2) Note 7 satisfies the GATT Art XXIV:5 *chapeau*

63. Note 7 must be necessary for the formation of the ESODEC customs union.⁸⁶ Note 7 is clearly necessary for this purpose as it is integral for ESODEC to liberalise internal trade, and to create a common external trade policy, since it results in substantially the same ORCs being applied to imports covered by ESODEC Regulations into its territory.⁸⁷

(3) The interim agreement satisfies GATT Art XXIV:5(a)

⁸² Respondent's Submissions, [59]

⁸³ ESODEC Agreement, Art 2(2); ECP Regulation Art 1(1).

⁸⁴ ABR, *Turkey – Textiles*, [50]

⁸⁵ *E.g.*, Treaty Establishing the African Economic Community, Art 4(2)

⁸⁶ ABR, *Turkey – Textiles*, [46]

⁸⁷ ECP Regulation, Art 1(1)

64. The interim agreement satisfies GATT Art XXIV:5(a) since the introduction of the measure does not increase ORCs in a prohibited manner.⁸⁸

(4) The interim agreement satisfies GATT Art XXIV:5(c)

65. GATT Art XXIV:5(c) requires the interim agreement to contain a plan and schedule for the formation of the customs union within a reasonable length of time.⁸⁹ This is satisfied here. The plan and schedule consists of provisions in the ESODEC Agreement, RCA and ECP Regulation.⁹⁰ The plan and schedule is sufficiently detailed since its substance is set out in the above instruments, and assists WTO Members in determining if the interim agreement is genuine and realistic.⁹¹ The schedule fits within a reasonable period,⁹² *i.e.* less than 10 years save where exceptional circumstances apply.⁹³ Exceptional circumstances apply here since Cosmia is a developing country and faces resource constraints in implementing the plan.⁹⁴

(5) The interim agreement satisfies GATT Art XXIV:7(a)

66. The interim agreement satisfies GATT Art XXIV:7(a), since the WTO was notified of the above legal instruments that form the interim agreement.

VII. FURTHER OR IN THE ALTERNATIVE, ANY ALLEGED BREACH OF GATT ART I:1 IS JUSTIFIED BY GATT ART XX

67. A measure inconsistent with GATT Art I:1 may be justified under GATT Art XX where a two-tier test is satisfied: (i) the measure is “provisionally justified” under the subparagraphs of GATT Art XX, and (ii) the requirements of the *chapeau* of GATT Art XX are satisfied.⁹⁵ The former concerns the ECP and the latter concerns the application of the ECP.⁹⁶

A. The ECP is justified under GATT Art XX(b)

68. If the Panel takes the view that the ECP is a SPS measure, it is provisionally justified under GATT Art XX(b) since it is consistent with the relevant SPS Agreement provisions.⁹⁷ Nonetheless, the ECP is justified under GATT Art XX(b) since: (i) the ECP is designed to

⁸⁸ Respondent’s Submissions, [57]-[58]

⁸⁹ GATT Art XXIV:5(c)

⁹⁰ Respondent’s Submissions, [63]

⁹¹ Bartels (2009), 348; Art XXIV:7(b) GATT

⁹² Art XXIV:5(c) GATT

⁹³ *Understanding on GATT Art XXIV*, [3]

⁹⁴ Bartels (2009), 347

⁹⁵ ABR, *US – Reformulated Gasoline*, 22

⁹⁶ ABR, *Brazil – Retreaded Tyres*, [215]

⁹⁷ SPS Agreement, Art 2(4)

protect the life of the Stormian crab, and (ii) is necessary to ensure Stormian crab sustainability.

(1) The ECP is designed to protect the life of the Stormian crab

69. The objective of the measure is to protect the life of Stormian crabs in the East Stormy Ocean, as explicitly indicated above.⁹⁸

(2) The ECP is necessary to ensure the sustainability of the Stormian crab

70. To determine if the ECP is necessary, the Panel must: (i) assess relevant factors in particular, the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake,⁹⁹ and (ii) compare it with alternatives that are less trade-restrictive but similarly effective.¹⁰⁰

71. On balance, the ECP is “necessary” because: (i) Stormian crab sustainability is important to Taikon and (ii) the ECP materially contributes to this interest.

72. First, ensuring the sustainability of the Stormian crab is important to Taikon, evident since Taikon jointly submitted a request to add the crab to CITES Appendix III,¹⁰¹ enabling Taikon to control the importation and hence consumption of the crab where the crab's population viability is threatened. The crab is also a symbol of the East Stormian Ocean region which Taikon belongs to.¹⁰²

73. The ECP materially contributes to the sustainability of the Stormian crab as there is a genuine relationship of ends and means between the ECP and crab sustainability.¹⁰³ Since marbled crayfish threatens the Stormian crab,¹⁰⁴ Taikon needs to eliminate the marbled crayfish in the region by prohibiting imports of PFPs containing marbled crayfish, which are bred in the East Stormy Ocean solely for commercial consumption. As Taikon is the largest consumer of Stormian crab meat, Taikon's prohibition of marbled crayfish imports will hence significantly benefit Stormian crab populations in the region. Taikon is entitled to rely on the 2017 study as it can rely on a qualified and respected scientific opinion¹⁰⁵ establishing the threat marbled crayfish pose to Stormian crabs.

74. The ECP is not too trade-restrictive as ESODEC can recognise equivalence and thereby exempt non-ESODEC Members from the ECP. On balance, the ECP is “necessary”.

⁹⁸ Respondent's Submissions, [5]

⁹⁹ ABR, *Brazil – Retreaded Tyres*, [156]

¹⁰⁰ *Ibid.*

¹⁰¹ Case, [1.8]

¹⁰² Case, [1.7]

¹⁰³ ABR, *Brazil – Retreaded Tyres*, [145]

¹⁰⁴ Case, Annex III

¹⁰⁵ ABR, *EC – Asbestos*, [178]

75. Since the ECP is *prima facie* established to be “necessary”, the burden shifts to Astor to prove the existence of less trade-restrictive alternatives.¹⁰⁶ Nonetheless, no viable alternatives exist. Requiring Taikon to send representatives to inspect Astorian Stormian crab farms and processing facilities is insufficient as inspections cannot cover all locations, so marbled crayfish could still be present in Astorian PFPs. It is also unreasonable to expect Taikon to shoulder the entire burden of inspection. Automatically recognising the equivalence of Astor’s sanitary regulations is also ineffective because Astor is not obliged to maintain equivalent laws, regulations and practices and may amend these in the future.¹⁰⁷ Hence, the ECP is necessary to ensure the sustainability of the Stormian crab.

B. The ECP is justified under GATT Art XX(g)

76. The ECP is justified under GATT XX(g), since: (i) the Stormian crab is an exhaustible natural resource, (ii) the ECP relates to the conservation of the crab, and (iii) the ECP is made effective in conjunction with restrictions on domestic production and consumption.

77. First, the Stormian crab is an exhaustible natural resource. “Exhaustible natural resources” include living creatures susceptible to depletion, exhaustion and extinction under certain circumstances, which are nonetheless capable of renewing their population through reproduction.¹⁰⁸ The Stormian crab satisfies this definition since its life cycle is fragile,¹⁰⁹ as indicated by the 2017 study,¹¹⁰ and its listing in CITES Appendix III. The crab need not be listed in CITES Appendix I or II to constitute an exhaustible resource because CITES listings are not dispositive of species exhaustibility.¹¹¹ Species not even listed under CITES can nonetheless constitute exhaustible resources.¹¹²

78. Second, the ECP relates to the conservation of the crab.¹¹³

79. Third, the measure is made effective in conjunction with even-handed restrictions on domestic production and consumption,¹¹⁴ since Taikon’s listing of the Stormian crab in CITES Appendix III enables Taikon to calibrate the level of importation and hence consumption of the crab according to the population viability of the crab, and reduce

¹⁰⁶ ABR, *Brazil – Retreaded Tyres*, [156]; ABR, *US – Gambling*, [309]-[311]

¹⁰⁷ Respondent’s Submissions, [22] & [44]

¹⁰⁸ ABR, *Shrimp – Turtle*, [128]

¹⁰⁹ Case, [1.8]

¹¹⁰ Case, Annex III

¹¹¹ CITES, Press Release, [5.5.4]

¹¹² PR, *Canada – Herring and Salmon*; PR, *US – Tuna (Canada)*

¹¹³ Respondent’s Submission, [74]

¹¹⁴ ABR, *US – Reformulated Gasoline*, 20-21

domestic consumption where the crab is threatened. As Taikon does not breed and sell products containing Stormian crab,¹¹⁵ restrictions on domestic production are irrelevant.

C. The ECP is justified under GATT Art XX(a)

80. The ECP is justified under GATT Art XX(a) because: (i) the ECP is “designed” to protect this public moral, and (ii) the ECP is “necessary” to protect this public moral.¹¹⁶

81. First, the ECP is designed to protect the public moral of Stormian crab sustainability. Public morals are standards of right and wrong conduct,¹¹⁷ and depend upon a range of factors, including prevailing social, cultural, ethical and religious values.¹¹⁸ Taikon should have adequate discretion to define and apply the concept of public morals according to its domestic system and values.¹¹⁹ The protection of animal life can constitute a public moral.¹²⁰ Hence, ensuring Stormian crab sustainability – due to the cultural importance of the crab as a symbol of the region¹²¹ – constitutes a public moral.

82. Second, the ECP is designed to protect this public moral, *i.e.* there is a relationship between the ECP and this public moral.¹²² Since the ECP discourages the commercial breeding of marbled crayfish, it protects Stormian crabs from extinction.¹²³

83. Third, the ECP is necessary to ensure the sustainability of the Stormian crab. The test for necessity is the same as that under GATT Art XX(b).¹²⁴ Applying this test, the ECP is necessary since the sustainability of the crab is important to Taikon, and the ECP materially contributes to the sustainability of the crab. The 2017 study is sufficient basis since Taikon is not required to identify a risk to public morals.¹²⁵ No viable alternatives exist, since all alternatives do not completely eliminate the risk of marbled crayfish imported into Taikon.¹²⁶

D. The application of the ECP to Astorian PFPs satisfies the GATT Art XX chapeau

84. For a measure to be consistent with Art XX GATT, the application of the measure must neither (i) constitute arbitrary or unjustifiable discrimination between Members where the same conditions prevail, nor (ii) constitute a disguised restriction on international trade.¹²⁷

¹¹⁵ Case, [1.8]

¹¹⁶ ABR, *Colombia – Textiles*, [5.67]

¹¹⁷ ABR, *US – Gambling*, [299]

¹¹⁸ PR, *US – Gambling*, [6.461]

¹¹⁹ ABR, *EC – Seal Products*, [5.199]

¹²⁰ *Id.*, [5.200]-[5.201]

¹²¹ Case, [1.7]

¹²² ABR, *Colombia – Textiles*, [5.68]

¹²³ Respondent’s Submission, [74]

¹²⁴ ABR, *China – Publications and Audiovisual Products*, [243]-[245]

¹²⁵ ABR, *EC-Seal Products*, [5.197]-[5.198]

¹²⁶ Respondent’s Submission, [76]

¹²⁷ ABR, *Brazil – Retreaded Tyres*, [225]

85. Whether a measure constitutes arbitrary or unjustifiable discrimination depends on whether there is a rational connection between the reasons given for the discrimination and the objective of the measure.¹²⁸ As examined above, the other factors identified in *EC – Seal Products* merely go towards supplementing the rational connection test at best.¹²⁹ Ultimately, the assessment must be made in light of the function of the *chapeau*, which is to prevent abuse of the Art XX exceptions in accordance with the principle of good faith.¹³⁰

86. First, the application of the ECP is not arbitrary or unjustifiable discrimination, because similar conditions do not prevail between Astor and Cosmia: Astorian PFPs may contain marbled crayfish whereas Cosmian TSCs do not.¹³¹

87. Second, even if similar conditions prevail, there is a rational connection between the reasons given for the application of the ECP and the objective of the ECP. We have demonstrated the existence of a rational connection in the analysis under sub-paragraphs (a), (b) and (g) of GATT Art XX.¹³² Moreover, in applying the ECP, Taikon has taken into account the prevailing conditions in non-ESODEC Members by negotiating equivalence agreements as opposed to imposing rigid and unbending requirements.¹³³ Taikon, through ESODEC, is willing to engage in serious negotiations with non-ESODEC Members.¹³⁴ Additionally, even-handedness is present,¹³⁵ and no less trade-restrictive alternatives exist.¹³⁶ Ultimately, given the above reasons, the application of the ECP is made in good faith.

88. “Arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction on international trade” impart meaning to one another.¹³⁷ Therefore, for the same reasons discussed above, the application of the ECP, which is not arbitrary or unjustifiable discrimination, is likewise not a disguised restriction on international trade.

89. Fundamentally, since Astor was the country that initiated the ban on marbled crayfish in ESODEC, it would be incongruous for Astor to now assert a lack of good faith.¹³⁸

¹²⁸ ABR, *Brazil – Retreaded Tyres*, [228]

¹²⁹ Respondent’s Submissions, [24]

¹³⁰ *Id.*, [215] and [227]; ABR, *US – Shrimp*, [158]

¹³¹ Respondent’s Submission, [22] & [44]

¹³² Respondent’s Submission, [74], [79] & [83]

¹³³ ABR, *US – Shrimp*, [177]

¹³⁴ *Id.*, [166] and [172]; ABR, *US – Reformulated Gasoline*, 27

¹³⁵ Respondent’s Submission, [80]

¹³⁶ Respondent’s Submission, [76]

¹³⁷ ABR, *US – Reformulated Gasoline*, 25

¹³⁸ Case, [2.3]

REQUEST FOR FINDINGS

For the above reasons, Taikon urges the Panel to find that:

1. The ESODEC Crayfish Ban, and the ECP Regulation as applied to implement the Crayfish Ban, are not SPS measures and not subject to the disciplines of the SPS Agreement.
2. *Even if* the ESODEC Crayfish Ban and the ECP Regulation are SPS measures, Taikonese Law 14/2012 is not a SPS measure and not subject to the disciplines of the SPS Agreement.
3. *Even if* the ESODEC Crayfish Ban, the ECP Regulation, and Taikonese Law 14/2012 are SPS measures subject to the disciplines of the SPS Agreement, Taikonese Law 14/2012 is not in violation of Article 2.3 of the SPS Agreement.
4. *Even if* the ESODEC Crayfish Ban and the ECP Regulation are SPS measures subject to the disciplines of the SPS Agreement, Taikon is not in breach of its obligation under Article 5.5 of the SPS Agreement.
5. *Even if* the ECP Regulation is a SPS measure, Taikon's application of Regulations Authority Note 7/2019 is not inconsistent with its obligations under Article 4.1 of the SPS Agreement.
6. Taikon's application of the ECP Regulation to Astorian prepared food products is not in violation of Article I:1 of the GATT.
7. *Even if* Taikon's application of the ECP Regulation to Astorian prepared food products is in violation of Article I:1 of the GATT, this is justified by Article XXIV of the GATT.
8. *Even if* Taikon's application of the ECP Regulation to Astorian prepared food products is in violation of Article I:1 of the GATT, this is justified by Article XX of the GATT.