

Team: 032

**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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<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 18 February 2000.
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, circulated 3 December 2007. Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, circulated 12 June 2007.
<i>Canada – Automobiles</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000.
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/19, circulated 11 May 2012.
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<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> ,

	WT/DS135/AB/R, adopted 5 April 2001.
<i>EC – Biotech</i>	Panel Report, <i>European Communities—Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006.
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<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation—Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R, adopted 19 August 2016.
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 22 October 1999.
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<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, circulated 29 September 2010.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/23, adopted 26 November 2001.

<i>US – Steel</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, circulated 10 November 2003.
<i>US – Tuna II (Mexico) Art. 21.5</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Recourse to article 21.5 of the DSU by the United States</i> , WT/DS381/AB/RW/USA, WT/DS381/AB/RW2, circulated 14 December 2018.

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8. Doaa Motaal, *The "Multilateral Scientific Consensus" and the World Trade Organization*, 38 J. OF WORLD TRADE 855 (2004).
9. Jacqueline Peel, *A GMO by Any Other Name . . . Might be an SPS Risk: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, EUROPEAN J. OF INT'L L. 1009 (2006).

List of Abbreviations

Abbreviation	Full Meaning
AB	Appellate Body
ABR	Appellate Body Report
Art.	Article(s)
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ESODEC	East Stormy Ocean Development and Economic Community
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade 1994
MFN	Most Favoured Nation
PR	Panel Report
RTA	Regional Trade Agreement
SPS	Sanitary and Phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Statement of Facts

1. Astor, Taikon, and Cosmia, all members of the World Trade Organization (WTO), are three small archipelagic nations located in the relatively isolated East Stormy Ocean. In 2009, Astor, Taikon, and Cosmia signed an agreement to establish the East Stormy Ocean Development and Economic Community (ESODEC), which became the ESODEC Free Trade Area in 2012 with tariffs and quantitative restrictions on all products eliminated among the three members. The three countries also signed and ratified the ESODEC Regulatory Community Agreement, which exempts all products from additional conformity assessments when they are traded among ESODEC members.
2. Taikon, internationally renowned for its colorful marine life, pristine islands, world-class honeymoon destinations, imports the Stormian crab, a hallmark of the traditional Stormian cuisine, from Astor and Cosmia. Unfortunately, some producers, within and outside ESODEC, started marketing as “Traditional Stormian Cuisine” meals containing the meat of marbled crayfish, which are far less expensive to breed. Moreover, according to a joint study by three ESODEC member states’ national universities, the presence of marbled crayfish poses dire threats to the Stormian crab’s survival.
3. In response, ESODEC enacted a regulation banning the marbled crayfish in all ESODEC members (Crayfish Ban) and requiring national authorities of ESODEC members to apply the ESODEC Enhanced Control Procedure (ECP) to imports of “products potentially containing marbled crayfish.” The ECP has proven to be extremely effective, as Taikonese authorities have never found crayfish in shipments of Stormian crabs after the enforcement of the Crayfish Ban.
4. Even though Astor had a strong voice within ESODEC and benefited greatly from the community, Astor announced its withdrawal from ESODEC in December 2018 following the election of Mr. Baars Terix, an internet celebrity, as the country’s President.
5. In light of Astor’s new status as a non-member of ESODEC, Cosmian and Taikonese authorities began to apply ESODEC regulations to Astorian products, including the ECP to covered products imported from Astor. Although ESODEC expressed great openness to negotiate equivalence agreements with Astor, Astor insisted on reaching *bilateral* agreements with Taikon and Cosmia respectively, which failed after three days of meetings.
6. After unsuccessful consultations, Astor submitted a request for the establishment of a panel to the DSB, claiming the ESODEC crayfish measures, including the ECP as applied to live animals and prepared food products, are SPS measures; and Taikon violated Articles 2.3, 5.5, 4.1 of the SPS Agreement and Article I:1 of the GATT 1994.

*Summary of Arguments***I. THE ESODEC CRAYFISH MEASURES AND THE ECP AS APPLIED TO PREPARED FOOD PRODUCTS AND LIVE CRAYFISH ARE NOT SPS MEASURES.**

- The Crayfish Ban as applied to prepared food products is not an SPS measure since its purpose is to protect traditional Stormian cuisine and culture rather than animal or human life or health. Even if the Crayfish Ban protects animal or human life or health, prepared foods are not pests or other substances covered by the SPS Agreement.
- As applied to live marbled crayfish, the Crayfish Ban is a broad environmental precautionary measure outside the scope of the SPS Agreement.
- The ECP as applied to prepared food products is not an SPS measure because its purpose is to protect traditional Stormian cuisine and culture rather than animal or human life or health. Further, prepared food products are not pests.

II. TAIKONESE LAW 14/2012 IS CONSISTENT WITH SPS ARTICLES 5.5 AND 2.3.

- Taikon's ALOP does not violate Article 5.5 of the SPS Agreement because it does not distinguish between WTO members. First, mutual recognition of equivalency is open to all WTO members, so there are no distinctions between the treatment of ESODEC members and non-members that could result in unlawful discrimination. Second, the SPS Agreement requires differential treatment of Astor and Cosmia since the situations in the two countries are no longer comparable after Astor's withdrawal from the oversight of ESODEC's Regulations Authority.
- Further, Taikon's ALOP is not arbitrary since it is necessary to achieve ESODEC's objective of facilitating inter-Stormian trade while protecting against all future risks associated with marbled crayfish. Additionally, the ALOP exhibits none of the three warning signals that indicate a disguised restriction on trade.
- Taikon's RCA does not violate Article 2.3 of the SPS Agreement because identical or similar conditions no longer prevail between Astor and Cosmia, the RCA does not discriminate between ESODEC members and non-members, and where discrimination may occur, it is not arbitrary since the discrimination relates to the RCA's objectives.

III. TAIKON'S APPLICATION OF THE ECP TO ASTOR IS CONSISTENT WITH TAIKON'S OBLIGATIONS UNDER ARTICLE 4.1 OF THE SPS AGREEMENT.

- After Astor's withdrawal from ESODEC, Taikon is legally prohibited from continuing to recognize Astor's measures as equivalence in order to comply with the MFN principle under GATT 1994 Article I:1.

- Taikon has no duty to afford Astor any recognition of equivalence because Astor failed to provide any science-based and technical information to support its request for equivalence. Moreover, Taikon enjoys broad discretion in determining whether the information Astor has submitted is sufficient for demonstrating equivalence under Article 4 of the SPS Agreement.
- Taikon has fulfilled all other obligations under Article 4 of the SPS Agreement and the Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, including Taikon's good-faith effort to reach a multilateral agreement on equivalence with Astor.

IV. TAIKON'S APPLICATION OF THE ECP TO ASTOR IS CONSISTENT WITH TAIKON'S OBLIGATIONS UNDER GATT 1994 ARTICLE I:1; TAIKON'S MEASURES ARE FURTHER JUSTIFIED UNDER GATT 1994 ARTICLES XX AND XXIV.

- Astorian crabs and Cosmian crabs are not like products because consumers' tastes and habits differentiate the two products. Astor also failed to prove that the advantage was not accorded immediately and unconditionally to Astor because Taikon did not attach a condition to the granting of advantage to Astor that has a detrimental impact on the competitive opportunities for Astorian products.
- Taikon's measures is justified under GATT 1994 Article XXIV because Taikon can prove that: (1) the measure at issue is introduced upon the formation of a free trade area; (2) the free trade area that meets the requirements of paragraphs 8(b) and 5(b) of Article XXIV; and (3) the measure is necessary for the formation of a free trade area.
- Taikon's measures are justified under Article XX because they (1) are designed to and necessary to protect public morals; (2) are designed to and necessary to protect human, animal, or plant life or health; and (3) relate to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production or consumption. Moreover, Taikon's measures do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor are they a disguised restriction on international trade.

Identification of the Measures at Issue

- **Taikonese Law 14/2012:** A measure adopted on 10 March 2015 incorporating the Regulatory Community Agreement (RCA) into Taikon’s domestic law.
- **Regulation 7/2015:** An ESODEC regulation adopted 10 March 2015, establishing the Enhanced Control Procedure for Potentially Dangerous Products (ECP Regulation).
- **Crayfish Ban 13/2018:** An ESODEC regulation adopted 12 March 2018, banning marbled crayfish in all ESODEC members.
- **Directive 44/2018:** An ESODEC regulation issued 10 July 2018, modifying the list of imported products subject to the ECP to include all products consisting of marine or aquatic animals, and all food products containing the meat of marine or aquatic animals.
- **Note 7/2019:** A notification by the ESODEC Regulations Authority acknowledging Astor’s new status as a non-ESODEC country as of 13 April 2019 and instructing Cosmian and Taikonese authorities to apply ESODEC regulations, including the ECP.

Legal Pleadings

- I. THE ESODEC CRAYFISH MEASURES AND THE ECP AS APPLIED TO PREPARED FOOD PRODUCTS AND LIVE CRAYFISH ARE NOT SPS MEASURES.

The SPS Agreement only covers measures that fulfill a purpose included in Annex A(1)(a)–(d) of the SPS Agreement.¹ None of these provisions apply to Taikon’s measures.

1. The Crayfish Ban (13/2018) and Directive 44/2018 are not SPS measures.

Annex A(1)(a) specifies that an SPS measure must protect “animal or plant life or health,” while A(1)(b) and (c) protect “human or animal life or health.”² Annex A(1)(d) includes measures that “prevent or limit other damage.”³ These purposes do not apply to Taikon’s measures with respect to prepared food products or live marbled crayfish.

A. *The Crayfish Ban’s purpose as applied to prepared food products is outside the scope of Annex A(1)(a).*

While the Crayfish Ban declares marbled crayfish an “invasive species” that risks harming human or animal health in the ESODEC region, the preamble of the Crayfish Ban instead justifies a prohibition on products containing marbled crayfish to protect “the richness of Stormian traditions” and “traditional Stormian cuisine and culture.”⁴ ESODEC wishes to

¹ See PR, *EC – Biotech*, [7.149]; PR, *US – Poultry (China)*, [7.98-7.99].

² Agreement on Application of Sanitary and Phytosanitary Measures, [Annex A(1)(a)–(c)] [Hereinafter SPS Agreement].

³ *Id.*, [A(1)(d)].

⁴ Case, [Annex I, Ex. D, “ESODEC Regulation 13/2018...Establishing Enforcement Procedures (Crayfish Ban)”, preamble]; *id.*, [Article 1.1].

maintain the quality and reputation of traditionally prepared Stormian crab that is threatened by the less expensive substitute of marbled crayfish, and the ban achieves this purpose by imposing additional costs on such products.

B. Prepared food products are not pests covered by Annex A(1)(a), (c) and (d).

Further, prepared food products are not covered by Annex A(1)(a), (c) or (d) because they are not pests. A measure is covered by the SPS Agreement only if it protects against risks that “occur as a result of” the event, substance, or conditions listed in each provision of Annex A(1).⁵ Annex A(1)(a), (c) and (d) describe measures that protect against risks “arising from the entry, establishment or spread of pests,” as well as diseases or disease-carrying organisms.⁶ Prepared foods themselves are not diseases, and there is no evidence indicating that they pose a risk of carrying or causing diseases. Similarly, prepared food products, which consist of packaged crayfish meat with spices, are not “pests.” This is not because prepared food products are not alive; in *EC – Biotech*, the panel rejected the argument that pests must be living organisms since there was a possibility that plants can continue to be destructive or harmful to health after being harvested.⁷ Rather, prepared food products are not pests because they, unlike harvested plants, pose no continued risk to damage the health of living organisms or the environment.

C. Prepared food products are not covered by Annex A(1)(b).

Annex A(1)(b) is distinct in describing risks to human or animal life or health “arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.”⁸ While prepared food products are certainly food, any of the “unknown effects” on human health would be the result of the marbled crayfish itself rather than the additives, contaminants, or toxins within the prepared food products.⁹

D. The Crayfish Ban as applied to live animals is outside the scope of the SPS Agreement.

As a precautionary environmental measure, the Crayfish Ban as applied to live animals is outside the traditional scope of the SPS Agreement covering a narrow range of measures regulating the risk associated with imported agricultural, meat or plant products carrying pests.¹⁰ However, the panel in *EC – Biotech* expanded this definition to include

⁵ PR, *EC – Biotech* [7.224] (holding the meaning behind “risks arising from” language in SPS Annex A(1)).

⁶ SPS Agreement, [Annex A(1)(a), (c)].

⁷ See PR, *EC – Biotech*, [7.351].

⁸ SPS Agreement, [Annex 1(b)].

⁹ Case, [Annex I, Ex. D, preamble].

¹⁰ See Jacqueline Peel, *A GMO by Any Other Name . . . Might be an SPS Risk: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, EUROPEAN J. OF INT’L L. 1009 (2006);

measures that cover a broad range of environmental and health risks, even where the harm only minimally results from the introduction of pests. A panel should reject this broad view in *EC – Biotech* because it imposes evidentiary requirements under the SPS Agreement that contradict the precautionary purposes of most environmental measures to protect against uncertain effects.¹¹ Even though Taikon’s measures are justified by the scientific study in Annex III, a panel should use this opportunity to realign the definition of SPS measures to comport with the original purpose of the SPS Agreement.

2. The ECP as applied to prepared food products is not an SPS measure.

The ECP achieves ESODEC’s goals of integrating the Storming economy by ensuring consistent regulation of products exported into the community. The ECP has similar goals to the Crayfish Ban, protecting “life and health . . . the richness of Stormian traditions . . . [and the] control of the safety of products.”¹² As the ECP applies to a prohibition on products containing marbled crayfish, the purpose is to control “the safety of products” and protect “Stormian traditions,” since the entry of canned food does not pose a direct or immediate risk to human or animal life or health.

II. TAIKONESE LAW 14/2012 IS CONSISTENT WITH SPS ARTICLES 5.5 AND 2.3

Even if a panel finds Taikon’s regulations to be SPS measures, they still comport with Articles 5.5 and 2.3. Articles 5.5 and 2.3 of the SPS Agreement both seek to prevent arbitrary or unjustifiable differences in SPS measures that result in discrimination or a disguised restriction of international trade.¹³ The interpretation of “arbitrary or unjustifiable” is informed by the chapeau of Article XX of the GATT, which requires differences to “bear[] a rational relationship to the objective of the measures.”¹⁴ ESODEC’s measures do not violate the SPS Agreement since there are no relevant “differences” between the treatment of ESODEC members and non-members that could result in unlawful discrimination. However, should the panel find that relevant differences in treatment exist, ESODEC’s objectives of fostering an integrated Stormian economy while maintaining the health and richness of Stormian citizens, traditions, and the environment justify the measures.¹⁵

1. ESODEC’s ALOP is consistent with Article 5.5.

Doaa Motaal, *The "Multilateral Scientific Consensus" and the World Trade Organization*, 38 J. OF WORLD TRADE 855, 856 (2004).

¹¹ See Jacqueline Peel, *A GMO by Any Other Name*.

¹² Case, [Annex I, Ex. C, “ESODEC Regulation 7/2015 . . . Establishing the Enhanced Control Procedure for Potentially Dangerous Products (ECP Regulation)”].

¹³ See PR, *US – Poultry (China)*, [7.259].

¹⁴ *Id.*, [7.263].

¹⁵ See Case, [Annex I, Ex. B, “ESODEC Regulatory Community Agreement of 2012”]; *id.*, [Annex I, Ex. C].

Article 5.5 of the SPS Agreement confers a non-discrimination obligation on WTO members with respect to the application of an appropriate level of SPS protection (“ALOP”).¹⁶ To prove a violation of this obligation, complainants bear the burden of showing that the ALOP violates all three conditions of Article 5.5.¹⁷ These include: A) the ALOP applies differently to WTO members in different yet comparable situations, (B) the levels of protection exhibit arbitrary or unjustifiable differences in their treatment of different situations, and (C) the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade.¹⁸ Astor fails to prove these conditions.

A. *ESODEC’s ALOP does not distinguish between WTO members.*

The first condition required to find a violation of Article 5.5, that a Member has adopted an ALOP in different situations distinguishing between WTO members, requires i) the existence of different yet comparable situations and ii) “the existence of different ALOPs in such situations.”¹⁹ Astor’s claim fails since ESODEC’s ALOP applies to different yet non-comparable situations and ESODEC’s equivalency agreement allows for similar levels of protection where situations in WTO member-countries are comparable to ESODEC members.

i. “Different yet comparable” situations do not exist between Astor and Cosmia

“Different situations” result from the varied application of a country’s ALOP to different WTO members or products.²⁰ The Panel in *U.S. – Poultry* found such a difference when the U.S. imposed a restriction only on China that barred the country from certifying its exports as equivalent while leaving the privilege open to others.²¹ In contrast, ESODEC’s restrictions on marbled crayfish constitute a complete moratorium on all crayfish imports, applying equal stringency to all WTO members in order to ensure the elimination of marbled crayfish from exports into the ESODEC community.²²

The existence of the RCA allows ESODEC members to forego measures imposed by the Crayfish Ban.²³ While Astor may argue that this results in differential treatment of ESODEC and non-ESODEC members, this would contradict the WTO’s permissive view of

¹⁶ See PR, *US – Poultry (China)*, [7.218].

¹⁷ See PR, *Australia – Salmon (Article 21.5 – Canada)*, [7.88].

¹⁸ See ABR, *EC – Hormones*, [214-215, 217].

¹⁹ See *id.*, [214-218]; see also ABR, *Australia – Salmon*, [140, 143] (citing PR, *Australia – Salmon*, [8.108]); PR, *US – Poultry (China)*, [7.225].

²⁰ See PR, *US – Poultry (China)*, [7.225].

²¹ See *id.*, [7.231].

²² See Case, [Annex I, Ex.D]. This may indicate, as in *Australia – Salmon*, that the measures do not constitute SPS measures at all.

²³ See Case, [Annex I, Ex. B]; *id.*, [Chapter II, art. 6-7].

RTAs.²⁴ The privileges afforded to ESODEC members only occur after the Regulations Authority has worked with member countries to ensure the laws and regulations of the country comply with ESODEC's regulations,²⁵ and the RCA imposes requirements on member countries to allow continued periodic review of member states' laws and regulations to ensure compliance.²⁶ By leaving ESODEC, Astor abandoned the requirements of continued monitoring necessary to maintain the regional trade area.

Further, the distinctions between ESODEC's ALOP as applied to members and non-members are not so "rigid and unbending" to qualify as "differences" under Article 5.5.²⁷ Unlike *US – Poultry*, all WTO Members outside ESODEC have an opportunity to enjoy the same benefits the RCA gives to ESODEC members by requesting equivalency, which ensures that the laws and regulations of the non-ESODEC exporter are sufficient to guarantee the elimination of marbled crayfish.²⁸ By seeking to avoid both the requirements of the RCA in leaving ESODEC and refusing to comply with the equivalence agreement provision for non-ESODEC members, Astor asks Taikon to extend a privilege that neither Cosmia nor other WTO Members enjoy, in violation of the SPS Agreement.

Even if the Panel finds relevant differences in ESODEC's level of protection, the different situations between Astor and ESODEC members are not "comparable," since Astor's abandonment of the RCA's continued monitoring requirements and refusal to negotiate with the Regulations Authority makes verification of Astor's regulations impossible. For a situation to be "comparable," there must be sufficiently "common elements" between the different situations considering the objective of the ALOP.²⁹ The objective of ESODEC's ALOP is the total elimination of marbled crayfish in the Stormian community, which is achieved through continued monitoring by the Regulations Authority.³⁰ While the historical monitoring of both Cosmia and Astor indicates that they posed nearly identical risks in the past, ESODEC's inability to ensure future compliance in Astor makes the two countries non-comparable.³¹ The continued claim of no risk in Astor cannot be assumed on good faith alone given Mr. Terix's indications that Astor will no longer cooperate with ESODEC's

²⁴ See Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 LAW AND CONTEMPORARY PROBLEMS 137, 138, 149-150 (2015).

²⁵ See Case, [Annex I, Ex. B, Chapter II, art. 7].

²⁶ See *id.*, [Annex I, Ex. B, Chapter II, art. 6.2, art. 25].

²⁷ Cf. ABR, *US – Shrimp*, [163].

²⁸ See Case, [Annex I, Ex. B, Chapter II, art. 12].

²⁹ ABR, *EC – Hormones*, [217].

³⁰ See Case, [Annex I, Ex. B, Chapter II, art. 6.2, art. 25].

³¹ See *id.*, [Annex II, "Trade Data", Ex. A, "Prepared Foods with Stormian Crab and Marbled Crayfish Imported into Taikon"].

Regulations Authority.³² Potential issues with verification and enforcement in Astor can justify differential treatment of unlike circumstances, especially since Astor refused ESODEC's offers to cooperatively solve these regulatory challenges.³³ Therefore, Astor and Cosmia no longer share "common elements" with respect to ESODEC's objective of eliminating all future risks of marbled crayfish.³⁴

- ii. *Alternatively, the equivalence agreement prevents substantial distinctions between ALOPs applied to ESODEC members and non-members.*

Even if "different yet comparable" situations exist, a panel must find that the differences in treatment between countries is substantial to find the application of different ALOPs.³⁵ Here, the equivalence agreement provides substantially similar treatment of all WTO members by waiving the application of the ECP to non-ESODEC members after entering into reciprocal equivalence agreements.³⁶ Since this extends the same privilege to ESODEC and non-ESODEC members, there is no significant difference between ALOPs.

Astor may argue that the equivalence agreement violates Article I:1 of the GATT by not granting unconditional or immediate equivalency to like products in Astor.³⁷ First, WTO members are permitted to enter RTAs as long as all other WTO members have the opportunity to demonstrate equivalency.³⁸ Additionally, "conditions" in the equivalence agreement are allowed to the extent that they are necessary to ensure non-ESODEC member laws are equivalent to ESODEC members.³⁹ Taikon fulfills these requirements since mutual recognition of equivalence is open to all WTO members, the equivalence agreements comply with Article 6 of the TBT Agreement and Article 4 of the SPS Agreement, and the only "condition" imposed on non-ESODEC members is cooperation with the Regulations Authority's assessment of equivalency.⁴⁰ Astor cannot claim a violation of the SPS Agreement or Article I:1 of the GATT because it has not requested equivalency.

B. ESODEC's ALOP is not arbitrary or unjustifiable.

Should the panel find relevant differences between the applications of ESODEC's ALOP, these differences are justified since they support the objectives of the Crayfish Ban

³² See Case, [5.1, 5.2].

³³ See Arwel Davies, *Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil – Tyres*, 43 J. OF WORLD TRADE 507, 520-21 (2009).

³⁴ Cf. ABR, *US – Gasoline*, [25-26].

³⁵ See PR, *Australia – Salmon*, [8.123].

³⁶ See Case, [Annex I, Ex. B, Chapter II, article 12]; see also *id.*, [Annex I, Ex. C, art. 6]

³⁷ See PR, *Canada-Automobiles*, [10.23].

³⁸ See Howse, *supra* note 29, at 140.

³⁹ See *id.* at 142; see also Lorand Bartels, *The Legality of the EC Mutual Recognition Clause Under WTO Law*, 8 J. OF INT'L ECON. L. 691 (2005).

⁴⁰ See Case, [Annex I, Ex. B, Chapter II, article 12].

and the RCA. An ALOP is arbitrary or unjustifiable if the rationale used to explain the difference in the treatment of different countries bears no connection to the objectives of the challenged measure.⁴¹ The objectives of the ESODEC Agreement and the RCA are to “facilitate inter-Stormian trade” and “establish[] a rules-based economic community.”⁴² This requires cooperation and trust to ensure member countries act in the mutual interests of the region. Accordingly, the ESODEC Regulations Authority requires continued monitoring of the laws and regulations of ESODEC members and retains the ability to revoke equivalence agreements of non-ESODEC members.⁴³ This is to ensure future compliance with the moratorium on marbled crayfish “considering the shared objectives of the Community[] enshrined in the ESODEC Agreement.”⁴⁴ By leaving ESODEC, Astor abrogated the trust necessary to achieve ESODEC’s community objectives and can no longer enjoy the same treatment as Cosmia without cooperating with ESODEC to ensure future equivalency.

C. *Any resulting difference is not a disguised restriction on trade.*

If any differences result from ESODEC’s ALOP, it is due to a legitimate purpose related to the measure’s objective and not a disguised restriction on international trade. A disguised restriction on international trade may be indicated by three “warning signals”: 1) arbitrary or unjustifiable character of the differences in levels of protection, 2) substantial differences in levels of protection between similar products or countries, and 3) inconsistency with Articles 5.1 and 2.2 of the SPS Agreement.⁴⁵ Since this submission already described the absence of the first two “warning signals,” this analysis will focus on the third.

Article 5.1 states that SPS measures must be based on an “assessment” of the “risks to human, animal or plant life or health, taking into account risk assessment techniques developed by . . . relevant international organizations.”⁴⁶ Here, the Crayfish Ban was implemented only after extensive review and consultation with an independent scientific body compiling various international studies.⁴⁷ ESODEC’s recognition of equivalence is also based on wide acceptance of equivalence agreements throughout the WTO community.⁴⁸

Article 2.2 similarly requires that SPS measures be based on scientific principles and evidence and that the SPS measures are applied “only to the extent necessary to protect

⁴¹ See ABR, *Brazil – Retreaded Tyres*, [227].

⁴² Case, [Annex I, Ex. A, “Agreement Establishing the East Stormy Ocean Development and Economic Community, preamble]; *id.*, [Annex I, Ex. B, preamble].

⁴³ See *id.*, [Annex I, Ex. B, art. 6, art. 12].

⁴⁴ Case, [Annex I, Ex. D, preamble].

⁴⁵ See ABR, *Australia – Salmon*, [158].

⁴⁶ SPS Agreement, [Art. 5.1].

⁴⁷ See Case, [Annex III, “Abstract of Scientific Study”].

⁴⁸ See Howse, *supra* note 29, at 140.

human, animal or plant life or health.”⁴⁹ The studies in Annex III show that, due to the potential for rapid breeding from just a few female crayfish individuals, the complete elimination of the species was necessary to protect human, environmental, and cultural resources in the Stormy Ocean community.⁵⁰ Since the scientific evidence indicates that a complete prohibition on imports potentially containing marbled crayfish is “necessary to protect human, animal . . . life or health,” ESODEC’s ALOP is justified.

2. ESODEC’s RCA is consistent with Article 2.3.

To prove a violation of Article 2.3 of the SPS Agreement, Astor must cumulatively prove that: A) identical or similar conditions prevail in the territory of Astor and Cosmia, B) the measure discriminates between Astor and Cosmia, and C) the discrimination is arbitrary or unjustifiable or a disguised restriction of international trade.⁵¹ This imposes similar, yet more general requirements to Article 5.5. As discussed in section II.1.A, *supra*, identical conditions no longer prevail in Astor because, without undergoing an equivalency agreement, ESODEC has no way of ensuring Astor’s continued compliance with ESODEC regulations. Additionally, the RCA does not discriminate between similar members, and where discrimination may occur, it is justified by the RCA’s objectives.

A. *Identical or similar conditions do not prevail between Astor and Cosmia.*

The assessment of identical or similar conditions between WTO members may include differences in environmental and physical factors, but also differences in human and regulatory conditions.⁵² While Taikon concedes that environmental conditions between Astor and Cosmia are identical or similar, Astor’s lack of commitment to the ESODEC community and unwillingness to cooperate with the Regulations Authority causes insurmountable differences in the regulatory conditions of Astor.

Astor may argue that that the Regulations Authority imposes significant burdens on Astor and that Taikon failed its obligation to facilitate access of Astor’s products. The panel in *EC – Seal Products* imposed a “procedural necessity of making regulation evenly available to all exporters,” finding that the U.S. violated this obligation by failing to assess whether export certifications were appropriate given the individual conditions prevailing in WTO member countries.⁵³ However, this obligation is satisfied if the imposing country seeks to

⁴⁹ SPS Agreement, [Art. 2.3].

⁵⁰ See Case, [Annex III].

⁵¹ See PR, *Australia – Salmon (Article 21.5 – Canada)*, [7.111]; see also PR, *India – Agricultural Products*, [7.389]; *US – Animals*, [7.571]; *Russia – Pigs (EU)*, [7.1297].

⁵² See generally Emily Lydgate, *Do the same conditions ever prevail? Globalizing national regulation for international trade*, 50 J. OF WORLD TRADE 971 (2016).

⁵³ *Id.* at 11; ABR, *EC – Seal Products*, [5.337].

cooperate with exporting countries to mitigate administrative difficulties.⁵⁴ Taikon fulfilled its obligation to mitigate administrative burdens in Astor by allowing mutual certification of equivalence with ESODEC's Regulations Authority. Unlike *EC – Seal Products*, failure to cooperate with Astor is not a result of Astor's lack of development or regulatory capacity, but rather Astor's unwillingness to cooperate.

Astor still may argue that achieving equivalency is overly burdensome. But ESODEC's recognition of equivalence places minimal administrative burdens on non-ESODEC member applicants, since the Regulations Authority, rather than the applicant, "prepare[s] a report on the laws, regulations and institutional framework of the exporting country."⁵⁵ Given that Astor previously complied with the extensive requirements to join ESODEC, a panel should not find that the minimal requirements necessary to achieve equivalency are overly burdensome.

B. *The RCA does not discriminate between ESODEC members and non-members.*

A measure "discriminates between Members" only if 1) there is differential treatment and 2) such differential has altered the conditions of competition between members to the detriment of one member's products.⁵⁶ As discussed in section II.1.A, *supra*, Taikon's measures do not discriminate because its equivalency agreement applies equally to all WTO members. Still, the panel may look to the impact on competition to determine whether general discrimination has occurred contrary to Article 2.3. While Astor's prepared food exports have dropped by nearly 70 percent following its withdrawal from ESODEC, its exports of live crabs has also grown 20 percent in the same period.⁵⁷ This indicates that if any change in the "conditions of competition" has occurred, reduced competition from marbled crayfish has helped increase live Stormian crab exports to Astor's benefit. While Astor's prepared Stormian crab exports have fallen, these are not SPS measures. Even if the panel finds they are SPS measures, Astor's complaint should fail because they cannot cumulatively prove the three elements of Article 2.3.

C. *Alternatively, any discrimination is justified by the RCA's objectives.*

A measure discriminates unjustifiably if it does so without any rational connection between the reasons given for the discriminatory treatment and the objective of the

⁵⁴ Cf. ABR, *US – Gasoline*, [25-26]; see also Davies, *supra* note 38, at 520-521.

⁵⁵ Case, [Annex I, Ex. B, Chapter II, art. 12].

⁵⁶ See PR, *US – Animals*, [7.573]; PR, *Russia – Pigs (EU)*, [7.1318].

⁵⁷ See Case, [4.4].

measure.⁵⁸ As discussed in part II.1.C, *supra*, the RCA's objective is to "deepen the integration between the Stormian economies," and help achieve the objectives of the ESODEC Agreement, such as "preservation of the . . . purity and cleanliness of the Stormian environment."⁵⁹ Applying the Crayfish Ban to the RCA is necessary to preserve the Stormian environment and any discrimination is therefore justified.

The science-based risk assessment conducted prior to implementing the measure supports this justification.⁶⁰ Before applying the Crayfish Ban to the RCA, the ESODEC community sought out scientific studies to evaluate the impact of marbled crayfish on the local ecosystems in the Stormy Ocean, building off previous studies that found the marbled crayfish to be a "high-risk invasive species" in introduced regions throughout the world and concluding similar or worse impacts on the ecosystem in the Stormy Ocean.⁶¹ The study therefore recommended "an immediate halt to the importation, production and commercialization of marbled crayfish in the East Stormy Ocean region," and ESODEC members placed a moratorium on marbled crayfish exports.⁶² Since ESODEC found it necessary to eliminate all products potentially containing marbled crayfish due to the risk of irreversible damage, Taikon is justified in using the RCA to implement the Crayfish Ban.

III. TAIKON'S APPLICATION OF THE ECP TO ASTOR IS CONSISTENT WITH TAIKON'S OBLIGATIONS UNDER ARTICLE 4.1 OF THE SPS AGREEMENT.

First, after Astor's withdrawal from ESODEC, Taikon is legally prohibited from continuing to recognize Astor's measures as equivalence in order to comply with GATT 1994 Article I:1's MFN principle. Second, Taikon has no duty to afford Astor any recognition of equivalence because Astor failed to provide any science-based and technical information to support its request for equivalence. Third, Taikon enjoys broad discretion in determining whether Astor's measures are equivalent. Finally, Taikon has fulfilled all other obligations under Article 4 of the SPS Agreement.

1. Taikon is legally prohibited from retaining Astor's equivalence status.

Taikon's previous recognition of Astor's measures as equivalence was solely based on Astor's membership in ESODEC pursuant to Article II of the ESODEC Regulatory Community Agreement of 2012, which exempts ESODEC member nations from "additional technical, sanitary, phytosanitary, or administrative controls to assess conformity with either

⁵⁸ See PR, *India – Agricultural Products*, [7.428-7.429]; PR, *Brazil – Retreaded Tyres*, [226-227]; PR, *Russia – Pigs (EU)*, [7.1320-7.1321].

⁵⁹ Case, [Annex I, Ex. B, preamble; *id.*, [Annex I, Ex. A, preamble].

⁶⁰ See, e.g., PR, *Russia – Pigs (EU)*, [7.1390].

⁶¹ Case, [Annex III].

⁶² *Id.*

the relevant ESODEC Regulation or the importing Member's own laws and regulations."⁶³ After Astor's withdrawal from ESODEC, this basis for recognition of equivalence has ceased to exist. Taikon thus must terminate Astor's equivalence since otherwise Taikon would contravene the MFN principle under GATT 1994 Article I:1. That is because other non-ESODEC members with the ability to achieve the appropriate level of protection will have cause to challenge Taikon for being excluded from recognition.⁶⁴ Therefore, Taikon is legally prohibited from continuing to recognize Astor's measures as equivalence after Astor's withdrawal from ESODEC.

2. Astor failed to make a proper request for recognition of equivalence.

Even if Taikon can legally retain Astor's equivalence status, Taikon is under no obligation to do so because Astor has yet to properly request for recognition for equivalence. Article 4.1 of the SPS Agreement obliges the exporting member to "objectively demonstrate[] to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection."⁶⁵ Moreover, the Decision on Equivalence requires the exporting member to "provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member."⁶⁶

In this case, Astor failed to satisfy the requirements in both Article 4.1 of the SPS Agreement and the Decision on Equivalence. In Astor's January 14, 2019 letter to ESODEC, Astor stated that it requested Cosmia and Taikon to "ensure that Astorian exporters continue to benefit from the recognition of the quality and safety of [Astorian] products as equivalent to [Cosmian and Taikonian products]." This statement standing alone, without providing any science-based and technical information necessary for Taikon to evaluate its claim, cannot suffice as a request for recognition of equivalence under Article 4.1 of the SPS Agreement or the Decision on Equivalence. Taikon thus is under no obligation to afford Astor any recognition of equivalence.

⁶³ Case, [1.4].

⁶⁴ See Emily Lydgate & L. Alan Winters, *Deep and Not Comprehensive? What the WTO Rules Permit for a UK-EU FTA*, 18 *WORLD TRADE J.* 451, 464 (2019) (noting that the United Kingdom will not be able to retain its mutual recognition agreements with the European Union without violating the MFN principle).

⁶⁵ SPS Agreement, [art. 4.1].

⁶⁶ WTO Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, 23 July 2004, WTO document G/SPS/19/Rev.2 (2004). [Hereinafter Decision on Equivalence].

3. It is Taikon's prerogative to determine what SPS measures are equivalent.

Even if Astor has properly made a request for recognition of equivalence, Taikon enjoys broad discretion in determining whether the information Astor has submitted is sufficient for demonstrating equivalence. Under the SPS Agreement, an importing member implicitly enjoys broad discretion as to what type of procedure from the exporting member constitutes adequate equivalence in light of standard treaty interpretation conventions.⁶⁷ This interpretation is formed in accordance with the Vienna Convention on the Law of Treaties (VCLT), which panels turn to pursuant to Dispute Settlement Understanding Article 3.2.⁶⁸ The VCLT states that “subsequent practice” in a treaty’s application can be taken into account when interpreting a treaty after first analyzing the ordinary meaning of the text.⁶⁹ Here, the text of the SPS Agreement leaves the equivalence requirement vague and open-ended, inferring a broad discretion conferred to the importing member.⁷⁰ Further, there is no adjudicated case law on SPS Agreement Article 4, indicating that members are rarely challenged for their non-recognition of equivalence. In fact, despite Article 4, equivalence agreements on a bilateral or multilateral basis are extremely rare and narrow in scope.⁷¹ The subsequent practice further affirms the broad discretion an importing member enjoys.

Moreover, under the SPS Agreement, the determination of the appropriate level of protection of human, animal, or plant life or health is the prerogative of the member imposing the SPS measure.⁷² Significantly, the Appellate Body has highlighted that the importing member is even allowed to set a “zero-risk” level of protection.⁷³ In this case, Taikon is entitled to set an extraordinarily high level of protection, as it did so under ESODEC Regulation 13/2018, which aims to completely prohibit marbled crayfish from Taikon’s territory.⁷⁴ Therefore, Taikon has broad discretion in determining whether Astor’s measures are equivalent.

4. Taikon has fulfilled all other obligations under Article 4 of the SPS Agreement and the Decision on Equivalence.

Even though it is the Decision on Equivalence’s recommendation that “[a]n importing Member shall respond in a timely manner to any request from an exporting Member for

⁶⁷ See SPS Agreement, [art. 4.1].

⁶⁸ DSU, [art. 3.2]; ABR, *US – Steel*, [61]

⁶⁹ Vienna Convention on the Law of Treaties, [arts. 31–32].

⁷⁰ See *id.*

⁷¹ See Lydgate & Winters, 467–68.

⁷² See ABR, *Australia – Salmon*, [199].

⁷³ See *id.*, [125].

⁷⁴ Case, [Annex I], ESODEC Regulation 13/2018 (Crayfish Ban), art. 1.1.

consideration of the equivalence of its measures, normally within a six-month period of time,”⁷⁵ nothing in the text of the SPS Agreement imposes a hard deadline for the importing member to respond. In fact, the panel in *US – Poultry* has concluded that the Decision on Equivalence has no legally binding effect on WTO member states.⁷⁶ Indeed, the timeline for consideration of equivalence should depend on the facts and circumstances of each case.

In this case, several reasons justify a more extended timeline. Stormian crab is vital to Taikon’s economy, environment, and national identity. In light of the grave dangers that marbled crayfish can pose to Taikonese citizens and environment, Taikon must exercise extra care in considering a measure for equivalence. Moreover, Astor’s reliance on the two countries’ historical trade relationship for an accelerated timeline is misplaced. The relationship between Taikon and Astor eroded dramatically since Astor withdrew from ESODEC and demonstrated remarkable animosity towards the organization. As a result, Taikon could no longer maintain the same level of trust in Astor’s procedures and is justified in being more cautious in reviewing an request of a sensitive nature from Astor. Further, Taikon is in full compliance with the Article 4.2 of the SPS agreement because Taikon has put in sufficient effort to “enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence.”⁷⁷ Taikon has in good faith welcomed a multilateral agreement on equivalence with Astor. The Taikonese President even stated that “[t]he doors to my office will remain open in case President Terix wishes to begin negotiations over such an agreement.” It is Astor, not Taikon, that unjustifiably and unilaterally abandoned the negotiations. Therefore, Taikon can in no way be faulted for a lack of an equivalence agreement between Astor and Taikon.

IV. TAIKON’S APPLICATION OF THE ECP TO ASTOR IS CONSISTENT WITH TAIKON’S OBLIGATIONS UNDER GATT 1994 ARTICLE I:1; TAIKON’S MEASURES ARE FURTHER JUSTIFIED UNDER GATT 1994 ARTICLES XX AND XXIV.

1. Taikon’s measures are consistent with GATT 1994 Article I:1.

GATT 1994, Article I:1 requires that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁷⁸ To establish a violation under Article I:1, Astor must prove that (1) the ECP measure is within the scope of Article I:1; (2)

⁷⁵ Decision on Equivalence para. 4.

⁷⁶ PR, *US – Poultry*, [2.5–2.16].

⁷⁷ SPS Agreement, [art. 4.2].

⁷⁸ GATT 1994, [art. I:1].

the ECP measure grants an advantage; (3) the products concerned are “like products;” and (4) the advantage was not accorded immediately and unconditionally to Astor.⁷⁹

In this case, the products concerned are not “like products,” and the advantage was not accorded immediately and unconditionally to Astor. First, Astor failed to prove that Astorian crabs and Cosmian crabs are like products. It is worth noting that the jurisprudence on “likeness” within Art I:1 is limited, and scholars have suggested that the decisions on “likeness” within the meaning of GATT 1994 Article III:4 should be considered.⁸⁰ Under Article III:4, a determination of whether two products are like products depends on the nature and extent of competitive relationship between the two products.⁸¹ A panel should examine all relevant factors on a case-by-case basis, including consumer tastes and habits.⁸² In this case, Astorian crabs and Cosmian crabs are not like products because consumers’ tastes and habits differentiate the two products. Although the two types of crabs may belong to the same species with similar physical characteristics, they represent different cultures and national identities. After Astor’s withdrawal from ESODEC, Taikonese consumers will harbor different feelings towards Astor and Cosmia and will carefully distinguish products from the two countries. As a result, the competitive relationship between Astorian crabs and Cosmian crabs will be much weakened, rendering the two products not like products.

Second, Astor failed to prove that the advantage was not accorded immediately and unconditionally to Astor. With regard to the meaning of “unconditionally” within Article I:1, the Appellate Body has clarified that “it does not follow that Article I:1 prohibits a Member from attaching *any* conditions to the granting of an “advantage” within the meaning of Article I:1 . . . Rather, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.”⁸³ In this case, although Taikon attached a condition to the granting of advantage to Astor, i.e., the exemption from the ECP is conditioned upon Astor’s membership in ESODEC, it is not a condition that has a detrimental impact on the competitive opportunities for Astorian products. On the contrary, a membership in ESODEC will only increase the market position of Astorian products in Taikon. Therefore, Astor failed to prove that the advantage was not accorded unconditionally to Astor.

⁷⁹ See ABR, *EC – Seal Products*, [5.86].

⁸⁰ PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 138 (4th ed. 2017).

⁸¹ ABR, *EC – Asbestos*, [113–14, 152–53].

⁸² *Id.*

⁸³ ABR, *EC – Seal Products*, [5.88].

2. The application of the ECP to Astor is justified under GATT 1994 Article XXIV.

Even if Taikon's application of the ECP to Astor is inconsistent with GATT 1994 Article I:1, Taikon's measure is justified under GATT 1994 Article XXIV. To invoke an Article XXIV exception for a free trade area (FTA), Taikon needs to show that (1) the measure at issue is introduced upon the formation of an FTA; (2) the FTA meets the requirements of paragraphs 8(b) and 5(b) of Article XXIV; and (3) the measure is necessary for the formation of an FTA.⁸⁴ Taikon has satisfied all three requirements.

A. The ECP is "introduced upon the formation" of an FTA.

The panel in *US – Line Pipe* has clarified the meaning of "introduced upon formation" as that a subsequently adopted measure falls within the Article XXIV defense as long as the regulatory mechanism for adopting the measure was established on the formation of the FTA.⁸⁵ Such interpretation aligns with the reality that FTAs evolve, and parties to an FTA are "unable to provide specifically for every conceivable eventuality upon the formation of the agreement."⁸⁶ Therefore, the exception under Article XXIV:5 should extend to both the regulatory mechanism and the subsequent implementing measures.

In this case, even though the ECP measure was not introduced immediately upon the formation of the ESODEC, it was adopted as a ESODEC regulation pursuant to the ESODEC Regulatory Community Agreement, which is a regulatory mechanism that entered into force upon the formation of ESODEC. Therefore, the ECP measure is "introduced upon the formation" of an FTA.

B. ESODEC satisfies requirements under paragraphs 5(b) and 8(b) of Article XXIV.

Paragraph 5(b) requires that duties and other regulations of commerce maintained in each member of the FTA are not higher or more restrictive after formation of the FTA than those prior to the formation of the FTA.⁸⁷ Here, ESODEC satisfies the requirement because nothing in the ESODEC Agreement or the RCA suggests that any ESODEC member is increasing its duties and other regulations of commerce against non-ESODEC member after the formation of ESODEC.

⁸⁴ See GATT 1994, [art. XXIV:5, 8]; see also PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 685–86 (4th ed. 2017).

⁸⁵ See PR, *US – Line Pipe*, [7.141 n.128]; see also Lorand Bartels, *The Legality of the EC Mutual Recognition Clause Under WTO Law*, 8 J. OF INT'L ECONOMIC L. 691, 712–13 (2005).

⁸⁶ Tegan Brink, *Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres (2010)*, 43 JOURNAL OF WORLD TRADE 813, 822–24 (2010) (citing Nicholas J.S. Lockhart & Andrew D. Mitchell, *Regional Trade Agreements under GATT 1994: An Exception and Its Limits*, in CHALLENGES AND PROSPECTS FOR THE WTO 225 (Andrew D. Mitchell ed. 2005)).

⁸⁷ GATT 1994, [art. XXIV:5(b)].

Paragraph 8(b) requires that duties and other restrictive regulations of commerce are eliminated on substantially all the trade between members of the free trade area. Here, ESODEC satisfies the requirement because pursuant to Article 2 of the ESODEC Agreement, tariffs on all products were eliminated among its members,⁸⁸ and pursuant to Article 2 of the RCA, ESODEC members are exempt from each other additional restrictive regulations of commerce.⁸⁹

C. *The ECP is necessary for the formation of ESODEC.*

No panels have yet to rule on what it means for a measure to be necessary for the formation of an FTA. In the context of a customs union, the Appellate Body in *Turkey – Textiles* introduced a necessity test which requires member claiming an defense under Article XXIV to show that “the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue.”⁹⁰ However, the panel in *US – Line Pipe* explained that the necessity test should not apply in “cases where the alleged violation of GATT 1994 arises from the elimination of ‘duties and other restrictive regulations of commerce’ between parties to an FTA, which is the very *raison d’être* of any free trade area.”⁹¹ Indeed, “the application of a necessity test in such circumstances would give rise to absurd results” because it would discourage the recognized goal of a FTA to “facilitate trade between the constituent territories” of the FTA.⁹² Moreover, as the panel clarified, “[i]f the alleged violation of GATT 1994 forms part of the elimination of ‘duties and other restrictive regulations of commerce’, there can be no question of whether it is necessary for the elimination of ‘duties and other restrictive regulations of commerce.’”⁹³

That is precisely the circumstance in this case. The alleged violation at issue, Taikon’s granting of the exemption to Cosmia under ECP, was part of ESODEC’s effort to eliminate “other restrictive regulations of commerce” with its members to form the FTA of ESODEC. Therefore, the ECP measure should be deemed necessary because the alleged violation of Article I:1 result only from the elimination of “other restrictive regulations of commerce.”

3. The application of the ECP to Astor is justified under GATT 1994 Article XX.

Taikon’s application of the ECP to Astor is further justified under the general exceptions in GATT 1994 Article XX. To invoke an exception under GATT 1994 Article XX,

⁸⁸ See Case, [1.3].

⁸⁹ See Case, [1.4].

⁹⁰ ABR, *Turkey – Textiles*, [58].

⁹¹ PR, *US – Line Pipe*, [7.148].

⁹² *Id.*, [7.148 n. 137]; see also GATT 1994, [art. XXIV:4].

⁹³ See PR, *US – Line Pipe*, [7.148].

Taikon needs to show that (1) the measure at issue is provisionally justified under one or more of the substantive exceptions in paragraphs (a) to (j); and (2) the measure has satisfied the requirements imposed by the chapeau of Article XX.⁹⁴

A. *Taikon's measures are justified under Article XX(a).*

To justify a measure under Article XX(a), the measure must be “designed to” and “necessary to” protect public morals.⁹⁵ First, members have the right to “define and apply for themselves the concept of ‘public morals’ . . . according to their own systems and scales of values.”⁹⁶ Specifically, a panel has found animal welfare to be “an important value and interest” within the meaning of “public morals.”⁹⁷ Moreover, the Appellate Body has held that a member has the right to determine the level of protection of public morals that it considers appropriate.⁹⁸ Second, a measure is “designed to” protect public morals when the measure is capable of protecting public morals. Finally, to determine whether a measure is “necessary to” protect public morals, three factors should be considered: (1) the importance of the interests or values at stake; (2) the measure’s contribution to the achievement of the protection of public morals; and (3) the trade restrictive impact on international trade.⁹⁹

First, the public morals Taikon aims to protect here are “purity and cleanliness of the Stormian environment” and “the richness of Stormian traditions”,¹⁰⁰ specifically the protection of Stormian crabs and related “traditional Stormian cuisine and culture.”¹⁰¹ Second, the ECP measure is “designed to” protect public morals of Taikon because the measure is capable of protecting Stormian crabs. Since the implementation of the ECP measure, the entry of marbled crayfish to Taikon has been reduced to zero,¹⁰² demonstrating the high effectiveness of the ECP at eliminating marbled crayfish within ESODEC and safeguarding Stormian crabs’ habitats.

Finally, the ECP measure is “necessary to” protect public morals of Taikon because (1) the importance of interests or values at stake is high because the wellbeing of Stormian crabs are crucial to the environment, economy, and national identity of Taikon; (2) the contribution of the measure to the achievement of the protection of public morals is high because the ECP was recognized to be highly effective in enforcing the Crayfish Ban; and (3)

⁹⁴ See ABR, *US – Gasoline*, [22].

⁹⁵ See ABR, *Colombia – Textiles*, [6.20].

⁹⁶ PR, *Colombia – Textiles*, [7.334].

⁹⁷ See PR, *EC – Seal Products*, [7.632].

⁹⁸ See ABR, *EC – Seal Products*, [5.200].

⁹⁹ See PR, *China – Publications and Audiovisual Products*, [7.789].

¹⁰⁰ Case, [Annex I, Ex. D, preamble].

¹⁰¹ Case, [Annex I, Ex. C, preamble].

¹⁰² See Case, [3.5].

the trade-restrictive impact of ECP is low because the measure is not a ban on Astorian products; instead, it is merely a procedure used to screen out the marbled crayfish from the Astorian imports. Additionally, there are no reasonable alternative measures that can achieve the same level of protection because less trade-restrictive means, such as a licensing or certification scheme, will not suffice as they are less rigorous in screening out marbled crayfish than the ECP measure. That is because Astor is no longer a part of the ESODEC Regulatory Community, and Astor's lack of a comprehensive regulatory regime further renders Taikon's measures necessary.

B. *Taikon's measures are justified under Article XX(b).*

To justify a measure under Article XX(b), the measure must be "designed to" and "necessary to" protect human, animal, or plant life or health.¹⁰³ First, for a measure to be "designed to" protect human, animal, or plant life or health, the policy pursued by measure must fall "within the range of policies designed to protect human, animal or plant life or health."¹⁰⁴ The jurisprudence has shown significant degree of deference in accepting the policy objective of a measure as to protect human, animal or plant life or health.¹⁰⁵ Second, the same three factors stated above should be considered in determining whether a measure is "necessary." Importantly, it is for the member imposing the measure to determine the level of protection that it deems appropriate.¹⁰⁶

In this case, first, the ECP measure as to enforce the Crayfish Ban is "designed to" protect Taikon's human, animal, or plant life or health because the measure is capable of protecting Stormian crabs from the environmental risks posed by marbled crayfish and preventing "the unknown effects of its consumption on human health."¹⁰⁷ Second, as explained above, the ECP measure is "necessary" because of the high importance of interests or values at stake, the high contribution of the measure to the achievement of the protection of human, animal or plant life or health, and the measure's low trade-restrictive impact.

C. *Taikon's measures are justified under Article XX(g).*

To justify a measure under Article XX(g), a measure must (1) relate to the "conservation of exhaustible natural resources" (2) "relate to" the conservation of exhaustible natural resources; and (3) made effective in conjunction with restrictions on domestic production or consumption. First, with respect to conservation, the panel in *China – Rare*

¹⁰³ See, e.g., PR, *US – Gasoline*, [6.20].

¹⁰⁴ *Id.*

¹⁰⁵ See PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 557–58 (4th ed. 2017).

¹⁰⁶ See ABR, *EC – Asbestos*, [178].

¹⁰⁷ Case, [Annex I, Ex. D, preamble].

Earth has clarified that “conservation” is not limited to mere “preservation of natural resources”; rather, WTO members are entitled to design conservation policies that meet their own development needs in light of every country’s permanent sovereignty over their own natural resources.¹⁰⁸ Further, the Appellate Body has adopted an “evolutionary” interpretation of “exhaustible natural resources,” which include “living” things such as fish.¹⁰⁹ Second, a measure “relate[s] to” the conservation of exhaustible natural resources so long as it bears a “close and genuine” relationship to the conservation objective. Third, for a measure to be made effective in conjunction with restrictions on domestic production or consumption, the measure needs to be applied “evenhandedly” on domestic and imported products.¹¹⁰ Significantly, Article XX(g) does not require imported and domestic products to be treated *identically* because otherwise there would be no need to invoke an Article XX exception in the first place.¹¹¹

Here, first, the protection of Stormian crabs is conservation of exhaustible natural resources because Stormian crabs, like fish, are living natural resources within the scope of Article XX(g). Second, the ECP measure has a “close and genuine” relationship to the conservation of exhaustible natural resources because the measure is proven to be highly effective in eliminating marbled crayfish and conserving Stormian crabs.¹¹² Third, the ECP is made effective in conjunction with restrictions on domestic production or consumption because the Crayfish Ban prohibited “possessing marbled crayfish” evenhandedly in the entire territory of ESODEC, including Taikon.¹¹³

D. *Taikon’s measures satisfied Article XX’s chapeau test.*

The ESP’s application to Astor does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor is it a disguised restriction on international trade. First, the analysis of whether discrimination is arbitrary or unjustifiable “must focus on the cause of the discrimination, or the rationale put forward to explain its existence” rather than the effects of the discrimination.¹¹⁴ The Appellate Body in *US – Shrimp* explained that “[i]f a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception, rather than for

¹⁰⁸ See PR, *China – Rare Earths*, [7.266]; see also PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 574 (4th ed. 2017).

¹⁰⁹ See ABR, *US – Shrimp*, [128].

¹¹⁰ See ABR, *US – Gasoline*, [20–21].

¹¹¹ *Id.*, [21].

¹¹² See Case, [3.5].

¹¹³ Case, [Annex I, Ex. D, art. 1.1].

¹¹⁴ See ABR, *Brazil – Retreaded Tyres*, [230]; see also ABR, *US – Tuna II (Mexico) Art. 21.5*, [7.316].

protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception.”¹¹⁵ Moreover, a measure does not constitute arbitrary or unjustifiable discrimination when the member attempted in good faith to negotiate multilateral solutions before taking unilateral measures.¹¹⁶ Second, with regard to the “between countries where the same conditions prevail” element, the Appellate Body in *EC – Seal Products* clarified that “the only ‘conditions’ that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau.”¹¹⁷ Finally, in determining whether a measure is a “disguised restriction on international trade,” the Appellate Body in *US – Gasoline* instructed one to consider the “purpose and object of avoiding abuse or illegitimate use of the exceptions . . . in Article XX.”¹¹⁸

In this case, the ECP does not constitute arbitrary or unjustified discrimination because differentiation in treatment is based on a rationale legitimately connected with the policy of Article XX exceptions. The differentiation in treatment here is not only based on a country’s membership in ESODEC, which confers the capacity to implement a comprehensive regulatory framework under ESODEC, but also the level of bilateral trust and common interest in eliminating marbled crayfish in their territories. Both the regulatory framework and bilateral trust is closely connected with Taikon’s policy of protecting public morals, human, animal, or plant life or health, and conservation of exhaustible natural resources. Additionally, Taikon has welcomed negotiations for Astor’s exemption from the ECP in good faith and in a multilateral manner, and Taikonese president expressed great openness in accepting an equivalence agreement between ESODEC and Astor. It is Astor that rejected a multilateral before Taikon had to resort to a unilateral measure.

Further, the differentiation in treatment did not occur “between countries where the same conditions prevail” because the relevant conditions for this analysis, i.e. membership in ESODEC, bilateral trust, and common interest in eliminating marbled crayfish, are entirely different between Cosmia and Astor. Finally, the ECP is not a disguised restriction on international trade because the measure is genuinely enacted to protect wellbeing of Stormian crabs and made no misrepresentation of its purpose in order to abuse the rules under Article XX. Therefore, Taikon’s measures passed Article XX’s chapeau.

¹¹⁵ ABR, *US – Shrimp*, [148].

¹¹⁶ *See id.* [115–34]; *see also* PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 598–99 (4th ed. 2017).

¹¹⁷ ABR, *EC – Seal Products*, [5.299].

¹¹⁸ ABR, *US – Gasoline*, [25].

Request for Findings

For the reasons stated above, Taikon respectfully requests the Panel find that:

- I. The Crayfish Ban (13/2018) and Directive 44/2018 are not SPS measures. Further, the ECP as applied to prepared food products is not an SPS measure;
- II. Taikonese Law 14/2012 is consistent with SPS Articles 2.3 and 5.5;
- III. The withdrawal of equivalence recognition and application of the ECP to products from Astor is consistent with Taikon's obligations under SPS Article 4.1;
- IV. Taikon's application of the ECP Regulation to Astor is consistent with Taikon's obligations under GATT Article I:1; and
- V. Taikon's measures are further justified under GATT Articles XXIV and XX.