

(ii) The Order is more trade-restrictive than necessary

43. Even if the stated objectives of the Order were found to be legitimate and even if the Order were found to be rationally connected to and capable of fulfilling those objectives, the analysis under Article 2.2 requires the panel to determine whether the Order is more trade-restrictive than necessary. In other words, is the Order appropriate and proportionate to the stated objectives?

44. Article 2.2 provides that in determining whether a measure is more trade-restrictive than necessary, the risks that would be created if the legitimate objective is not met must be taken into account. The relevant elements to be considered in assessing such risks include "available scientific and technical information, related processing technology or intended end-uses of products".²¹

45. It is clear that no risks would arise from the non-fulfilment of the stated objectives.

46. There would be no risk to consumers if they did not receive the type of information to be provided pursuant to the Order. Indeed, the Order would likely result in confusion for French consumers. For example, consumers choosing a package of scallops labelled "coquilles Saint-Jacques" in the expectation that the package contains large scallops, may discover on opening the package that they have purchased small *Pecten alba*. On the other hand, permitting large scallops from Canada to be labelled "coquilles Saint-Jacques" will not result in any harm to the consumer.

47. No risk would arise if the objective of preventing fraud was not met in this case, as there is no evidence that fraud has ever been a factor in the labelling of scallops in France.

48. No risk would arise if the objective of ensuring fairness in commercial transactions were not met as the Order would not ensure fairness in commercial transactions. Rather, as noted above, it would adversely affect the attainment of such fairness.

49. No risk would arise if the objective of protecting the French language were not met as the basis for the Order is inconsistent with the linguistic origin of the terms "coquilles Saint-Jacques" and "pétoncles".

50. In any event, the Order is out of all proportion to the stated objectives. It is not necessary to place Canadian scallops at a competitive disadvantage in order to meet the types

²¹ Canada has considered scientific and technical information including domestic and international scientific works, and has considered the intended end-use of the products (a survey of French consumers and importers, and the views of Canadian exporters were considered).
