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ELSA Moot Court Competition (EMC2) on WTO Law 2010-2011

The Bench Memorandum

Russelia – Measures Affecting the Importation of Sheep and Sheep Products from Aldousia

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Introduction: An SPS dispute, not a debate about cloning

The Case concerns a dispute between two states Members of the World Trade Organization (**WTO**) relating to alleged violations of certain provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (the **SPS Agreement, SPS**). The dispute relates to a counterfactual scenario regarding cloned animals and derivative products, an area that has not yet been covered directly in either WTO negotiations or dispute settlement. The Case will require teams to demonstrate their understanding of basic disciplines of the SPS Agreement, such as the requirement of sufficient scientific basis for national SPS measures, the requirement of proper risk assessment, the concept of a least-trade-restrictive alternative, the regime for measures adopted in case of insufficient scientific evidence, as well as traditional trade principles of non-discrimination and disguised restriction of trade as they are embodied in the SPS Agreement. In addition, teams will be required to display their knowledge with regard to certain aspects of Article XX of the General Agreement on Tariffs and Trade 1994 (**GATT**), and, of course, procedural issues flowing from the WTO Dispute Settlement Understanding (DSU). Other potential claims, whether under the SPS, the GATT, or other WTO Covered Agreements, have been deliberately excluded from the case, although inevitably teams may refer in their argumentation to WTO case law more generally.

The case authors intend the teams to exchange legal arguments over the interpretation and application of SPS and GATT law, and not to conduct a debate over the actual scientific basis for banning cloned products. This is a fine yet crucial distinction that reflects the overarching difficulty common to all SPS cases: incorporating scientific methodologies, complex and uncertain facts, and legal disciplines. Panelists must be sensitive to these distinctions and encourage participants to focus on legal argumentation limited to the facts available in the moot case only.

Teams have been referred to existing and current risk assessments of the European Food Safety Authority (EFSA) and the US Federal Drug Administration (FDA), but only in order to assist them in understanding the scientific complexities related to cloning. Scientific *data* from both assessments (as well as any other external 'real world' scientific source relating to cloning) are not to be used in the parties' argumentation. Statements of fact must refer exclusively to the facts provided in the case. However, as a matter of law, participants may refer to 'real world' *methodologies* for dealing with scientific uncertainty or for performing risk assessment, to the extent that their application is relevant to the facts available in the case (as set out in greater detail below). Statements of law and scientific methodology must refer to the initial bibliography, and to any relevant source of law applicable in WTO dispute settlement. They may also refer, where pertinent and useful, to methodological documents produced by recognized international standard-setting organizations, bearing in mind that the level of information available to the parties regarding the exact methodologies pursued in the case events is limited.

As a general matter, each party may assert that the scientific evidence relied on by its adversary is inadequate and/or unfounded, and concentrate on the legal consequences resulting from such an assertion.

1. Summary of Facts[1]

1. Aldousia is a developed country that specializes in sheep farming. An important part of its exports are sheep and sheep products. Recently, an Aldousian company (**Podsnap Inc.**), jointly owned by the Government of Aldousia and private shareholders, has launched a commercial project consisting of the production and subsequent sale of cloned stud rams to sheep breeders on both domestic and international markets. The commencement of the project was preceded by a favourable report (the **2010 ELSA Report**) issued in January 2010 by the Expert League of Scientists (**ELSA**) in Aldousia, a statutory body that advises the Aldousian government on all scientific issues (the rules on establishment of ELSA committees and appointment of scientists to those committees were not transparent). The report concluded that food produced from cloned animals was safe for humans, and did not identify any specific issues for animal health. In August 2010, Podsnap began introducing cloned stud rams into conventionally bred flocks of sheep in Aldousia.

2. Russelia is a developing country and a significant importer of Aldousian sheep and sheep products. Russelia also imports sheep products from Zamyatin, another developing country and a WTO Member. In 2000 the Government of Russelia issued an advisory statement that advised to suspend any importation and marketing of cloned animals and their offspring until full risk assessment had been completed. The statement also added that "this precaution is not merely necessary to protect human, animal and plant life and health, but is a basic requirement of public morals in our society".

3. In 2005, upon the request of the Russelian Ministry of Health, a special research group, composed of Russelian scientists, issued a report (the **2005 Russelian Report**), which determined that cloned animals and products derived from them might pose certain risks to human and animal health. The report was based on qualitative methods and relied on the opinions expressed by Russelian and Zamyatinian scientists. However, the 2005 Report did not identify any specific risks associated with cloned animals.

4. In the same month, the Russelian Parliament adopted the Cloning Precaution Statute (the **CPS**) that introduced a general ban on the importation and marketing of any cloned animals and their progeny (defined as an animal with at least one cloned parent) as well as any food products derived from such animals. The CPS was notified after its adoption in accordance with all relevant provisions of the SPS Agreement, in particular its Annex B. The Russelian Customs and Border Control Administration (the **RCBCA**) started to enforce the CPS only on 1 September 2010 (after Podsnap's commercial launch), by requiring from exporters evidence confirming that goods were not cloned animals or their progeny or derivates thereof. The documentation

[1] This summary is not a substitute for the full moot case; in the event of any discrepancy between the summary and the moot case (including the Clarifications), the latter shall prevail.

required for imports to be considered as falling outside the scope of the CPS were determined by the RCBCA.

5. Zamyatin imposed a similar ban on 15 September 2010. However, about 100 Aldousian cloned stud rams had been already imported to that country and introduced into flocks with the intention of using them in reproduction processes. Although Russelia was aware of this fact, the importation of Zamyatinian sheep and sheep products to Russelia remains unaffected by RCBCA enforcement of the CPS.

6. On September 20, 2010 Aldousia requested consultations with Russelia in accordance with the WTO DSU. In its response, Russelia included a document entitled "Survey and Assessment of Risks Associated with Cloned Sheep and Derivative Products (the **2010 Russelian Report**). Russelia conceded that the report was based on external experiments and analysis and was performed only after the adoption of the CPS and in parallel with the commencement of RCBCA enforcement, predominantly in response to critical remarks that had been received from Aldousia. The Report identified one specific risk for animal health (specifically for the health of progeny of cloned animals) connected with epigenetic effects.[2] In particular, the Report connected the higher birth mortality rate of cloned animals with such effects. The same conclusion was reached with respect to susceptibility of such animals to illnesses and higher frequency to develop abnormalities. Although the 2010 Russelian Report did not provide any probabilistic estimation of the relevant risk, it included a qualitative assessment which described existing risk as very small, albeit not negligible.

7. With regard to other potential risks, the 2010 Russelian Report concluded that due to uncertainty and taking into account the high level of human and animal health protection sought by Russelia, it was not possible to complete risk assessment and a temporary and precautionary ban was justified. In particular the report identified the following gaps in existing knowledge:
   a) possibility of extrapolating data between sheep and other animals;
   b) potential long-term animal health risks that may result from cloning;
   c) potential animal health risks resulting from cloned animals that are kept in normal farming conditions;
   d) impact of cloning on the immune functions of cloned sheep and the susceptibility of these animals to infections (and subsequent consequences for human health as a result of exposure to transmissible disease agents);
   e) possibility of inducing genetic mutations in sheep in the cloning process, including silent mutations, and their transmissibility, if such effects occur this may have effect on the health of offspring as we as human health; and
   f) novelty of a technique ("we don't know what we don't know").

8. Furthermore, in its response to the Aldousian request for consultations, Russelia announced that it had decided to launch two comprehensive 10-year

[2] Epigenetic effects may be defined as changes in a behaviour of genes due to factors such a cloning process itself or environmental conditions despite the lack of alternation in DNA sequence.

research programmes that will fully investigate the above issues. However, it also informed that the resources which may be dedicated for such a research were only limited. Russelia also indicated that it welcomed Aldousian assistance in the conduct of these projects and would be willing to permit the limited importation of cloned stud rams for the purpose of scientific research.

9. Aldousia and Zamyatin are parties to the UN Convention on Biological Diversity and 2000 Cartagena Protocol on Biosafety. Russelia is a party to none of those instruments. All those countries, however, are members of the Codex Alimentarius Commission and the World Organization for Animal Health (OIE).

2. Timeline of the Case

1996	First successful cloning of female sheep by Aldousian scientists.
2000	Government of Russelia issues its advisory statement.
September 2005	Adoption by Russelia of the report "Cloned Animals and Derivative Products: A Scientific Risk Assessment (the 2005 Russelian Report).
September 2005	Adoption of the CPS.
January 2010	ELSA issues its 2010 Report.
15 April 2010	Podsnap announces introduction of large-scale cloning technique.
August 2010	Podsnap begins introducing cloned animals into conventionally bred flocks.
August – September 2010	Some Aldousian cloned stud rams are imported to Zamyatin.
1 September 2010	RCBCA starts enforcing the CPS with respect to Aldousian sheep and sheep products.
15 September 2010	Zamyatin imposes a ban on importation and marketing of cloned animals and derivative products.
15 September 2010	"Survey and Assessment of Risk Associated with Cloned Sheep and Derivative Products" (the 2010 Russelian Report) is issued
20 September 2010	Aldousia requests consultations with Russelia under Article 4 DSU.
1 October 2010	Russelia responds to the request for consultation. It attaches the 2010 Russelian Report and announces launch of two comprehensive research programs
20 November 2010	Aldousia requests the establishment of a panel. Zamyatin reserves its rights as a third party in the panel proceedings.

3. Applicability of the SPS Agreement

a) General Remarks

Article 1.1 SPS provides that:
This Agreement applies to all [SPS] measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

Annex A(1) further defines SPS measures as any measure applied:

a. to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
b. to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
c. to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
d. to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

b) Claims of the Parties

There is little ground for claiming that the SPS Agreement does not apply to the case, as the case has been deliberately designed as a 'classical' SPS case. Nevertheless, it is incumbent upon Aldousia to precisely identify the measures it is challenging and to establish that they are indeed SPS measures to which the SPS Agreement applies. Furthermore, there is little reason for the parties to disagree, in substance, on the identification of the measures. However, the quality of subsequent argumentation depends in part upon the precision in identification of the relevant measures and their characterization as SPS measures. In this respect, several questions may arise.

First, was the 2000 Russelian Advisory Statement an SPS measure? Parties might argue in this respect, whether the Advisory Statement is included in the Annex A(1) SPS list of measures, and whether the list is exhaustive or not. However, in the Clarifications it was stated clearly that the 2000 Advisory Statement was not identified in the Panel request. The Advisory Statement should not, therefore, constitute a measure for the purpose of Panel proceedings, even if it may provide context for the challenged measures.

Second, do the 2005 and 2010 Russelian Reports constitute SPS Measures? It is doubtful whether they are measures at all. They lack the requisite degree of validity and legal form necessary to be considered a measure (i.e., Art. 1, Annex A SPS refers to "relevant laws, decrees, regulations, requirements and procedures"), and there is little reason to consider the Reports as acts affecting international trade, even potentially. Furthermore, the 2010 Report Russelian Report was issued after the consultations were launched and cannot be considered the measure challenged, even if it might be part of the justification therefore, as will be discussed below.

Third, the focus of argumentation is expected to be the CPS and RCBCA enforcement measures as SPS measures. The CPS may be actually regarded as consisting of two separate measures: a permanent importation ban (to be assessed under Article 2.2/5.1 SPS) and provisional ban (to be evaluated under Article 5.7 SPS). In this respect, Russelia may argue that the measures do not affect international trade as required by Art. 1.1 SPS, as the case facts do not include any factual indication of a decline in imports from Aldousia. However, Aldousia should argue that the text of Art. 1.1 SPS refers to potential direct or indirect effects on trade. It may also refer to relevant jurisprudence, according to which "it cannot be contested that an import ban affects international trade" (*EC-Hormones* (US complaint), para. 8.25).

Fourth, parties might argue whether cloned sheep and derivative products constitute "pests" within the meaning of Art. 1, Annex A SPS. Aldousia will rely upon the very broad definition embraced by the Panel in *EC – Biotech* (a pest is "an animal or plant which is destructive, or causes harm to the health of other animals, plants or humans, or other harm, or a troublesome or annoying animal or plant" (para. 7.240)). Note, however, that according to Annex A(1), an SPS measure needs to be applied in order to protect animal health within the territory of the importing WTO Member. On the basis of the same report, the Russelian measures may also fall within the scope of subparagraph (b) of Annex A SPS, as products derived from cloned animals could be regarded as food containing additives, contaminants, toxins or disease-carrying organisms. It is also worth noting that the *EC - Biotech* panel adopted an equally broad interpretation with regard to the notion 'risks arising from'. This was understood as including risks which may only potentially arise in the future and which are indirect. On the other hand, Russelia may argue that this definition is overly broad, referring to the fact that the *EC - Biotech* Panel Report was not appealed.

Fifth, there is some scope for the parties to argue whether the CPS and RCBCA enforcement measures each constitute separate SPS measures, or whether they constitute measures to be considered jointly as a single SPS measure. This may have significant tactical implications and affect the coherence of the argumentation's structure.

Finally, Russelia, may argue that the CPS and RCBCA, even if found to be SPS measures, also serve a non-SPS purpose (namely, public morals – as referred to in the 2000 Advisory Statement and as may be inferred from

Russelia's Article XX(a) GATT defense), and therefore might enjoy separate justification that has not been challenged (eg, under the TBT Agreement). In *EC – Biotech*, the panel found that the same measure may be considered an SPS measure to the extent it is applied for an SPS purpose, and a non-SPS measure to the extent it is applied for a purpose not covered by the SPS Agreement (paras. 7.162-7.174). Hence, a 'dual purpose' measure may be found to be SPS consistent, in whole or in part, and parties may argue over the extent to which Russelia's measures relate to SPS purposes.

4. Aldousia's claim under Article 2.2 SPS (necessity, scientific basis)

a) General Remarks

Article 2.2 SPS provides that:
Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

The case law has not yet defined the term "scientific principles" tending to evaluate both elements (i.e. scientific principles and sufficient scientific evidence) in a single analysis that actually concentrates only on the second element. What seems clear is that both elements require a certain methodological rigour derived from scientific claims advanced by a defendant. Sufficiency (of scientific evidence) has been conceptualized as a relational concept, which requires an adequate relationship between two elements (an SPS measure and scientific evidence), to be determined on a case-by-case basis. In other words, existing evidence needs to sufficiently support a measure under the examination.

b) Claims of the Parties

Aldousia should claim that the evidence put forward by Russelia in its 2010 Report is either scientifically unfounded or insufficient to support the measure (for more detailed argument, see section 5(b) below, "Minority scientific opinion…"). Aldousia may also point out to the lack of evaluation of probability in the 2010 Report (see section 5(b) "Required content") and lack of specificity of the 2005 Report (see section 5(b) "Specificity").

Aldousia should also argue that risk identified in the 2010 Russelian Report is negligible (for a more detailed argument see section 5(b) below, "Identified risk") and as such cannot constitute a basis for the contested SPS measure.

The defence of Russelia should be based on the same arguments as discussed in relevant parts of section 5 below.

In addition, Aldousia can claim, relying on the panel and the Appellate Body's findings in *Japan – Apples*, that disproportion between identified risk and an SPS measure implies a lack of rational relationship (e.g. Appellate Body Report, para. 164). The CPS measure is strict (absolute ban) while risk

is either negligible (as Aldousia argues) or very small (as Russelia admits). Lack of such rational relationship indicates that the Russelian measure is maintained without sufficient scientific evidence and consequently it violates Article 2.2.

Russelia in its response may advance two arguments. First, it may argue that both the SPS Agreement and the corresponding case law accept that each WTO Member is free to establish any level of protection it deems appropriate (e.g. Appellate Body Report, *EC – Hormones*, para. 124). This obviously includes the objective of zero risk and may cover any ascertainable risk, including small or "negligible" risks. Russelia should stress that precluding a WTO Member from taking strict measures to address low-level risks will effectively deprive such a Member of the right to establish its level of protection. Second, Russelia may also refer to the discussion on the applicable standard of review[3] in the Appellate Body Report in *US/Canada – Continued Suspension*. When analysing carcinogenicness of hormone residues, the Appellate Body criticized the panel and said that "it was not the Panel's task […] to determine whether there is an appreciable risk of cancer arising from the consumption of meat from cattle treated with oestradiol-17ß" (para. 614). Consequently, once risk is ascertainable, a panel is arguably not permitted to conduct any further examination as to the *extent* of risk. Russelia may conclude that this finding precludes any proportionality analysis of the kind endorsed in the *Japan – Apples* case.

[3] For details see Section 8 of The Bench Memorandum.

5. Aldousia's claim under Article 5.1 and Annex A(4) SPS (requirement of risk assessment)

a) Introduction

Article 5.1 SPS stipulates that:
Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

Article 5.2 enumerates elements that are relevant in the assessment of risk (the list is not exhaustive):
In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

In addition **Annex A(4) SPS** defines the meaning of a risk assessment in the context of the SPS Agreement:

Risk assessment — the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

The case law accepts the consideration of different factors in risk assessment but also recognizes that science plays a predominant role in such a process. At the same time, science is not understood narrowly. As the Appellate Body observed in *EC – Hormones*: "risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die" (para. 187). Having said that, other elements cannot "affect the rigour or objective nature of the risk assessment, which must remain, in its essence, a process in which possible adverse effects are evaluated using scientific methods."[4]

b) Claims of the Parties

- **Time when Russelia's risk assessment was performed**
  Aldousia should argue that the document, which is referred to by Russelia as risk assessment (i.e. the 2010 Russelian Report), was prepared only after the adoption of a contested SPS measure and, as

[4] Appellate Body Report, *US – Continued Suspension*, para. 534.

openly admitted by Russelia, predominantly in response to critical remarks that had been received from Aldousia. This may serve as indirect evidence that the document does not constitute a basis for a measure but rather attempts to justify *ex post* actions taken by Aldousia (adoption of the CPS and subsequent enforcement of its provisions by the RCBCA). This would indicate that there is no objective/rational relationship between the risk assessment and the SPS measure as required by Article 5.1.

Russelia should argue that Article 5.1 imposes only a substantive obligation and does not introduce any procedural requirement (i.e. to take into account a risk assessment when or before enacting SPS measure). Russelia may refer to the relevant SPS case law, which accepted that risk assessment can be performed *ex post*, even at the time of a panel's proceeding (e.g. Appellate Body Report, *EC – Hormones*, para. 189, Panel Report, *EC – Biotech*, para. 7.3030). Russelia may also add that SPS case law recognizes that risk assessment (as well as scientific research as such) may be carried out by another country or international organization and simply 'borrowed' by a Member (e.g. Appellate Body Report, *EC – Hormones*, para. 190). This would relate to the statement in the case whereby the 2010 Russelian Report was based upon experiments and analysis conducted in research centers around the world.

- **Identified risk**

  Aldousia should argue that risks identified by the 2005 and 2010 Russelian Reports are merely theoretical/hypothetical.[5] It may refer in this context to the Appellate Body observation in *EC – Hormones* that "theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed" as "science can *never* provide *absolute* certainty that a given substance will not ever have adverse effects" (para. 186).

  Aldousia should also refer to another concept that was introduced in the SPS case law and argue that risk identified by Russelia (i.e. risk related to epigenetic effects) is negligible. In this regard, Aldousia may recall the panel report in *Japan – Apples*, where it was held that negligible risk did not constitute a sufficient basis for SPS measures.[6] The same panel also gave a definition of negligible risks. These are, in the opinion of the panel, risks that are characterized by likelihood of between 0 and 1 in a million (para. 8.149). Aldousia should, therefore, assert that risk described by the 2010 Russelian Report, as very being small, is actually a negligible risk.

  On the other hand, Russelia should claim that the relevant risks are not merely theoretical or hypothetical. The risk identified in its 2010 Report

[5] Although this is not entirely clear in the SPS case law, both concepts – theoretical and hypothetical risks – seem to indicate the same thing.

[6] Panel Report, *Japan – Apples*, para. 8.153; the Appellate Body upheld this finding.

is concrete and specific, the existence of which is supported by scientific evidence (albeit coming from scientific minority circles). In this context, Russelia can add that its 2010 Report was based on experiments and analysis conducted in research centers around the world as published in scientific journals, which guarantees its high quality. In arguing that relevant risk is not merely theoretical, Russelia may recall findings of the 2010 Report, which identified epigenetic effects as responsible for higher birth mortality of cloned animals as well as elevated susceptibility to illnesses and frequency to develop abnormalities.

The same arguments may be advanced with regard to negligible risks. In fact the 2010 Russelian Report expressly provides that identified risk although very small cannot be regarded as negligible. Russelia should also add that SPS case law clearly recognizes that WTO Members are free to regulate any kind of ascertainable risk, no matter how small it is (e.g. Appellate Body Report, *EC - Hormones*, para. 186).

- **Required content of risk assessment**

  Aldousia should argue that the content of the 2010 Russelian Report does not constitute risk assessment as required by the SPS Agreement. Annex A(4) SPS distinguishes between assessment of risks to life and health of humans, animals and plants attributable to pest and diseases (so-called *quarantine* risk assessment), on one hand, and risks to life and health of humans and animals arising from the presence of certain substances in food (so-called *food-borne* risk assessment). Quarantine risk assessment requires evaluation of likelihood (i.e. probability) of risk occurrence, while food borne risk assessment speaks only about evaluation of the potential of adverse effects (i.e., possibility).

  Aldousia should explain first that the risks mentioned in the 2010 Russelian Report fall within the first category, which requires evaluation of likelihood (i.e. probability) rather than just possibility. The support for Aldousia's argument may be found in the *Australia – Salmon* report, where the Appellate Body specifically said that "in view of the very different language used in Annex A(4) for the two types of risk assessment, we do not believe that it is correct to diminish the substantial difference between these two types of risk assessment" (fn. 70). Consequently, when assessing disease risks or pest risks, in the form of quarantine risk-assessment it is not sufficient that risk assessment concludes that there is mere possibility.

  As a second step, Aldousia should indicate that the 2010 Report expressly admits that it did not include probabilistic estimation of the relevant risk. What the 2010 Report contains is a mere qualitative assessment of possibility. Consequently, it fails to meet the relevant requirements of Annex A(4).

  Russelia should argue that its 2010 Russelian Report contains the required assessment of probability, not mere possibility, but in qualitative rather than quantitative terms. The lack of probabilistic

estimation that is referred to in the Report should be understood as an absence of quantitative calculations. It does not mean that the 2010 Report examined only a possibility of adverse effect. Russelia should refer in this context to existing SPS case law, which accepts that likelihood (i.e. probability) can be expressed either quantitatively or qualitatively (e.g. Appellate Body Report, *Australia – Salmon*, para. 124). Russelia may also add that the term possibility is nowhere mentioned in its Report.

Russelia may also add that when reading the SPS obligations with regard to risk assessment it is necessary to take into account the expression "as appropriate to the circumstances". As noted by the panel in *EC – Biotech*, this expression "purports a certain degree of flexibility in terms of how […] the applicable elements of the Annex A(4) definition, including likelihood evaluation, are satisfied" (para. 7.3053). In particular, the phrase allows to factor into risk assessment methodological difficulties posed by risk under the examination (e.g. *US/Canada – Continued Suspension*). There is also an in-built discretionary element in Article 5.1. Thus, a WTO Member which follows the precautionary approach (as in the case of Russelia) and "which confronts risk assessment that identifies uncertainties or constraints, would be justified in applying (i) an SPS measure even though another Member might not decide to apply any SPS measure on the basis of the same risk assessment, or (ii) an SPS measure which is stricter that the SPS measure applied by another Member to address the same risk."[7] In addition, as noted by the Appellate Body in *EC – Hormones* "a panel … should bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible …" (para. 124). All these findings show that Russelia enjoys a wide margin of discretion regarding how to assess and evaluate risk related to the occurrence of epigenetic effects. This also means that Aldousia, in order to establish a violation of Article 5.1 and Annex A(4) SPS will need to show that Russelia overstepped the limits of its discretion.

Aldousia may rebut these arguments by arguing that the flexibility built in Article 5.1 and Annex A(4) SPS does not excuse the Russelian risk assessors from evaluating risks. Aldousia may refer for example to the Appellate Body report in *US – Continued Suspension*, where it was observed that the phrase "as appropriate to the circumstances" cannot "annul or supersede the substantive obligations […] to base the sanitary measure […] on a risk assessment" (para. 562). The same is true with regard to the relevance of a discretionary/precautionary approach for assessment of risk.

[7] Panel Report, *EC – Biotech*, para. 7.3065.

- **Specificity of risk assessment**
  Aldousia can also contest the 2005 Russelian Report by arguing that it did not identify any specific risks associated with cloned animals. It may refer in this context to the relevant SPS case law, which holds that a general discussion on a particular SPS risk is not sufficient to meet the requirement of specificity (e.g. Appellate Body Report, *EC – Hormones*, para. 200). On the other hand, Russelia instead of defending its 2005 Report may simply argue that it is only the 2010 Russelian Report that should be considered as relevant risk assessment. It will be more difficult to argue lack of specificity with regard to the 2010 Russelian Report, which seems to evaluate specific potential/ likelihood of harm arising from a particular risk.

- **Minority scientific opinion as a basis for risk assessment**
  Aldousia should argue first that minority scientific opinions that are referred to by Russelia are incompatible with the results of mainstream research on which Aldousian risk assessment (i.e. 2010 ELSA Report) is based. Consequently (*per* Aldousia), Russelian risk assessment does not take into account existing scientific evidence in violation of Article 5.2 SPS.

  Russelia should in turn claim that SPS case law accepts that risk assessment may be based on both mainstream scientific opinions as well as the opinions of scientists taking divergent views. In this context it may refer to the Appellate Body report in *EC – Hormones*, where it was clarified that "[i]n most cases, responsible and representative governments tend to base their legislative and administrative measures on 'mainstream' scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources."[8] Thus, minority scientific opinions are a legitimate basis for national SPS measures.

  Aldousia may, without rejecting that risk assessment may be based on minority scientific opinions, respond that divergent scientific opinions put forward in the 2005 and 2010 Russelian Reports are speculative assertions rather than defendable scientific claims. Referring to the same passage from *EC – Hormones*, Aldousia should contend that the Appellate Body required a certain level of reliability and scientific quality ("qualified and respected sources") from diverging opinions. Such opinions "must […] have the necessary scientific and methodological rigour to be considered reputable science."[9] Aldousia may add that since the existing mainstream research contradicts minority scientific opinions they cannot be considered as defendable scientific claims.

[8] Appellate Body Report, *EC – Hormones*, para. 194.

[9] Appellate Body Report, *US – Continued Suspension*, para. 591.

Russelia may answer that correctness of the diverging opinions does not need to be accepted by mainstream research. What matters under Article 5.1 is only whether such minority views attain a certain epistemic threshold and not whether they are correct. Consequently the examination of such epistemic value should be performed independently from the determination of mainstream research. Russelia may refer in this context to the applicable standard of review as developed by the Appellate Body in *US – Continued Suspension* (see below). In particular, it may refer to the following finding of the Appellate Body: "the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable" (para. 590).

- **Objective relationship between risk assessment and the SPS measure**

  Aldousia should indicate that the result of risk assessment should, under the obligation to base a measure on such assessment, objectively warrant an SPS measure. In other words, scientific conclusions reached in a risk assessment need to reasonably support the conclusions embedded in the SPS measure. Aldousia should add that since the 2010 Russelian Report does not meet the requirements of the SPS Agreement (e.g. with regard to evaluation of probability or its scientific quality), it cannot be regarded as sufficient basis for a total ban. In this context, Aldousia may recall a finding of the panel in *EC - Biotech* where it was held that a measure that introduced a total ban could not be rationally (objectively) related to a risk assessment, which found no evidence of any specific risk (para. 7.3607). This strategy will be also compatible with a normal dispute settlement practice where the panels tend to identify lack of objective relationship once a risk assessment is found to be deficient (e.g. Panel Report, *US – Continued Suspension*, para. 7.578).

  On the other hand, since Russelia believes that its risk assessment complies with all requirements of the SPS Agreement it should argue that such an assessment, by implication, must be rationally related to its SPS measure.

6. Aldousia's claim under Article 5.7 SPS (measures adopted in case of insufficiency of scientific evidence)

a) General Remarks

Article 5.7 SPS provides:
In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Article 5.7 therefore establishes four requirements in its application: (i) there is insufficiency of scientific evidence for performance of a risk assessment, (ii) an SPS measure is adopted on the basis of available pertinent information, (iii) a WTO Member seeks to obtain additional scientific data necessary for a more objective assessment of risk, and (iv) a measure is subject of review within reasonable period of time. Those conditions are of cumulative nature, meaning that failure to meet any of them will lead to non-conformity with Article 5.7. Nevertheless, normally, SPS case law concentrates on the first element (existence of insufficiency of scientific evidence). Consequently, it will be crucial for Aldousia to show that that relevant scientific evidence is sufficient to perform risk assessment as required by the SPS Agreement (first condition of Article 5.7). It may be also relevant whether Russelia based its measure on pertinent information (second condition of Article 5.7). Two other conditions (requirement to seek additional information and review an SPS measure in reasonable period of time) are of limited importance but teams may also address them in their submissions.

According to case law, it is for a claimant to make a *prima facie* case of violation of Article 5.7 (*cf.* Panel Report, *EC – Biotech*, para. 7.2960).[10] Only if such *prima facie* case is established, it is for a defendant to rebut such a presumption of inconsistency.

b) Insufficiency of scientific evidence

Aldousia's Claims

- **Uncertainty distinguished from insufficiency, theoretical uncertainty.**
  Aldousia should claim that the existence of uncertainty cannot be equated with the situations where scientific evidence is insufficient. This will go in line with the findings of the Appellate Body in *Japan – Apples* where it was observed that "the application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence. […] The two concepts are not

interchangeable."[11] The Appellate Body also clarified in another case that existence of unknown and uncertain elements does not justify a departure from the requirements of Article 5.1 (*Australia – Salmon*). Aldousia may also refer to the panel report in *US/Canada – Continued Suspension*, which stressed that "the fact that a number of aspects of a given scientific issue remain uncertain may not prevent the performance of a risk assessment."[12] In other passage it stated that "the mere fact that relevant scientific evidence is sufficient to perform risk assessment does not mean that the result and conclusion of the risk assessment are free from uncertainties" (para. 7.1525). Another support for Aldousia's argument may be found in the Appellate Body report in *US/Canada – Continued Suspension*, where it was determined that a mere possibility of conducting further research or analyzing additional information does not mean that scientific evidence is insufficient (para. 702).

Aldousia should also add that uncertainties indentified by Russelia are merely theoretical uncertainties (uncertainty that is inherent in scientific method and which results from intrinsic limits of experiments and methodologies, as scientific truths are always somewhat uncertain). This type of uncertainty was recognized in the SPS case law as irrelevant in the context of Article 5.7 (e.g. Panel Report, *US – Continued Suspension*, para. 7.631). In this context, Aldousia may rely on relevant observations made by the Appellate Body (see discussion on Article 5.1 above). Aldousia may advance this argument with respect to all uncertainties identified by Russelia in its 2010 Report (e.g. impact of cloning in the immune functions of cloned animals and their progeny, possibility of inducing genetic mutations).

- **Insufficiency and other risk assessments.**
  Aldousia should indicate that a number of countries (including itself) were able to complete risk assessment, which concluded that cloned animals and food derived from them do not pose any specific risks. Aldousia may argue that existence of such risk assessments is sufficient to establish a *prima facie* case of violation of the first conditions of Article 5.7. Consequently, it should be for Russelia to rebut this presumption by advancing evidence, which would call into question conclusions of Aldousia's risk assessment. In this context, Aldousia may refer to the *EC – Biotech* panel, which adopted a similar approach (in relying on the existence of risk assessment by the EC as demonstrative of the sufficiency of evidence, in contrast to claims by of insufficiency of evidence at the Member State level).

  Aldousia should also point out certain inconsistencies in the arguments of insufficiency of evidence advanced by Russelia. Russelia argues that its 2005 Report constitutes a risk assessment (albeit in the opinion of Aldousia not the one that meets the requirement of Article 5.1 and

[11] Appellate Body Report, *Japan – Apples*, para. 184.

[12] Panel Report, *US – Continued Suspension*, para. 7.631.

Annex A(4) SPS). Therefore, it was possible for Russelia to complete risk assessment in 2005 while in 2010 it concluded that due to uncertainties this was not possible any more (despite the accumulation of new scientific evidence during a period of last 5 years). Aldousia can add in this context that it does not matter that the 2005 Russelian Report found the existence of risk. An issue to be decided under Article 5.7 is only whether there is sufficient scientific evidence for performance of risk assessment and it does not predetermine the outcome of such risk assessment. The difference between conclusions of the 2005 and 2010 Russelian Reports may therefore serve as indirect evidence that the 2010 Russelian Report was adopted solely in reaction to WTO consultations and not as a response to the identification of some new insufficiencies of evidence. This conclusion is additionally supported by the fact that the 2010 Russelian Report was only performed after the adoption of the contested SPS measure (CPS) and in parallel to its enforcement by the RCBCA.

- **Insufficiency and minority scientific opinions.**
  Aldousia may claim that existing SPS case law is not entirely clear whether minority scientific opinions can constitute a basis for determining existence of insufficiency of scientific evidence (so far it clearly accepts such opinions only in the context of Articles 2.2 and 5.1). Aldousia should also add that mainstream research, which is reflected in Aldousia's risk assessment, contradicts the conclusions reached in Russelia 2010 Report with regard to insufficiency of scientific evidence. In such case, minority scientific opinions have tended to be marginalized by the WTO panels (*cf.* Panel Report, *EC – Biotech*, para. 7.3300).

- **Time when insufficiency is determined.**
  This brings us to another potentially weak point in the Russelia argumentation. As noted by the panel in *EC – Biotech Products* "a determination of whether a particular case is a case 'where relevant scientific evidence is insufficient' must be made by reference to the time the relevant provisional SPS measure was adopted."[13] Since the 2010 Russelian Report was performed only after adoption of CPS and in parallel to its implementation by the border authorities, this may limit its relevance for determination of insufficiency.

- **Some specific issues in Russelia's risk assessment.**
  As far as some specific issues raised in the Russelia's risk assessment are concerned, Aldousia may also claim as follows:
  - **Problem of variability** - the problem of variability (i.e. differences between species resulting from their dissimilar metabolic reactions and difference between individuals within one species) can be properly addressed through the application of standard risk assessment techniques. Thus, Aldousia should argue that uncertainty related to the limited quantity of available

[13] Panel Report, *EC – Biotech*, para. 7.3253.

scientific data with regard to sheep (a need to extrapolate between species) and small sample sizes that have been used in different scientific investigations around the globe (a need to extrapolate from small samples to larger groups) can actually be accommodated in risk assessment. This is normally done through reliance on safety factors (a figure that allows to extrapolate the results of the research between different species or from small samples to larger groups), worst-case scenarios and conservative assumptions. It is also possible to apply more sophisticated methods such as uncertainty analysis. All those methods allow completing risk assessment despite the existence of uncertainties. As to the substance of relevant scientific evidence, Aldousia may add that in any case sheep do not exhibit any specific physiological features, which would prevent extrapolations from other mammals.

- **Ignorance** – although there is no WTO case law that would address directly this issue, Aldousia may claim that ignorance ("we don't know what we don't know") cannot qualify as an instance of insufficiency of scientific evidence, and should be treated similarly as theoretical uncertainty (science will always fall short in responding to all questions). In addition, Aldousia may also rely on a pragmatic argument: allowing for this type of justification will make the whole SPS system inoperable as there is always a potential for theoretical risks or issues to be investigated.
- **Relevance of appropriate level of protection to insufficiency –** Aldousia should argue that assessment of insufficiency is an objectively verifiable determination that takes place in a purely scientific process. In other words it is a "determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk" and it "must be disconnected from intended level of protection."[14] Appropriate level of protection may become relevant only after the existence of sufficiency/insufficiency is determined and will help in deciding what kind of measure needs to be adopted.

Russelia's Claims

- **Uncertainty distinguished from insufficiency, theoretical uncertainty.**
  Russelia may admit that the existence of scientific uncertainty as such does not automatically amount to insufficiency of scientific evidence. However, Russelia should also indicate that uncertainty is not a uniform concept and actually includes different subcategories. Apart from theoretical uncertainty or ignorance (which indeed might be disregarded under the SPS Agreement), there are also instances where uncertainty may be equated with insufficiency of scientific evidence. Lack of observations and measurement data, practical immeasurability (i.e. data

[14] Panel Report, *US – Continued Suspension*, para. 7.612.

can be theoretically collected and measured but such a process is either overcomplicated or too expensive) or indeterminacy (i.e. uncertainty that results from genuine stochastic relationships between cause and effect, chaotic relationships) are such examples.[15] These qualitative deficiencies of scientific data, if important enough for the assessment of a particular risk, could qualify as a form of insufficiency of scientific evidence. In other words, although uncertainty and insufficiency of scientific evidence are two distinctive concepts there is also an overlap between them.

Russelia should add that the above interpretation is consistent with WTO practice. The Appellate Body has made clear that insufficiency is not merely concerned with the amount of scientific data but also has a qualitative dimension (whether existing evidence is conclusive). In the words of the Appellate Body, insufficiency of scientific evidence includes cases where available evidence is more than minimal in quantity but not led to reliable or conclusive results."[16] Additional support may be also found in the panel report *Japan - Apples* where it was stated that "it is possible that … a lot of scientific research may have been carried out on a particular issue without yielding sufficiently relevant … or reliable evidence" (para. 7.9).

Russelia should argue that uncertainties indicated in its 2010 Report are not merely theoretical/hypothetical but that they amount to a genuine lack of knowledge preventing Russelia to perform required risk assessment. Russelia should point out that identified insufficiencies are both of quantitative (e.g. limited quantity of available scientific data with regard to sheep, potential long-term health effects that may result from cloning) and qualitative character (e.g. lack of understanding of the impact of cloning on the immune functions of cloned animals, possibility of inducing genetic mutations in sheep in the SCNT process). In this context, it would be worth mentioning that the 2010 Russelian Report expressly acknowledged that the majority of available evidence is inconclusive or speculative with respect to the existence of risks to human and animal health (cf. para. 18 of the Case). This lack of reliability and conclusiveness results in uncertainty that amounts to insufficiency of scientific evidence as required by Article 5.7.

- **Insufficiency and other risks assessments.**
  Russelia should argue that existence of risk assessment in another jurisdiction (here Aldousia) cannot be determinative for the purpose of establishing insufficiency of scientific evidence. First, the notion of sufficiency/insufficiency is not absolute and may differ between risk assessors (and consequently between different countries). Such

[15] *Cf*, A. Klinke & O. Renn, *A New Approach to Risk Evaluation and Management*, 22 Risk Analysis 1071 (2002), M. Van Asselt & J. Rotmans, *Uncertainty in Integrated Assessment Modelling*, 54 (1-2) Climatic Change 75 (2002), L. Gruszczynski, *Regulating Health and Environmental Risks under WTO Law* (2010).

[16] Appellate Body Report, *Japan – Apples*, para. 185.

determination involves not only examination of available scientific information but also other factors such as subjective judgements of the experts that reflect their attitude toward particular risks (less or more cautious), values of the particular community in which experts are acting, and the nature of risk assessment, which requires answering a number of non-scientific questions (e.g. what weight should be assigned to positive and negative studies, can uncertainties be addressed through conservative assumptions and safety factors or perhaps additional research is needed). This is particularly true when a specific field of research is novel and complex,[17] as is the case for animal cloning. Russelia may recall in this context, an observation made by one of the experts advising the panel in *EC – Biotech*: "when additional scientific knowledge is needed […] each nation's […] scientific advisory committees are place in the difficult position of choosing between expediency and greater certainty. It is not always clear where the distinction lies between what regulators 'need to know' vs. what is merely 'nice to know'".[18]

Russelia can also add that the Appellate Body in *US/Canada - Continued Suspension* – a later case than *EC - Biotech*, determined at the Appellate Body level - accepted such understanding of insufficiency in its finding that the national level of protection could be relevant for determination of insufficiency. Consequently, a particular WTO Member may "perform certain research as a part of its risk assessment that is different from the parameters considered and the research carried out in the risk assessment" of other WTO Member (para. 685). Second, Russelia may assert that granting too much weight to Aldousian (or any other) risk assessments will be incompatible with the standard of review applicable to evaluation of scientific evidence (for more detailed discussion, see point 7 below). In particular, Russelia can argue that the task of the panel is not to decide on the correctness of Russelian scientific determinations but rather on their defensibility. In other words, the applicable standard of review under the SPS Agreement sets specific limits for the investigative authority of the panel.[19] Third, Russelia may refer to another observation made by the Appellate Body in *US/Canada - Continued Suspension* when discussing the relevance of international standards for the purpose of insufficiency. In particular, the Appellate Body held that existence of risk assessment underlying international standards is only a factual issue which although may help to establish a *prima facie* case of sufficiency, does not create any automatic presumption of sufficiency. In any case such a risk assessment is not dispositive for the purpose of Article 5.7 (para. 697).

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[17] *E.g.* D. Winickoff, S. Jasanoff, L. Busch, R. Grove-White, & B. Wynne, *Adjudicating the GM Food Wars: Science, Risk and Democracy in World Trade Law*, 30 Yale Journal of International Law 81 (2005), p. 114.

[18] Panel Report, *EC – Biotech Products*, Annex H, para. 14.

[19] *Cf.* Section 8 of this Memorandum.

As far as its 2005 and 2010 Reports are concerned, Russelia may argue that SPS case law generally recognizes that science continuously evolves and scientific basis, which was once deemed to be sufficient to perform risk assessment, may be called into question by some new evidence (Panel Report, *US – Continued Suspension*, para. 7.645). In the same case the Appellate Body was even more explicit on this issue when it observed that: "[w]e agree that scientific progress may lead a WTO Member […] to reconsider the risk assessment underlying an SPS measure. In some cases, new scientific developments will permit a WTO Member to conduct a new risk assessment with the sufficient degree of objectivity. There may be situations, however, where the new scientific developments themselves do not permit the performance of a new risk assessment that is sufficiently objective. Such a situation would fall within the scope of Article 5.7" (para. 701). Russelia may also add that its 2005 Report implicitly recognized the lack of important scientific evidence as it did not identify or specify risks associated with cloned animals (*cf.* para. 12 of the Case). Furthermore, Russelia should point out that the 2010 ELSA Report did not make a positive finding based on sufficient evidence, but only noted that "existing research has yielded no results" indicative of health problems (Case para. 4). Thus, it is at the least uncertain whether Aldousian risk assessment was based on sufficient evidence.

- **Time when insufficiency is determined.**
  Russelia should argue here that SPS case law is not conclusive in this respect. Although the *EC - Biotech* panel required assessment of (in)sufficiency of evidence at the moment of adoption of a measure, the panel in *Japan – Apples* adopted a different approach. For example, it explicitly rejected the argument of Japan that evidence, which become available after adoption of the measure should be disregarded for the purpose of Article 5.7 SPS (para. 7.10). Russelia may also add that the same approach is also conventionally taken under Article 5.1 SPS where the body of scientific evidence is ascertained as of the date of panel proceedings and not by reference to the date of adoption of a measure. This means that risk assessment may be performed ex post (e.g. Panel Report, *EC – Biotech*, para. 7.3030). There seems to be no reason to apply different standard in the context of Article 5.7, and so Russelia may rely upon its actions subsequent to the adoption of the CPS.

- **Insufficiency and minority scientific opinions.**
  Russelia should argue that the standards relating to treatment of scientific minority opinions developed in the context of Article 2.2/51 and Article 5.7 SPS must not differ (both cases are concerned with scientific determinations and relate to complementary factual situations). Consequently, Russelia should be allowed to rely on such opinions when assessing existence of sufficiency/insufficiency of scientific evidence. Russelia may also refer to the Appellate Body Report in *US/Canada – Continued Suspension* where it was stated that "where there is […] a qualified and respected scientific view that puts into question […] relevant scientific evidence […], thereby not permitting the performance

of a sufficiently objective assessment of risk on the basis of the existing scientific evidence, then a Member may adopt provisional measures under Article 5.7 on the basis of that qualified and respected view." Consequently, minority scientific opinions should be seen as a valid source for determination of insufficiency of scientific evidence. In this respect, the panel report in *EC – Biotech* is of limited importance as it was adopted before the above-mentioned report of the Appellate Body.

- **Some specific issues in Russelia's risk assessment.**
  Russelia should stress that its 2010 Report identified very particular issues that require further research before an appropriate risk assessment can be performed. As some of the potential risks may relate to human health (i.e. susceptibility of cloned animals to infections and possible increase of the exposure of human to transmissible disease agents, transmissibility of mutations in the cloning process and its impact on human health), the panel should exercise its investigative authority very carefully. Russelia may refer in this context to one of the findings of the Appellate Body: "a panel […] should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health, are concerned."[20] Russelia may also add, referring to the Appellate Body Report in *US/Canada – Continued Suspension*, that under the applicable standard of review, the role of the panel is limited. Consequently, the panel is not expected to determine whether a risk assessment is correct but only whether coherent reasoning and respectable scientific evidence support such an assessment.

  With regard to specific issues raised in its 2010 Report, Russelia can argue:
  - **Problem of variability** - the existing physiological differences between sheep and other mammals are such that cannot be addressed through applications of standard risk assessment techniques such as extrapolations, safety factors or uncertainty analysis. Moreover, existing scientific studies (for different animals) are based on a very small sample size. Additional difficulty is added by the fact that the cloning technique is novel and in fact not yet fully understood (*cf.* para. 19(b) of the Case). Each of these factors adds additional layers of uncertainty. The 2010 Russelian Report concluded on the basis of minority scientific opinion (which according to the case law may be relied in determination of insufficiency) that deficiencies in knowledge are such that they prevent performance of required risk assessment.
  - **Ignorance** – SPS case law has not yet determined the relevance of ignorance for determination of insufficiency of scientific evidence. Nevertheless, Russelia may add that the problem of ignorance

[20] Appellate Body Report, *EC – Hormones*, para. 181.

should be read together with other outstanding scientific issues identified in the 2010 Russelian Report. The accumulation of different uncertainties, including those posed by ignorance, reinforce the final conclusion that scientific evidence is insufficient to perform risk assessment.

- **Relevance of appropriate level of protection on insufficiency** – a level of protection may play a role in determining existence of insufficiency. Russelia should in particular refer to the Appellate Body report in *US/Canada – Continued Suspension* where this was explicitly acknowledged (see. para. 685-6). In particular, it may influence frames of the research and affect a judgment with regard to required scientific investigation.

c) Pertinent information

Aldousia should claim that the Russelian SPS measures (as far as they concern risks for which there is insufficient evidence) are not based on available pertinent information. Since in the opinion of Aldousia (*cf.* the 2010 ELSA Report) existing scientific evidence does not indicate any difference between safety of food originating from cloned animals or their progeny and the safety of traditional food, the ban cannot be considered as based on available pertinent information. The same logic applies to animal health issues related to cloning.

Russelia should argue that information included in its 2005 and 2010 Reports has to be regarded as available pertinent information. Russelia identified a number of very specific issues, which may be problematic when assessing safety of cloned animals and derivative products (*cf.* para. 19(b) of the Case). The conclusions of the 2010 Russelian Report were based on experiments and analysis conducted in research centers around the world as published in scientific journals. Although the 2010 Russelian Report acknowledged that the majority of such evidence is inconclusive or speculative (*cf.* para 18 of the Case), pertinent information has to be understood as requiring a lower level of conclusiveness as compared to scientific evidence for the purposes of Articles 2.2/5.1 SPS.

d) Obligation to seek additional information

Aldousia may also argue non-conformity with the third condition of Article 5.7. In particular, Aldousia should stress that Russelia ostensibly did nothing in this respect for a period of 5 years following the adoption of its 2005 Report. Moreover, Russelia admits (cf. para. 18 of the Case) that its 2010 Report was performed in parallel with the commencement of CPS enforcement by the RCBCA. Although Article 5.7 does not require any specific outcome, it mandates making "the best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organization

or other sources."[21] Aldousia should point out that inaction lasting for more than 5 years can hardly be seen as meeting this standard.

On the other hand, Russelia may argue that before adoption of the 2010 Russelian Report, it was not obliged to seek additional information as the initial ban on the importation of cloned animals and derivative products derived was based on Article 5.1 rather than Article 5.7 (consequently it should be considered as a permanent rather than a provisional ban). The obligation to seek additional information was only activated with the adoption of the 2010 Russelian Report. In this context, Russelia should point to its announcement relating to the launch of two 10-year research programs that are specifically aimed at investigating matters that were identified in the 2010 Russelian Report. In this context Russelia should point out that the conclusions of the 2010 ELSA are inconclusive.

e) Obligation to review a measure within reasonable period of time

The analysis of the fourth condition of Article 5.7 SPS (to review a measure within reasonable period of time) is similar to the third. Aldousia may note that a period of 5 years exceeds what may be considered a reasonable period of time. This conclusion is further reinforced by the fact that Russelia actually did not launch any research until the commencement of the WTO proceedings. The mere fact that the cloning technique is novel and its future consequences are highly uncertain does not extend reasonable period of time.[22] Russelia may rely on the same arguments as with respect to the obligation to seek additional information.

[21] Appellate Body Report, *US – Continued Suspension*, para. 679.

[22] Note, however, that there is no case law that would address this issue.

7. Relevance of the Convention on Biodiversity, the Cartagena Protocol on Biosafety and the Customary Precautionary Principle

Although the case deliberately avoids reference to these non-WTO sources, in the clarification process many teams raised questions in this regard. Consequently, the case clarifications specify that Aldousia and Zamyatin are both parties to the Convention on Biodiversity (CBD) and to the Cartagena Protocol on Biosafety (CPB), whereas Russelia is a party to neither.

Both the CBD and the CPB include provisions of a precautionary nature, that might provide states with additional justification for import restrictions of the type debated in the moot case. However, since Russelia – the party defending its SPS measures - is not a party to the CBD and CPB, the potential relevance of these treaties is greatly diminished. Furthermore, the question of the applicability of these non-WTO treaties between the parties does not arise, and neither does the interpretation and application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), since it is clear that not all parties to the dispute, let alone all Members of the WTO, are parties to the CBD and CPB. However, parties may seek more creative ways to use these treaties in their argumentation.

First, either party may choose to refer to the CBD or CPB, or to secondary documents derived from them, for the purpose of divining the 'ordinary meaning' of terms used in the SPS Agreement, in accordance with Article 31(1) VCLT as reflecting customary international rules of interpretation. This would be in line with the approach pursued, *inter alia*, by the *EC - Biotech* Panel.

More specifically, Aldousia may argue that being a party to the CBD and CPB establishes a rebuttable presumption that its decision to permit commercial distribution of cloned sheep, on the basis of the ELSA Report, complies with the highest international notions of precaution, higher indeed than the SPS standard accepted by Russelia as legally binding, and that this should override the doubts raised by the 2005 and 2010 Russelian Reports that underlie the CPS.

Russelia cannot in any case rely directly on the CBD and CPB if only because it is not a party to either, but it could argue that Aldousia's adherence of the CBD and CPB constitute an acceptance of a general principle of precaution.

Finally, parties to the may debate whether the 'precautionary principle', whereby states must (or may) take positive action against risk before it has been scientifically established, has crystallized into international customary law, and if so, whether this principle should affect the assessment of the legality of Russelia's measures. Parties may turn to the extensive international law literature on this issue, but must address the findings of the *EC - Hormones* Panel and Appellate Body rulings, as well as the *EC - Biotech* Panel, according to which the customary status of the precautionary principle is doubtful, and in any case, in the WTO context, the principle is embodied by

the provisions of Article 5.7 SPS, which subsumes the customary principle, if it indeed valid.

8. Problem of applicable standard of review under Articles 2.2/5.1 and 5.7 SPS

a) General remarks

Articles 2.2/5.1 and Article 5.7 SPS raise the question of the applicable standard of review. This may be defined as "the level of intensity of the scrutiny that [the] reviewing body [here the panel] will exert over the decision or regulation being reviewed."[23] The applicable standard of review is particularly important when reviewing scientific evidence submitted by the parties. A fully deferential standard results in the inability of a panel to review the substance of scientific findings made on national level and forces it to concentrate on procedural dimension (i.e. whether a procedures prescribed by the SPS Agreement were followed). A *de novo* standard of review allows a panel to review the substance of domestic scientific determinations and, if needed, to substitute them with its own judgments.

SPS case law is rather inconsistent as to the applicable standard of review. The general principle is that such standard is neither *de novo* review as such nor 'total deference' but rather the 'objective assessment' of facts."[24] However, the understanding as to what constitutes an 'objective assessment of fact' differs (labelling a standard as 'objective' does not in fact determine how intrusive it should be). Some case law has gone in the direction of *de novo* review (*EC – Biotech* and *Japan - Apples*), while other case law has been more deferential, such as the *US/Canada – Continued Suspension* Appellate Body Report. According to this report, a panel is expected to: (a) identify the scientific basis underlying the SPS measure, (b) verify that the scientific basis comes from a respected and qualified source, (c) assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent, and (d) determine whether the results of the risk assessment sufficiently warrant the SPS measure at issue.

The approach of the Appellate Body in the most recent case (*Australia – Apples*),[25] remains somehow ambiguous. On the one hand, it accepted the panel's approach, which was focused on the methodology of Australia's risk assessment. It also confirmed a rather deferential approach to the evaluation of scientific evidence as such (para. 215) and endorsed documentation and transparency requirements (i.e. how risk assessors reached the expert judgments made at intermediate steps of risk assessment) (para. 248). These elements are typical for a deferential approach that focuses on risk assessment process rather than its substance. On the other hand, the Appellate Body accepted that the investigation into the underlying methodology and the reasoning articulated in a risk assessment could be relatively intrusive (para.

[23] C. Button, *The Power to Protect. Trade, Health and Uncertainty in the WTO*, p. 164.

[24] Appellate Body Report, *EC – Hormones*, para. 117.

[25] The Appellate Body Report in this dispute was issued subsequent to the publication of the EMC^2 moot case. However, as emphasized in answer Q11 in The Clarifications to the Case, teams may, and must, refer to such recent case law where pertinent.

215). It also disagreed with Australia that the panel review, when evaluating expert judgments (used in order to make up for missing scientific data or to address indentified scientific uncertainties), should be limited to establish whether they fall within a range considered legitimate by the standards of the scientific community. According to the Appellate Body, a panel is entitled to make its own assessment and decide whether such expert judgments and conclusions are actually correct or not (para. 231). Third, the Appellate Body saw the standard of serious fault (i.e. a fault that undermines "reasonable confidence" in risk assessment) as being too low a threshold for examination of contested assessment (paras. 259-60). All of these indicate rather intrusive standard of review, which may go beyond the standards established in *US/Canada - Continued Suspension*.

This lack of clarity and consistency as to the applicable standard of review gives a considerable room for teams to argue applicability of different standards of review.

b) Strategies of teams

Aldousia should argue for a standard that is closer to *de novo* review of scientific claims made by Russelia (although it should also acknowledge that the applicable standard is not purely a *de novo* one). This would mean that the panel may assess quality, persuasive force and accuracy of scientific evidence, that the panel is not required to "accord to factual evidence … the same meaning and weight as do the parties"[26] and that there is no obligation to grant a WTO Member with any significant degree of discretion in the manner in which it chooses, weighs, and evaluates scientific evidence.[27] The *EC – Biotech* report and some findings of the Appellate Body in *Australia – Apples* (see above) can be referred to in this context.

Russelia, on the other hand, should opt for a standard that is closer to a broad deferential approach. In this context, Russelia may refer to the Appellate Body report in *US/Canada – Continued Suspension* and to some of the findings made by the Appellate Body in *Australia – Apples* (see above). Accordingly, it should argue that the panel is not required to assess the correctness of risk assessment but rather whether such assessment is reasonable (in other words whether it is scientifically defensible even if in a panel's opinion other evidence would be better).

[26] Appellate Body, *Australia – Salmon*, para. 267.

[27] Appellate Body, *Japan – Apples*, para. 162-3.

9. Aldousia's claim under Article 5.6 SPS (the least-trade-restrictive alternative)

a) General remarks

Article 5.6 stipulates that:
Without prejudice to paragraph 2 of Article 3, when establishing or maintaining [SPS] measures to achieve the appropriate level of [SPS] protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

Original Footnote No.3 attached to Article 5.6 clarifies that:
For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of [SPS] protection and significantly less restrictive to trade.

The obligation of Article 5.6 may be labelled as the least-trade-restrictive alternative requirement, which compels WTO Members to adopt measures that are not more trade-restrictive than required in order to achieve appropriate level of protection.

b) Claims of the Parties

In order to establish a violation of Article 5.6, Aldousia will need to identify alternative measures that are:

- reasonably available, taking into account technical and economic feasibility;
- achieves Russelia's appropriate level of protection; and
- are significantly less restrictive to trade than the contested measures.

Since the above tests are cumulative, they all need to be demonstrated by Aldousia before finding the violation.

The identification of specific alternatives to the absolute ban that was introduced by Russelia should be left to the creativity of teams. An example of such an alternative may be labelling requirements for food produced from cloned animals. Another one would be a premarketing approval system that will assess safety of imported food (or animals) on a case-by-case basis. As a general rule, alternatives that are merely theoretical or impose an undue burden on Russelia (substantially higher costs or technical difficulties) are not considered to be 'reasonably available'.[28] Obviously, these two considerations may constitute a basis for Russelia's defence. In particular, Russelia may argue that premarketing approval system will be substantially more expensive than the absolute ban.
As a second step of its argument, Aldousia should establish that its alternative is able to achieve Russelia's appropriate level of protection (ALOP). Note that

[28] Appellate Body, *EC – Asbestos*, para. 308.

the question here is not whether an alternative meets the level of protection currently achieved by the Russelian measure (i.e. zero risk) but rather the ALOP that is sought by Russelia (i.e. in accordance with the 2010 Russelian Report, as a high level of human and animal health protection – see para 19(c) of the Case).[29] This should make Aldousia's easier, as a high level of protection accepts the existence of some risk (which is not a case for zero risk approach). On the other hand, Russelia may argue that the statement in the risk assessment does not constitute a determination of relevant ALOP. ALOP as such is determined not by the risk assessor but rather by risk managers (i.e. legislator), who take into account different factors such as the outcome of risk assessment and also available resources, cultural considerations, and potential benefits.[30] Introduction of an absolute ban by the CPS shows that risk managers wanted to achieve zero risk rather than a 'merely' high ALOP. Russelia can add that in case of any doubts as to the designated ALOP, the panel should rely on standard rules developed in SPS case law which require the determination of ALOP on the basis of the level of protection reflected in the SPS measure actually applied (e.g. Appellate Body Report, *Australia – Salmon*, para. 207), on an 'objective' basis.

In addition, Russelia may also claim that alternatives identified by Aldousia (irrespective of what one considers as ALOP) do not achieve the level of protection that Russelia deems appropriate.

Finally, Aldousia needs to demonstrate that such an alternative is significantly less restrictive to trade than Russelia's measures. Since Article 5.6 introduces a *de minimis* threshold, Aldousia needs to show that the difference in restrictiveness is significant. However, this should not be difficult if Aldousia imposes a complete ban without any alternative that permits international trade to continue (even if such trade is subject to specific conditions). Russelia should concentrate in its argument on two elements of the above tests rather than defend a measure under the third element only. It is also worth adding that the 'least trade restrictive test" embedded in Article 5.6 SPS is a reflection of interpretations of Article XX(b) GATT and strongly associated with that provision. Parties may therefore be expected to refer to GATT/WTO jurisprudence relating to the "necessity" test in various sub-provisions of Article XX GATT. In particular, differences may arise with respect to the question of whether the least-trade restrictive test should be applied to a specific measure or to the comprehensive regulatory scheme (i.e., to the CPS and RCBCA enforcement measures separately or taken as a whole).[31] If the least trade restrictive test is applied to the entire Russelian regulatory scheme, it would be more deferential to Russelian rules and decisions. If applied

[29] As noted by the Appellate Body "to imply the appropriate level of protection from existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case" (Appellate Body Report, *Australia-Salmon*, para. 203). The opposite situation, although rare, is also possible (a level of protection reflected in a measure is higher than ALOP). For example in the *Australia - Salmon* case, Australia described its ALOP as conservative while the relevant measure was based in a zero-risk approach.

[30] *See e.g.* Gruszczynski (Regulating health), p. 20.

[31] In particular, see Appellate Body Report, *US - Shrimp*, paras. 115-116.

specifically to the RCBCA enforcement measures, these measures would be more difficult to justify. Especially since there is no evidence that these measures set out transparent criteria for compliance.

10. Aldousia's claim under Article 2.3 SPS (prohibition of discrimination and disguised restriction of trade)

a) General remarks

Article 2.3 SPS reads:
Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 2.3, alongside Article 5.5, introduces an element of consistency in the context of the SPS Agreement as WTO Members are expected to respond to the same or similar risks in a consistent fashion.

b) Claims of the Parties

In order to establish a violation of Article 2.3, first sentence, Aldousia needs to show that:

- the Russelian measure discriminates between two WTO Members;
- discrimination is arbitrary or unjustifiable;
- identical or similar conditions prevail in the territory of the Members compared.

Aldousia should claim that discrimination (different treatment of products compared to the detriment of one group) exists with regard to the treatment of sheep and sheep products from Aldousia and sheep and sheep products from Zamyatin. In particular, Aldousia should argue that although Zamyatin imposed a ban on the importation and marketing of cloned animals some cloned stud rams had been exported to that country and introduced into its flocks with the intention of using them in the reproduction process. Given the relatively rapid ovine cycle of reproduction, one might assume that a considerable (yet indeterminate) number of Zamyatinian sheep already qualify (and this number will grow in the future) as cloned progeny. Nevertheless, the importation of Zamyatinian sheep and sheep products to Russelia remains unaffected by border enforcement activities of the RCBCA. Consequently, a Russelian SPS measure discriminates between two WTO Members. The discrimination also exists between Aldousian sheep and Russelian domestic sheep (*cf.* para. 9 of the Case which confirms that Russelia maintains domestic production of sheep).

Subsequently, Aldousia should argue that discrimination is either arbitrary or unjustifiable. With regard to Zamyatinian sheep such arbitrariness consists in different treatment of exactly the same goods (cloned sheep or products derived from them) posing at least in theory the same potential risks. The same is true with regard to Russelian domestic production. Since Aldousia claims that there is no difference in terms of safety between cloned sheep and their traditional counterparts, different treatment of these two categories

should be regarded as arbitrary. Aldousia should add that potential justification could be provided by scientific evidence that would show existence of risk. In the opinion of Aldousia this is not the case, as Russelia has failed to present such evidence. Furthermore, once Zamyatinian sheep, that are possibly cloned progeny or even cloned stud rams from Aldousia indirectly imported to Russelia, are introduced to Russelian flocks, there is no basis for the distinction.

With regard to the third condition, should it arise, Aldousia may simply maintain that similar sanitary and phytosanitary conditions exist on the territory of every Member concerned.

In its defence, Russelia can admit that despite the differences in the treatment of sheep and sheep products from Aldousia vs. domestic and Zamyatinian sheep and sheep products, that may amount to discrimination, this cannot be regarded as arbitrary or without justification. In regard to Zamyatinian sheep and sheep product, Russelia should emphasize the difference in risk as compared to Aldousian goods. Risk is a combination of likelihood and adverse effect. While both groups of goods involve the same adverse effects, the likelihood of their occurrence is entirely different due to the small volume of cloned sheep in Zamyatin.

Russelia may recall in this context a finding of the panels in *EC – Hormones* and *Australia - Salmon* (paras. 8.193 and 8.134 respectively) where the difference in the extent of risk was considered as sufficient justification (albeit under Article 5.5 and not 2.3). This approach does not exclude in the future the enforcement of the CPS will be extended to other countries, which are commercially involved in cloned sheep production (as of now Aldousia is the only country that is involved in such activity - *cf.* para. 3 of the Case). Russelia may also add that under Zamyatinian law, importation and marketing of cloned animals and product derived from them is illegal. Consequently, any export of such animals and related products to Russelia will be only marginal.

As far as differential treatment of Aldousian and Russelian produce is concerned, Russelia may rely on a similar argument. Since in its opinion cloned animals pose (or may pose) a health risk, their differential treatment as compared to traditional counterparts is justified. Russelia may again refer to relevant SPS case law, which recognizes a level of risk as a possible form of justification.

11. Russelia's defence under Article XX of the GATT 1994 (public morals exception and human and animal health and life exception)

a) General remarks

If Russelia cannot successfully persuade the panel that its measures are compatible with the requirements of the SPS Agreement, it has made an alternative claim according to which its measures are justified either under Article XX(a) or Article XX(b) of the GATT 1994.

The relevant part of **Article XX of the GATT 1994** provides that:
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health.

b) Claims of the Parties

1. Article XX(a) – Public Morals

Aldousia does not claim that Russelia has violated the GATT 1994, but only the SPS Agreement (the case emphasizes that Russelia made no claims under other covered agreements (para. 22). Participants are required to understand that the defense raised by Russelia under Article XX(a) GATT is not intended to justify a violation of the GATT, but rather to justify SPS measures taken not in conformity with the SPS Agreement. This raises the question of the applicability of Article XX GATT general exceptions to non-GATT 1994 obligations. Indeed, this should be the focus of the parties' arguments in this claim.

In other words, Russelia must argue that even if its measures are found to be violations of the SPS Agreement, they can be justified for reasons related to public morals. As noted in section 3 above, the *EC - Biotech* Panel found that an SPS measure may concurrently serve a non-SPS purpose and consequently might benefit from separate justification to the extent that it serves that purpose, with respect to which it might be considered a non-SPS measure (paras. 7.162-7.174). The construction of an Article XX(a) argument by Russelia is, however, different, because it will assume that the measures have been found to constitute SPS measures, in whole or in part, but that they may nevertheless be justified under Article XX(a) GATT.

Russelia must therefore first establish that the general public morals exception in Article XX(a) GATT applies to SPS obligations. Such an argument is without direct precedent in WTO jurisprudence. Russelia should argue that SPS obligations must be read in context together with

the GATT 1994, including the general exceptions. The SPS Agreement and the GATT 1994 are both part of Annex 1A to the Marrakesh Agreement Establishing the WTO, and they both relate to trade in goods. The SPS Agreement establishes obligations that are enhancements and elaborations of the GATT 1994 provisions that apply to SPS measures. If the public morals exception may justify an import ban that runs afoul of the GATT 1994, it would not make sense if the same import ban, if inconsistent with the provisions of the SPS, could not benefit from the same defense. Any other interpretation would empty the general exceptions of meaning, and significantly upset the balance of rights and obligations between WTO Members by denying them their right to adopt measures necessary to protect public morals – an outcome that was not the intention of the drafters of the SPS. Russelia may argue that a general exceptions was not included in the SPS or in any other of the Annex 1A GATT 1994 instruments precisely because parties assumed that Article XX GATT would continue to apply to all trade in goods. This is in contrast with the non-goods related agreements in Annex 1 GATT 1994, the GATS and TRIPS, to which Article XX GATT clearly could not apply, and each of which therefore includes specific regulation of general exceptions. In this context, Russelia may refer to the Appellate Body Report in *China - Audiovisual Products* (at para. 233), that determined that China may rely upon Article XX(a) as a defense in relation to violations of commitments in its Protocol of Accession.

In response, Aldousia should argue that according to the language of the *chapeau* of Article XX GATT ("nothing in *this* agreement..."), the general exceptions apply only to the GATT 1994 itself, and nothing in the language and context of the SPS implies that the general exceptions are applicable to it. The absence of a general exceptions clause or public morals exception in the SPS indicates that the drafters did not intend for any such exceptions to apply. The Appellate Body decision in *China - Audiovisual Products* is (*per* Aldousia) not dispositive in the present case for at least two reasons. First, the Apellate Body decision related to a protocol of accession. Under article 1(b)(ii) GATT 1994, pre-1994 protocols of accession are part and parcel of the GATT. Aldousia may argue that China's post-1994 protocol of accession was similarly covered by the GATT 1994, and hence, subject to the assimilation of Article XX exceptions. All this is in contrast to the SPS Agreement, that is clearly not explicitly referred to in such a way. Second, the Appellate Body did not apply Article XX(a) GATT to China's protocol of accession as a whole or as a general matter, but only to one of its specific provisions of it (para. 5.1), on the basis of an intepretation of that provision. Therefore, even if the *China - Audiovisual Products* case were relevant, it would be incumbent upon Russelia to explain how particular provisions of the SPS that it wishes to derogate from, may be interpreted as applying the public morals exception of Article XX(a) GATT.

Beyond the threshold question of the applicability of Article XX(a) GATT to the SPS Agreement, parties may devote some of their arguments to the merits of the Article XX(a) GATT claim. Russelia will refer to the definition of public morals put forth by the Panel in *US - Gambling*, whereby "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation" (para. 6.465). Here it is important to note that the case facts do not provide any information about particular standards of right and wrong in Russelian society, beyond the text of the 2000 Russelian Advisory Statement, which states that the ban on imports of cloned animals and derivative products is *a "precaution […] not merely necessary to protect human, animal and plant life and health, but […] a basic requirement of public morals in our society"*. Thus, participants have hardly any basis for arguing that cloning and cloned animals, as such, violate Russelian public morals. Rather, participants should make a more sophisticated argument, according to which precaution in the face of scientific uncertainty is a requirement of Russelian public morals, and therefore any violation of the SPS is justified by it. The selected bibliography that participants have been referred to includes an article that makes this argument.[32] However, inevitably some participants will argue that cloning is against Russelian morals. In any case, Russelia will have to argue that the CPS satisfies the necessity test of Article XX(a) GATT, and that it is a non-discriminatory and non-arbitrary measure that is not a disguised restriction of trade, with reference to classical Article XX GATT Jurisprudence.

Aldousia will argue that the SPS Agreement already addresses the need for precaution through rules that in themselves provide for less trade restrictive measures than import bans based on precaution alone. The degree of precaution that a member may exercise should properly be determined according to the SPS Agreement. If the CPS and RCBCA are SPS measures that are not inconformity witht he SPS Agreement, Russelia cannot simply reintroduce the vague concept of precaution throguh the side door of public morals, without violating its obligation to comply with the SPS in good faith. Russelia has not shown any special moral tendency for precaution in Russelian society (let alone that there is a Russelian moral attitude towards cloning). The measures are not necessary, due to the existence of less-trade restrictive alternatives (see section 9 above), and in any case the RCBCA's lack of enforcement of the CPS towards imports from Zamyatin indicates that the ban is arbitrary and discriminatory, constituting a disguised restriction of trade.

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[32] Gareth T. Davies, *Morality Clauses and Decision-Making in Situations of Scientific Uncertainty: The Case of GMOs*, 6(2) World Trade Review 249 (2007).

2. Article XX(b) Human, Animal or Plant Life of Health

This claim is of very limited actual value in the dispute but has been inserted in order to require participants to demonstrate their knowledge with respect to the relationship between the SPS Agreement and Article XX(b) GATT, both of which relate to restrictions on trade necessary to protect human, animal or plant life or health.

In the recent *US - Poultry* case, the US argued that certain SPS measures affecting imports of poultry from China were justified under Article XX(b) GATT, in addition to being SPS compliant. However, in that dispute, the complainant (China) had claimed violations of GATT provisions (in particular, Article XI) in addition to violations of the SPS Agreement. In the present moot case, Aldousia has not made any claims under the GATT. Thus, any Article XX(b) argument raised by Russelia must relate to the SPS itself.

Similar to its Article XX(a) public morals argument described above, Russelia might make a far-reaching claim that it considers the SPS Agreement to be derogable under Article XX(b) GATT, for the purpose of precaution. Indeed, under Article 2.4 SPS, SPS measures that conform to the relevant provisions of the SPS Agreement are presumed to to be in accordance with GATT 1994 obligations relating to SPS measures, in particular Article XX(b). However, this does not imply that if a measure does *not* conform with the SPS Agreement, it is necessarily not in conformity with Article XX(b), nor does it mean that the SPS Agreement is not derogable. Hence, Russelia might argue that Article XX(b), if applicable to the SPS Agreement, permits it to apply a higher standard of precaution, subject to the terms of that provision. This is a very slim argument, given that the SPS Agreement incorporates the substantive conditions of Article XX(b).

Ultimately, the *US - Poultry* panel found (para. 7.582) that if an SPS measure is not in conformity with the SPS Agreement, it cannot benefit from an Article XX(b) defense with respect to GATT violations. Aldousia should argue on this basis that *a fortiori*, such a measure cannot benefit from an Article XX(b) defense with respect to SPS violations.

12. Indicative References:

a) Legal Acts

- 1969 Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/28, UNTS 58 (1980), 8 ILM 679
- Agreement on the Application of Sanitary and Phytosanitary Measures
- General Agreement on Tariffs and Trade (GATT) 1994
- Understanding on Rules and Procedures Governing the Settlement of Disputes

b) World Trade Organization Cases:

- Panel Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA (**EC – Hormones**)
- Panel Report, *Australia – Measures Affecting Importation of Salmon,* WT/DS18/R **(Australia – Salmon)**
- Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R **(Japan – Agriculture Products)**
- Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R **(Japan – Apples)**
- Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R **(EC – Biotech)**
- Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R **(US – Continued Suspension)**
- Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand* WT/DS367/R (not yet adopted) **(Australia – Apples)**
- Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (**US-Poultry**)
- Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (**US - Gambling**)
- Appellate Body Report, *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (**EC – Hormones**)
- Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R **(Australia – Salmon)**
- Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R **(Japan – Agriculture Products)**
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- Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R **(US – Continued Suspension)**
- Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand* WT/DS367/AB/R (not yet circulated or adopted) **(Australia – Apples**)

c) Selected Literature:

- Broude, Tomer, *Genetically Modified Rules: The Awkward Rule-Exception-Right Distinction and EC-Biotech*, 6(2) World Trade Review 215 (2007)
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- Guzman, Adrew, *Dispute Resolution in SPS Cases*, in Dan Horovitz, Daniel Moulis & Debora Steger (eds.), *Ten Years of WTO Dispute Settlement*, International Bar Association: 2007
- Marceau, Gabrielle & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade*, 36 Journal of World Trade 811 (2002)
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- Winickoff, David, Sheila Jasanoff, Lawrence Busch, Robin Grove-White & Brian Wynne, *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 Yale Journal of International Law 81 (2005)
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