

secure compliance and if any less restrictive measures are not sufficient.<sup>56</sup>

81. The EC has failed to discharge its burden of proof of showing that the GATT-inconsistent Order is the least trade-restrictive measure available to secure such compliance. Even if it could be shown that the Order could actually enforce compliance with a GATT-consistent law or regulation, there are other less trade-restrictive alternatives reasonably available to France.<sup>57</sup>

*iii. The Order is a means of arbitrary and unjustifiable discrimination, and is a disguised restriction on trade*

82. The Panel must find that the Order is a means of arbitrary or unjustifiable discrimination if it determines that the Order is only directed to imports of scallops from certain countries rather than to such imports from *all* countries where the same conditions prevail.<sup>58</sup> The Panel must also find that the Order is a disguised restriction on trade if it determines that, although the Order does not on its face purport to restrict trade, it has the effect of restricting trade. In conducting these assessments under Article XX(d), the Panel must examine the manner in which the measure is applied.<sup>59</sup>

83. The Order is a means of arbitrary and unjustifiable discrimination as it is not directed against scallops from all countries where the same conditions prevail. Rather, the Order arbitrarily discriminates against imports of scallops from a number of countries including Canada. Scallops from countries such as Australia and New Zealand are permitted to be labelled "coquilles Saint-Jacques" while scallops from Canada must be labelled "pétoncles". There are no relevant conditions that are different between Canada and other countries permitted to label their scallops "coquilles Saint-Jacques" in the French market. This discrimination is unjustifiable as the Order cannot be supported by international labelling practices, scientific classification, scientific analytical methodologies such as electrophoresis, or most importantly, the criteria that normally are relevant to consumers.

84. The Order is also a disguised restriction on trade. Although it does not impose an import ban, a quota, or any other quantitative restriction, the application of the Order has the effect of restricting imports of Canadian scallops into France. France has attempted to disguise both

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<sup>56</sup> *Supra*, note 40, at paragraph 5.52.

<sup>57</sup> *Supra*, paragraph 47.

<sup>58</sup> *United States - Imports of Certain Automotive Spring Assemblies*, Report of the Panel adopted on 26 May 1983, BISD 30S/107, at paragraph 55.

<sup>59</sup> *Ibid.*, at paragraph 53.