

Team: 011

ELSA MOOT COURT COMPETITION ON WTO LAW  
2010-2011

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

Aldousia  
(*Complainant*)

vs

Russelia  
(*Respondent*)

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SUBMISSION OF THE COMPLAINANT

## PART A – General

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### I LIST OF REFERENCES

#### A WTO and GATT Agreements

1. *General Agreement on Tariffs and Trade 1947*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948)
2. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), and its Annexes, including:
  - a. *Agreement on Technical Barriers to Trade*, Annex 1A
  - b. *Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex 1A
  - c. *General Agreement on Tariffs and Trade 1994*, Annex 1A
  - d. *General Agreement on Trade in Services*, Annex 1B
  - e. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2

#### B Other Treaties and Conventions

3. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

#### C WTO Reports

4. *Australia—Apples*: Panel Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
5. *Australia—Salmon*: Panel Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R
6. *Australia—Salmon (Art 21.5 – Canada)*: Panel Report, *Australia—Measures Affecting Importation of Salmon – Recourse to Art 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
7. *Brazil—Desiccated Coconut*: Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
8. *Brazil—Retreaded Tyres*: Appellate Body Report, *Brazil—Measures Affecting Imports of*

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*Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007

9. **China—Publications and Audiovisual Products**: Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
10. **EC—Approval and Marketing of Biotech Products**: Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
11. **EC—Bananas III**: Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
12. **EC—Hormones**: Panel Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R
13. **Japan—Agricultural Products II**: Panel Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report WT/DS76/AB/R
14. **Japan—Alcoholic Beverages II**: Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
15. **Japan—Apples**: Panel Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R
16. **Korea—Dairy**: Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
17. **Korea—Beef**: Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
18. **US—1916 Act (Japan)**: Panel Report, *United States—Anti-Dumping Act of 1916*, *Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Reports WT/DS136/AB/R, WT/DS162/AB/R
19. **US—Continued Suspension**: Panel Report, *United States—Continued Suspension of*

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*Obligations in the EC—Hormones Dispute*, WT/DS320/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R

20. **US—Gambling**: Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
21. **US—Gasoline**: Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
22. **US—Poultry (China)**: Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
23. **US—Section 110(5) Copyright Act**: Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, 3769
24. **US—Shrimp**: Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

### D Non-WTO Cases

25. **Serbian Loans**: *Payment of Various Serbian Loans Issued in France*, (1929) PCIJ (ser A) No 20

### E WTO Documents

26. *Tenth Meeting of the Negotiating Group on Agriculture*, 14 September 1998, MTN.GNG./NG5/10

### F Books, Chapters and Journal Articles

27. Gruszczynski, Lukasz, *Regulating Health and Environmental Risks Under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford University Press, 2010)
28. Scott, Joanne, *The WTO Agreement of Sanitary and Phytosanitary Measures: A Commentary* (Oxford University Press, 2007)

### G Other Sources

29. European Food Safety Authority, *Scientific Opinion of the Scientific Committee, Food Safety, Animal Health and Welfare and Environmental Impact of Animals derived from*

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*Cloning by Somatic Cell Nucleus Transfer (SCNT) and their Offspring and Products  
Obtained from those Animals*, The EFSA Journal (2008)

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### II LIST OF ABBREVIATIONS

|                    |  |
|--------------------|--|
| 2005 Report        | Cloned Animals and Derivative Products: A Scientific Risk Assessment (2005)                |
| 2010 ELSA Report   | Report conducted in January 2010 by the Expert League of Scientists in Aldousia            |
| 2010 Report        | Survey and Assessment of Risks Associated with Cloned Sheep and Derivative Products (2010) |
| AB                 | Appellate Body   |
| ABR                | Appellate Body Report  |
| Art                | Article  |
| Cf                 | <i>Confer</i>  |
| Covered Agreements | The Agreements listed in Annex 1 of the DSU  |
| CPB                | <i>Cartagena Protocol on Biosafety</i>   |
| CPS                | <i>Cloning Precaution Statute</i>  |
| DSB                | Dispute Settlement Body  |
| DSU                | <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>          |
| Eg                 | <i>exempli gratia</i>  |
| Fn                 | Footnote   |
| GATS               | <i>General Agreement on Trade in Services</i>  |
| GATT 1947          | <i>General Agreement on Tariffs and Trade 1947</i>   |
| GATT 1994          | <i>General Agreement on Tariffs and Trade 1994</i>   |
| PR                 | Panel Report   |
| RCBCA              | Russelian Customs and Border Control Administration  |
| SPS                | <i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>                 |
| TBT                | <i>Agreement on Technical Barriers to Trade</i>  |
| VCLT               | <i>Vienna Convention on the Law of Treaties</i>  |
| WTO                | World Trade Organization   |
| WTO Agreement      | <i>Marrakesh Agreement Establishing the World Trade Organization</i>                       |



### **III SUMMARY**

#### **1. Russelia's measures fall within the SPS**

- The CPS and its enforcement by the RCBCA are SPS measures that fall within the scope of the SPS. These measures affect international trade and fall within the second paragraph of SPS Annex A(1) because the CPS is a 'law' and the RCBCA enforcement is a 'requirement'.
- Russelia's measures are applied for a purpose under Annex A(1)(a) as epigenetic effects are a disease. The measures are applied to protect against the spread of transmissible diseases.
- Russelia's measures are applied for a purpose under Annex A(1)(b) as they protect against contaminants, toxins and transmissible diseases in food.
- Russelia's measures are applied for a purpose under Annex A(1)(c) as cloned sheep and their progeny are disease-carrying organisms.

#### **2. Sufficient scientific evidence exists to perform a risk assessment (SPS Art 5.1)**

- SPS Art 5.1 applies, and SPS Art 5.7 does not apply, because sufficient scientific evidence exists to conduct a risk assessment pursuant to Annex A(4). A large body of scientific evidence exists about the effects of cloning, as recognized by Russelia in its purported 'risk assessments'.
- Scientific uncertainties, such as those identified by Russelia, cannot be equated with insufficiency, and are properly accounted for under Art 5.1.

#### **3. Russelia's measures are not based on a risk assessment (SPS Art 5.1)**

- The 2010 Report is not a valid risk assessment as it does not satisfy Annex A(4).
- The 2010 Report does not evaluate the likelihood of entry of a disease, disease-carrying organism or disease-causing organism. Rather, the 2010 Report identifies mere uncertainties and does not assess their likelihood. Similarly, the 2005 Report is not a risk assessment. It does not identify risks with sufficient certainty. Neither the 2005 Report nor the 2010 Report adequately identifies or considers alternative measures. At any rate, the 2010 Report cannot be taken into account because it post-dates the adoption of the measures.
- Even if the 2005 and 2010 Reports are risk assessments, Russelia's measures are not based on them as there is no rational and objective connection between the Reports and the measures.

#### **4. Russelia's measures do not satisfy the requirements of SPS Art 5.7**

- Even if there is insufficient evidence to carry out a risk assessment, Russelia has not met the requirements of Art 5.7. Russelia does not intend to seek information for a more objective risk assessment, nor does it intend to review its measures within a reasonable period of time.

**5. Russelia's measures violate SPS 5.6.**

- Significantly less trade-restrictive measures are reasonably available to Russelia.
- First, Russelia could allow the importation of animals for the purposes of non-food production, whilst keeping such animals separate from the domestic population.
- Second, Russelia could alter its ban so it allows the importation of distant progeny.

**6. Russelia's measures are inconsistent with SPS Art 2.2**

- A violation of Art 5.1 or Art 5.6 necessarily implies a violation of Art 2.2. However, if there is no violation of these provisions, Russelia has still breached Art 2.2. Art 2.2 requires a higher level of correlation between the measure and the scientific evidence. Russelia's measures are not maintained with sufficient evidence and are disproportionate to existing evidence.

**7. Russelia's measures violate SPS Art 2.3**

- Russelia's measures arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin as stud rams exist in the domestic populations of each country. Similarly, the measures arbitrarily or unjustifiably discriminate between Aldousia and Russelia as non-enforcement of the CPS against animals from Zamyatin indicates that clone progeny will exist in Russelia.
- The CPS is a disguised restriction on trade as it arbitrarily or unjustifiably discriminates.

**8. GATT Art XX cannot justify inconsistency with the SPS**

- The exceptions in GATT Art XX apply to the obligations under GATT 1994 and are not available to justify inconsistency with the SPS. Further, the SPS is *lex specialis* of Art XX(b) and contains specific rules and disciplines that are independent of GATT.

**9. Russelia's measures do not meet the requirements of GATT Art XX**

- Russelia's measures cannot be justified under GATT Art XX(b) because the SPS elaborates on Art XX(b) and therefore controls its meaning in respect of SPS measures.
- Russelia's measures are not necessary to protect human or animal life or health under Art XX(b) because they contribute little to that objective and are highly trade-restrictive.
- Russelia has not established that its measures protect public morals and they are not necessary for that purpose.
- Russelia's measures fail to meet the requirements of the chapeau to GATT Art XX because they arbitrarily or unjustifiably discriminate, as submitted pursuant to SPS Art 2.3.
- Russelia's measures arbitrarily or unjustifiably discriminate as they subject Aldousian farmers not engaged in cloning to more stringent requirements than Zamyatinian farmers.

#### IV STATEMENT OF FACTS

1. Aldousia is a developed country WTO Member and a world leader in agrotechnological research. Aldousia specializes in the farming of sheep, and a significant portion of its export income derives from ovine products, including live animals, meat and dairy products. Russelia is a developing country WTO Member and a significant consumer of sheep and sheep products. It maintains a small domestic sheep population but imports sheep from Aldousia and from Zamyatin, another developing country and WTO Member.
2. In 1996, Aldousian researchers successfully cloned a sheep using SCNT. SCNT allows the creation of genetic replicas of selected animals that exhibit specific desirable traits, thus permitting the production of elite animals for further breeding. In 2000, the Government of Russelia suspended the importation and marketing of cloned animals and progeny pending a risk assessment and the collection of sufficient scientific evidence.
3. In 2005, the Russelian Ministry of Health issued a report purporting to be a risk assessment (the 2005 Report). This Report detailed Russelia's high level of human and animal health protection and identified a low probability risk that cloning could cause unspecified health problems. Following this report the Russelian Parliament enacted the CPS, imposing a general ban on the importation and marketing of any cloned animals or their progeny to an infinite number of generations, and on products derived from clones or clone progeny.
4. In 2010, Podsnap, an Aldousian farming company, perfected SCNT techniques for the commercial cloning of sheep. Podsnap began introducing cloned stud rams into conventionally bred Aldousian flocks in August 2010. This was done in close collaboration with industry bodies and was based on the expert safety opinion contained in the 2010 ELSA Report.
5. On 1 September 2010, the RCBCA began enforcing the CPS by barring the entry of Aldousian sheep and sheep products unless the importer could prove that they were not of cloned origin. Neither the import ban, nor the requirement to prove ancestry are being enforced in regard to the importation of Zamyatinian sheep and sheep products to Russelia despite the introduction of approximately 100 stud rams into Zamyatinian sheep flocks.
6. On 15 September 2010, the research group responsible for the 2005 Report issued another report purporting to be a risk assessment (the 2010 Report). The assessment in the 2010 Report was performed subsequent to the adoption of the CPS and was published after the implementation of the RCBCA enforcement activities.

## V THE MEASURES AT ISSUE

The measures at issue are: (1) the CPS, which bans the importation and marketing of cloned animals, progeny and products; and (2) the enforcement of the CPS by the RCBCA, which requires importers to prove that Aldousian sheep and sheep products are not of cloned origin.

## VI LEGAL PLEADINGS

### A Treaty Interpretation

1. DSU Art 3.2 requires the Panel to interpret the Covered Agreements according to ‘the customary rules of interpretation of international law’, which relevantly include those in Arts 31 and 32 of the VCLT.<sup>1</sup> Thus, the text of the relevant agreement should be interpreted in good faith<sup>2</sup> pursuant to its ordinary meaning<sup>3</sup> and in light of its object, purpose, and context, which includes its preamble and annexes.<sup>4</sup> ‘Relevant rules of international law applicable in the relations between the Parties’<sup>5</sup> may also be ‘taken into account’ as interpretive aids, provided they bind all WTO Members.<sup>6</sup> Additionally, preparatory material relating to the relevant Agreement may be consulted in order to confirm an interpretation arrived at via the methods outlined above.<sup>7</sup>

### B Russelia’s measures fall within the SPS

2. SPS Art 1.1 provides that the SPS applies to all SPS measures affecting international trade. The CPS and the RCBCA’s enforcement activities fall within the SPS because they are SPS measures affecting imports and therefore international trade.<sup>8</sup>

(1) *Russelia’s measures fall within SPS Annex A(1), second paragraph*

3. Pursuant to SPS Annex A(1), second paragraph, SPS measures include measures taking the form of ‘all relevant laws, decrees, regulations, requirements and procedures’ as well as those in the nature of ‘*inter alia*, ... certification and approval procedures’.<sup>9</sup> The CPS is a ‘relevant law’, and its enforcement by the RCBCA involves a ‘requirement’ that importers of Aldousian sheep

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<sup>1</sup> See eg ABR, *US—Gasoline*, 17; ABR, *Japan—Alcoholic Beverages II*, 10.

<sup>2</sup> See eg *Japan—Alcoholic Beverages II*, fn 21.

<sup>3</sup> ABR, *Japan—Alcoholic Beverages II*, 12.

<sup>4</sup> See eg PR, *US—Section 110(5) Copyright Act*, [6.45].

<sup>5</sup> VCLT, Art 31(3)(c).

<sup>6</sup> PR, *EC—Approval and Marketing of Biotech Products*, [7.68].

<sup>7</sup> VCLT Art 32; ARB, *Japan—Alcoholic Beverages II*, [87]; ABR, *US—Gambling*, [67].

<sup>8</sup> PR, *EC—Hormones*, [8.23]; PR, *US—Poultry (China)*, [7.123].

<sup>9</sup> PR, *Australia—Apples*, [7.149]–[150], [7.153]; cf PR, *EC—Approval and Marketing of Biotech Products*, [7.149].

and sheep products prove their imports are not of cloned origin.<sup>10</sup>

(2) *Russelia's measures are applied for an SPS purpose*

4. Moreover, the SPS regulates only those measures applied for a purpose listed in Annex A(1)(a) to (d). The CPS and the RCBCA requirements are applied for purposes falling within Annex A(1)(a), (b) and (c). Purpose is determined objectively, taking into account the impugned measure's text, scope and surrounding documents.<sup>11</sup> Such documents may post-date the adoption of the measure because Annex A(1) relates to the measure as 'applied'.<sup>12</sup> Thus, both the 2010 Report and the 2005 Report can be taken into account when determining the purpose of the measures.

(a) The purpose of the measures falls within SPS Annex A(1)(a)

5. Measures applied 'to protect animal or plant life or health ... from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms' are SPS measures pursuant to Annex A(1)(a). Russelia's measures fall within this paragraph because epigenetic effects are a disease, and, correspondingly, sheep with epigenetic disorders are disease-carrying organisms. A disease is a 'disorder of structure or function' that presents abnormal symptoms or illness.<sup>13</sup> The 2010 Report indicates Russelia's concern that cloning may produce epigenetic effects in cloned animals. Such effects are a 'disease' because they involve a disorder of genetic function that causes symptoms such as higher birth mortality rates, birth abnormalities and increased susceptibility to disease.<sup>14</sup> Sheep with heritable epigenetic effects are moreover 'disease-carrying organisms' because epigenetic effects may be transferred through breeding. Further, Russelia's measures are applied to prevent the entry of cloned sheep and progeny because they may be more susceptible to infections and transferable disease agents and are therefore more likely both to be carrying diseases upon importation and to acquire diseases subsequent to importation.<sup>15</sup> Therefore, the measures are applied to protect against the 'entry, establishment or spread' of 'disease-causing organisms' within the meaning of Annex A(1)(a).

(b) The purpose of the measures falls within SPS Annex A(1)(b)

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<sup>10</sup> Cf ABR, *Japan—Apples*, [15].

<sup>11</sup> ABR, *Australia—Apples*, [172]; see PR, *Australia—Salmon*, [8.31]–[8.37]; Scott (2007), 17.

<sup>12</sup> Annex A(1); PR, *EC—Approval and Marketing of Biotech Products*, [7.2558].

<sup>13</sup> PR, *EC—Approval and Marketing of Biotech Products*, [7.277].

<sup>14</sup> ELSA Case, [19(a)].

<sup>15</sup> ELSA Case, [19(b)(3)]; PR, *EC—Approval and Marketing of Biotech Products*, [7.278].

6. Measures applied to protect human life or health from risks arising from ‘contaminants, toxins or disease-causing organisms in foods’ are SPS measures pursuant to Annex A(1)(b). Russelia’s measures prevent the importation of food products derived from cloned sheep and are applied to protect human life and health from risks arising from ‘contaminants, toxins or disease-causing organisms’ therein. Contaminants are unintentionally added ‘substance[s]’ that infect or pollute.<sup>16</sup> Mutated genes may be ‘contaminants’ or ‘toxins’. Cloning may unintentionally produce genetic mutations in animals, which could cause allergic reactions when consumed.<sup>17</sup> These mutated genes are thus a ‘substance’ that may infect or pollute food products.<sup>18</sup> Moreover, as allergens, mutated genes are ‘toxins’,<sup>19</sup> which are ‘any poisonous antigenic substance produced by or derived from micro-organisms, which causes disease when present at low concentration in the body’.<sup>20</sup> Higher disease susceptibility in cloned sheep and progeny may also expose humans to ‘transmissible disease agents’ in food.<sup>21</sup> The measures are applied to protect against such disease agents, which are ‘disease-causing organisms’.

(c) The purpose of the measures falls within SPS Annex A(1)(c)

7. Measures applied ‘to protect human life or health ... from risks arising from diseases carried by animals’ are SPS measures pursuant to Annex A(1)(c). As noted at paragraph 5 above, the 2010 Report identifies risk to humans from diseases carried by cloned sheep or progeny. The measures are applied to protect human life or health from these diseases.

**C SPS Arts 2.2 and 5.1 apply to Russelia’s measures**

8. SPS measures that are not based on international standards<sup>22</sup> may be maintained pursuant to either (a) SPS Arts 2.2 and 5.1, which together require measures to be based on scientific principles and maintained with sufficient scientific evidence;<sup>23</sup> or (b) SPS Art 5.7, which allows the adoption of provisional measures where available scientific evidence is quantitatively or qualitatively ‘insufficient’ to conduct an adequate risk assessment.<sup>24</sup> Scientific insufficiency is thus a precondition for the applicability of Art 5.7 and must be determined on an objective

<sup>16</sup> PR, EC—*Approval and Marketing of Biotech Products*, [7.312].

<sup>17</sup> ELSA Case, [19(b)(4)].

<sup>18</sup> PR, EC—*Approval and Marketing of Biotech Products*, [7.298], [7.313].

<sup>19</sup> PR, EC—*Approval and Marketing of Biotech Products*, [7.337].

<sup>20</sup> PR, EC—*Approval and Marketing of Biotech Products*, [7.321].

<sup>21</sup> ELSA Case, [19(b)(3)].

<sup>22</sup> SPS Art 3.2.

<sup>23</sup> ABR, EC—*Hormones*, [180]; PR, EC—*Approval and Marketing of Biotech Products*, [7.1439].

<sup>24</sup> ABR, Japan—*Apples*, [179]; ABR, Australia—*Salmon*, [124].

basis.<sup>25</sup>

9. Uncertainty must not be equated with insufficiency: ‘the existence of unknown or uncertain elements does not justify a departure from the requirements of [Art 5.1].’<sup>26</sup> Available evidence is not insufficient merely because it does not provide a conclusive description of risk.<sup>27</sup> Such uncertainty is properly accounted for in Art 5.1 because Members may base their measures on minority scientific opinion and can assess risk either quantitatively or qualitatively.<sup>28</sup> Moreover, the obligation in Art 5.1 to base measures on a risk assessment requires only an ‘objective relationship’ between the assessment and the measure,<sup>29</sup> allowing Members considerable discretion to factor uncertainty into their risk assessment and adopt precautionary measures.<sup>30</sup> To erase the distinction between uncertainty and insufficiency would be contrary to the ordinary meaning of ‘insufficient’ in Art 5.7 and would undermine the division of rights and obligations in the SPS.<sup>31</sup>

10. Sufficient scientific evidence exists to perform a risk assessment pursuant to Annex A(4) and Art 5.1. Cloning has been successfully implemented in many jurisdictions for over 15 years, and since 2005 scientific study of cloning has proliferated.<sup>32</sup> Russelia implicitly recognizes the existence of sufficient evidence by referring to its 2005 and 2010 Reports as ‘risk assessments,’ in contrast to the claim of insufficiency in its 2000 Advisory Statement.<sup>33</sup> Moreover, findings from studies of cloned cows and pigs can be extrapolated to sheep. Minority opinion questioning the relevance of these studies<sup>34</sup> does not negate sufficiency, but can be accounted for under Art 5.1. That Aldousia has conducted a risk assessment is also strong evidence of sufficiency.<sup>35</sup>

#### **D Russelia’s measures are not based on a risk assessment (SPS Art 5.1)**

11. SPS Art 5.1 provides that Members must base their SPS measures ‘on an assessment ... of the risks to human, animal or plant life or health’. Russelia’s measures are not based on risk

<sup>25</sup> ABR, *US—Continued Suspension*, [674]; DSU, Art 11.

<sup>26</sup> ABR, *Australia—Salmon*, [130].

<sup>27</sup> ABR, *Japan—Apples*, [184]; PR, *US—Continued Suspension*, [7.631].

<sup>28</sup> ABR, *EC—Hormones*, [194]; ABR, *Japan—Apples*, [179]; ABR, *Australia—Salmon*, [124].

<sup>29</sup> ABR, *EC—Hormones*, [189] (emphasis in original); see also PR, *EC—Approval and Marketing of Biotech Products*, [7.3065].

<sup>30</sup> PR, *US—Continued Suspension*, [7.633]; PR, *EC—Approval and Marketing of Biotech Products*, [7.1525], [7.3065]–[7.3066]; see also Gruszczynski (2010), 135, 189.

<sup>31</sup> ABR, *Japan—Apples*, [184].

<sup>32</sup> ELSA Case, [3], [19].

<sup>33</sup> ELSA Case, [11], [12], [18]; PR, *EC—Approval and Marketing of Biotech Products*, [7.3300].

<sup>34</sup> ELSA Case, [19(b)].

<sup>35</sup> ELSA Case, [4]; ABR, *US—Continued Suspension*, [696].

assessments because neither the 2010 Report nor the 2005 Report is a risk assessment. Further, the measures bear no rational connection to either report. Finally, the measures cannot be ‘based on’ the 2010 Report because it post-dates the adoption of the measures.

(1) *The 2010 Report is not a risk assessment*

12. The 2010 Report is not a ‘risk assessment’ because it does not satisfy the first or second limb of SPS Annex A(4). The first limb requires: first, identification of the relevant disease or pest; second, evaluation of the likelihood of its entry, establishment or spread, and of associated biological and economic consequences; and third, evaluation of the likelihood according to the SPS measures that might be applied.<sup>36</sup> The second limb requires: first, identification of the relevant disease-causing organisms in food, beverages or feedstuffs; and second, evaluation of any potential adverse effects on human and animal health.

13. The sole specific risk identified in the 2010 Report is that adverse epigenetic effects arising from cloning might be heritable.<sup>37</sup> However, while the 2010 Report identifies the risk of *heritability* as ‘very small ... [but] not negligible’, it does not evaluate the likelihood of entry, establishment or spread of epigenetic effects or the severity of associated biological and economic consequences. In addition, the first limb of Annex A(4) requires the identification and consideration of possible alternative measures and an evaluation of the relevant risks in light of those alternatives.<sup>38</sup> The 2010 Report fails to consider any alternative SPS measures.<sup>39</sup>

14. Paragraph (b) of the 2010 Report is not a risk assessment because it is ‘devoid of any indication of potentiality’.<sup>40</sup> While the 2010 Report identifies potential adverse effects, it contains no evaluation of their possible occurrence. Further, all potential risks outlined by the 2010 Report stem ‘from the intrinsic limits of experiments, methodologies or instruments deployed by scientists’ and are therefore not assessable.<sup>41</sup> As such, they are mere theoretical uncertainties.<sup>42</sup>

15. Moreover, the 2010 Report fails to qualify as a ‘risk assessment’ because it lacks objectivity. In determining whether a report constitutes a risk assessment, the Panel must assess the quality of the scientific evidence contained therein and determine the extent to which its

<sup>36</sup> ABR, *Australia—Salmon*, [121]; ABR, *Japan—Agricultural Products II*, [112].

<sup>37</sup> ABR, *EC—Hormones*, [200]; ABR, *Japan—Apples*, [202]; PR, *US—Continued Suspension*, [7.513].

<sup>38</sup> ABR, *Australia—Salmon*, [121]; ABR, *Japan—Agricultural Products II*, [113].

<sup>39</sup> ABR, *Japan—Agricultural Products II*, [113].

<sup>40</sup> ABR, *US—Continued Suspension*, [569].

<sup>41</sup> ABR, *Japan—Apples*, [241].

<sup>42</sup> ABR, *US—Continued Suspension*, [569].



conclusions are based on objective and reliable science.<sup>43</sup> While the 2010 Report states that it is based on international research, it is primarily founded upon minority scientific opinions. Although measures may be based upon minority scientific opinion,<sup>44</sup> these may be relied upon only where they are ‘expressed as part of, and in’ a risk assessment that details both mainstream and divergent opinions.<sup>45</sup> The 2010 Report fails to meet this requirement because it does not set out the mainstream opinions that contradict Russelia’s assessment. The 2010 Report is also heavily based on Russelian and Zamyatinian interpretations of scientific opinion and was prepared by the same Russelian and Zamyatinian scientists responsible for the 2005 Report, further undermining its objectivity.<sup>46</sup>

(2) *The 2005 Report is not a risk assessment*

16. The 2005 Report is also not a risk assessment. It does not fall into either limb of Annex A(4). While it identifies ‘certain risks’,<sup>47</sup> it does not state the source of these risks, including whether they derive from diseases or pests or whether they are food-borne. Moreover, the 2005 Report provides no details concerning specific studies consulted and fails to describe the methodology of the scientists who authored the report.<sup>48</sup>

(3) *Russelia’s measures are not ‘based on’ the 2010 Report or the 2005 Report*

17. Even if the 2010 Report is a risk assessment, Russelia’s measures are not ‘based on’ it within the meaning of Art 5.1. A measure is ‘based on’ a risk assessment where: (a) there is a ‘rational relationship’ between the measure and the risk assessment; and (b) the risk assessment ‘reasonably supports’ the measure.<sup>49</sup> There can be no rational relationship where a risk assessment does not evaluate relevant risks as well as modes of mitigation.<sup>50</sup> The 2010 Report makes an abstract evaluation of the relevant risks, but it fails to evaluate any possible ways to mitigate these. In particular, the CPS imposes a ban on derivative food products, but neither the 2010 Report nor the 2005 Report identifies any specific food-borne risks.

18. Similarly, even if the 2005 Report is a risk assessment, Russelia’s measures are not ‘based on’ it. The 2005 Report identifies ‘certain risks’ associated with cloned animals but does not

<sup>43</sup> ABR, *EC—Hormones*, [186]; ABR, *Japan—Agricultural Products II*, [84]; PR, *US—Continued Suspension*, [7.578]; see also Gruszczynski (2010), 135.

<sup>44</sup> ABR, *EC—Hormones*, [194].

<sup>45</sup> PR, *EC—Approval and Marketing of Biotech Products*, [7.3059].

<sup>46</sup> ELSA Case, [18].

<sup>47</sup> ELSA Case, [12].

<sup>48</sup> PR, *Australia—Apples*, [7.289].

<sup>49</sup> ABR, *EC—Hormones*, [193].

<sup>50</sup> PR, *Australia—Salmon*, [8.98]–[8.99].

specify these. An import ban cannot be rationally related to a risk assessment that finds no evidence of any specific risk.<sup>51</sup>

(4) *At any rate, Russelia cannot rely on the 2010 Report because it post-dates the challenged measures*

19. Russelia cannot rely on the 2010 Report because SPS measures cannot be ‘based on’ risk assessments conducted subsequent to their adoption.<sup>52</sup> Logically, an assessment upon which SPS measures are said to be based must precede those measures’ adoption because it identifies the risks to which the measures respond.<sup>53</sup>

### **E Russelia’s measures do not satisfy the requirements of SPS Art 5.7**

20. If, contrary to Aldousia’s submissions, scientific insufficiency is established, Russelia must show that: (a) its measures are adopted on the basis of ‘available pertinent information’; (b) it is seeking to obtain ‘additional information necessary for a more objective assessment’ of risk; and (c) it has reviewed or will review the measures within ‘a reasonable period of time’. A measure that fails to satisfy any of these requirements will be inconsistent with Art 5.7.<sup>54</sup>

21. Russelia has not satisfied requirement (b). To fulfill this requirement, a Member cannot simply source information in support of its measure.<sup>55</sup> Russelia has indicated that it plans to undertake research concerning risks to animal and human health posed by cloning.<sup>56</sup> Its research proposal does not demonstrate willingness to consider evidence of the safety or benefits of cloning or to explore the possibility of alternative SPS measures.<sup>57</sup> Any resulting risk assessment would therefore not be ‘objective’.

22. Nor has Russelia reviewed the measure within a reasonable period of time pursuant to requirement (c). Russelia’s research proposal comprises two concurrent 10-year research programs,<sup>58</sup> with no guarantee that its measures will be reviewed after their completion. In view of the AB’s decision in *Japan—Agricultural Products II* that the maintenance of fruit testing measures under Art 5.7 for 4 years was unreasonable,<sup>59</sup> this is an unreasonable period of time.

<sup>51</sup> ABR, *EC-Hormones*, [200]; ABR, *Japan-Apples*, [202].

<sup>52</sup> ELSA Case, [14]–[15].

<sup>53</sup> PR, *Australia—Salmon (Canada – 21.5)*, [7.69]; cf PR, *EC—Approval and Marketing of Biotech Products*, [7.1430].

<sup>54</sup> ABR, *Japan—Agricultural Products II*, [89].

<sup>55</sup> ABR, *Japan—Agricultural Products II*, [92].

<sup>56</sup> ELSA Case, [20].

<sup>57</sup> ABR, *Japan—Agricultural Products II*, [113].

<sup>58</sup> ELSA Case, [20].

<sup>59</sup> ABR, *Japan—Agricultural Products II*, [93].

This is especially so since Russelia has already maintained its moratorium on cloned products for 10 years.<sup>60</sup> Even conceding that Russelia, as a developing country, should be accorded lenience, the maintenance of provisional measures for a total of 20 years is unreasonable. This conclusion is supported both by the fact that the measures are highly trade-restrictive and by the relative ease of obtaining additional information in light of the research that is being undertaken around the world.<sup>61</sup>

**F Russelia’s measures are inconsistent with SPS Art 5.6**

(1) *Russelia’s measures do not comply with the necessity requirement of SPS Art 5.6.*

23. SPS Art 5.6 provides that SPS measures must not be ‘more trade-restrictive than required’ to achieve a Member’s appropriate level of protection, ‘taking into account technical and economic feasibility’. Russelia’s measures are inconsistent with SPS Art 5.6. because significantly less trade-restrictive alternatives that would achieve Russelia’s level of protection are reasonably available.<sup>62</sup> Russelia has explicitly adopted a ‘high level of ... protection’,<sup>63</sup> which is lower than the zero-risk level of protection reflected in its ban.<sup>64</sup> As such, any alternatives identified by Aldousia need only achieve a ‘high’ level of protection. Taking into account Russelia’s technical and economic capacity, Aldousia proposes two alternative measures: (a) the controlled importation of cloned sheep for limited uses; and (b) the alteration of the definition of ‘progeny’ in the CPS.

(a) Alternative 1: controlled importation for the production of non-edible goods

24. Russelia could alter its current measures to allow for the controlled importation of cloned sheep and progeny for the production of non-consumable goods, such as wool, sheepskin and lanolin. Russelia has already offered, in its proposal, to allow the importation of Aldousian cloned stud rams and sperm for the purposes of ‘scientific research’.<sup>65</sup> Imported cloned sheep could be kept separate from the conventionally bred sheep population and be used for non-food purposes. This alternative is significantly less trade-restrictive as it allows the importation of some cloned sheep and ovine products where currently there is none.

(b) Alternative 2: Altering the definition of ‘progeny’ in the CPS

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<sup>60</sup> ELSA Case, [11], [14].

<sup>61</sup> ABR, *Japan—Agricultural Products II*, [93]; ELSA Case, [13].

<sup>62</sup> SPS fn 3; ABR, *Australia—Salmon*, [194].

<sup>63</sup> ELSA Case, [12], [19(c)].

<sup>64</sup> ABR, *Australia—Salmon*, [203].

<sup>65</sup> ELSA Case, [20].

25. Russelia could alter the CPS so that its ban applies to a limited number of generations of clone progeny. Sheep have a relatively short reproductive cycle, meaning the majority of Aldousian sheep will have some cloned genetic material in the near future.<sup>66</sup> As such, Russelia's current measures will have an increasingly pervasive effect on trade as cloned genetic material spreads through the Aldousian sheep population. However, the epigenetic effects of concern to Russelia disappear within a few generations.<sup>67</sup> Further, the quantity of cloned genetic material decreases with each subsequent breeding cycle. Allowing the importation of some progeny would therefore allow Russelia to maintain its 'high' level of human and animal health protection and is 'reasonably available' because the RCBCA already examines proof of ancestry.<sup>68</sup> This alternative is significantly less trade-restrictive because it would allow for the importation of a substantial proportion of Aldousian sheep.

#### **G Russelia's measures are inconsistent with SPS Art 2.2**

26. Inconsistency with Art 5.1 necessarily implies inconsistency with Art 2.2 because Art 5.1 is a specific application of Art 2.2.<sup>69</sup> Similarly, Art 5.6 is a specific application of the first limb of Art 2.2, so that inconsistency with the former implies inconsistency with the latter.<sup>70</sup> However, even if Russelia's measures comply with either Arts 5.1 or 5.6, they may still be inconsistent with Art 2.2.<sup>71</sup> The requirement in Art 2.2 that SPS measures be 'maintained with sufficient evidence' posits a closer degree of correlation between SPS measures and scientific evidence than does the requirement in Art 5.1 that measures be 'based on' a risk assessment. Thus, measures 'based on' a risk assessment might nevertheless be maintained without 'sufficient scientific evidence'. Although the AB has interpreted both provisions as requiring an 'objective or rational relationship' between science and the impugned SPS measure, the different terms of the provisions indicates that their content must diverge. This interpretation is supported by the AB's approval in *Japan—Apples* of a proportionality test in Art 2.2 between the seriousness of risk and the nature of the measure to ensure that the two are commensurate,<sup>72</sup> and not just rationally or objectively connected. This test is not inconsistent with Members' right to set their own appropriate level of protection pursuant to SPS Annex A(5), but clarifies that the types of

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<sup>66</sup> ELSA Case, [8].

<sup>67</sup> European Food Safety Authority (2008), 14.

<sup>68</sup> ELSA Case, [15].

<sup>69</sup> ABR, *Australia—Salmon*, [138]; PR, *Australia—Salmon*, [8.52]; ABR, *Japan—Agricultural Products II*, [82].

<sup>70</sup> PR, *EC—Approval and Marketing of Biotech Products*, [7.1430].

<sup>71</sup> ABR, *EC—Hormones*, [250]; PR, *Australia—Salmon*, [8.52]; ABR, *Australia—Salmon*, [138].

<sup>72</sup> PR, *Japan—Apples*, [8.181]; ABR, *Japan—Apples*, [147]; see also Scott (2007), 90.

SPS measures which a given level will justify must be determined within the context of the particular risk concerned. The SPS will not support severely trade-restrictive measures where the risk to be prevented is negligible.

27. Russelia's measures are disproportionate to the risks identified and are therefore not maintained with sufficient scientific evidence. Insofar as Russelia's 2005 and 2010 Reports identify any risks at all, those risks are insufficiently serious and too improbable to justify a full ban. The unsubstantiated assertion that there exists a 'low' possibility of 'certain' risks cannot justify the highly trade-restrictive effects of Russelia's measures.<sup>73</sup>

### **H Russelia's measures are inconsistent with SPS Art 2.3**

28. SPS Art 2.3, first sentence, provides that SPS measures must not 'arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail'. This obligation relates to SPS measures as applied in practice, not merely as such.<sup>74</sup> Art 2.3, second sentence, provides that SPS measures 'shall not be applied in a manner which would constitute a disguised restriction on international trade'.

#### *(1) Russelia's measures are inconsistent with SPS Art 2.3, first sentence*

29. SPS Art 2.3 incorporates the requirements of the chapeau to GATT Art XX, recast as positive obligations.<sup>75</sup> The chapeau therefore informs the meaning of Art 2.3. In the context of the chapeau, discrimination will be 'arbitrary or unjustifiable' if it bears no rational connection to a legitimate objective of the measure.<sup>76</sup> The paragraphs of Art XX enumerate legitimate objectives that Members may pursue subject to the requirements of the chapeau. However, Art 2.3 contains no such list, raising a question as to what constitutes a legitimate objective under Art 2.3. SPS Art 5.5 also informs the meaning of Art 2.3 because it elaborates 'a particular route leading to the same destination' as Art 2.3 by prohibiting arbitrary or unjustifiable distinctions in Members' appropriate levels of protection that result in discrimination or a disguised restriction on trade.<sup>77</sup> Such distinctions will be 'arbitrary or unjustifiable' under Art 5.5 where a Member adopts different levels of protection in comparable situations in which there is no scientific justification for treating the same or similar risks differently.<sup>78</sup> Therefore, discrimination will be

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<sup>73</sup> ELSA Case, [19(a)].

<sup>74</sup> ABR, *Australia—Salmon*, [252]–[254].

<sup>75</sup> ABR, *Australia—Salmon*, [251].

<sup>76</sup> ABR, *Brazil—Retreaded Tyres*, [227].

<sup>77</sup> ABR, *EC—Hormones*, [212], [250].

<sup>78</sup> ABR, *Australia—Salmon*, [146], [158]; ABR, *EC—Hormones*, [223], [228]–[235]; PR, *US—Poultry (China)*,

‘arbitrary or unjustifiable’ under Art 2.3 if it bears no rational connection based on scientific evidence to the objective of protecting against the risks in question or against similar risks.

30. Russelia’s measures discriminate between Aldousia and Zamyatin because they require importers of only Aldousian sheep and sheep products to prove that such imports are not of cloned origin. Identical or similar conditions prevail in Aldousia and Zamyatin because cloned stud rams form part of the ovine populations of both countries,<sup>79</sup> raising a strong possibility that Zamyatinian ovine exports already include or will include animals and products of cloned origin. Such discrimination is arbitrary or unjustifiable because there is no relevant difference between clone progeny and derivative products from Aldousia and those from Zamyatin. Thus, the discrimination bears no rational connection based on scientific evidence to Russelia’s objective of protecting against the risks it claims arise from cloning.<sup>80</sup>

31. Russelia’s measures also arbitrarily or unjustifiably discriminate between Aldousia and Russelia because clone progeny are likely to be exported from Zamyatin into Russelia and to breed there. Thus, animals and products of cloned origin will be farmed and sold in Russelia. As such, the measures arbitrarily or unjustifiably discriminate between Aldousia and Russelia for the same reasons they arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin.

(2) *Russelia’s measures are inconsistent with SPS Art 2.3, second sentence*

32. The AB has held in relation to the chapeau to GATT Art XX that the term ‘disguised restriction on international trade’ embraces ‘arbitrary or unjustifiable discrimination’.<sup>81</sup> Thus, ‘arbitrary or unjustifiable discrimination’ is one type of disguised restriction on trade in Art 2.3. Russelia’s measures are disguised restrictions on trade because they entail arbitrary or unjustifiable discrimination, as already discussed. Further, the fact that Russelia’s measures are not ‘based on’ a risk assessment pursuant to Art 5.1, as discussed at paragraphs 17–18 above, is an additional ‘warning signal’ indicating that the measures are disguised restriction on trade.<sup>82</sup>

## **I GATT Art XX cannot justify inconsistency with the SPS**

(1) *The exceptions in GATT Art XX do not apply to the SPS*

33. According to the chapeau of GATT Art XX, ‘nothing in *this Agreement* shall be construed

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[7.263].

<sup>79</sup> ELSA Case, [16].

<sup>80</sup> ABR, *Brazil—Retreaded Tyres*, [227].

<sup>81</sup> ABR, *US—Gasoline*, 25.

<sup>82</sup> ABR, *Australia—Salmon*, [166], [237].

to prevent the adoption or enforcement by any Member’<sup>83</sup> of measures falling within one of the exceptions listed in Art XX and satisfying the requirements of the chapeau.<sup>84</sup> When interpreted in their context, the words ‘this Agreement’ should be read as referring to GATT 1994, not the SPS. Paragraph (d) of Art XX refers to ‘the enforcement of monopolies under paragraph 4 of Article II and Article XVII’, meaning GATT Arts II:4 and XVII. Thus, ‘this Agreement’ in paragraph (d) refers to GATT 1994.<sup>85</sup> It should be given the same meaning in the chapeau.

34. The circumstances of the conclusion of GATT 1994 confirm this interpretation. GATT Art XX originally formed part of GATT 1947, which was drafted before the WTO agreements. Therefore, ‘this Agreement’ in Art XX of GATT 1947 referred to ‘GATT 1947’. There is no indication that ‘this Agreement’ in Art XX of GATT 1994, which adopts the text of GATT 1947 with some modifications,<sup>86</sup> means anything other than ‘GATT 1994’. Specifically, ‘this Agreement’ does not refer to the WTO Agreement or to Annex 1A of the WTO Agreement, of which the SPS is a part. It cannot refer to the WTO Agreement because this would render similar exceptions<sup>87</sup> set out in GATS Art XIV inutile, contrary to the principle of effectiveness.<sup>88</sup> And it cannot refer to Annex 1A because this would render SPS Arts 2.1, 2.2 and 2.3, which set out all of the requirements of Art XX(b),<sup>89</sup> inutile. The AB has confirmed that Art XX applies to ‘all of the obligations under the General Agreement’.<sup>90</sup>

(2) *The SPS contains specific rules and disciplines that are independent of GATT*

35. Members must comply with both GATT and the SPS because both Agreements form part of a package of cumulative obligations contained in the ‘single undertaking’ of the WTO Agreement.<sup>91</sup> According to the SPS Preamble, the SPS is a ‘framework of rules and disciplines to guide the development, adoption and enforcement of [SPS] measures’. Thus, the SPS contains specific rules and disciplines that are independent of and additional to those of GATT.<sup>92</sup> A measure meeting the requirements of Art XX is GATT-consistent,<sup>93</sup> but it may still violate the

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<sup>83</sup> Emphasis added.

<sup>84</sup> ABR, *US—Gasoline*, 23.

<sup>85</sup> ABR, *Korea—Beef*, [157].

<sup>86</sup> Paragraph 1(a) of the language of Annex 1A incorporating GATT 1994 into the WTO Agreement.

<sup>87</sup> ABR, *US—Gambling*, [291].

<sup>88</sup> ABR, *Japan—Alcoholic Beverages II*, 11–12, 17.

<sup>89</sup> ABR, *Australia—Salmon*, [251].

<sup>90</sup> ABR, *US—Gasoline*, 24.

<sup>91</sup> ABR, *Brazil—Desiccated Coconut*, [38]; see also ABR, *Korea—Dairy*, [75].

<sup>92</sup> PR, *EC—Hormones (US)*, [8.38].

<sup>93</sup> ABR, *US—Shrimp*, [121], [159].

SPS. Indeed, SPS Art 2.1 provides that Members ‘have the right to take [SPS] measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of *this Agreement*’,<sup>94</sup> meaning the SPS.<sup>95</sup>

**J Russelia’s measures do not meet the requirements of GATT Arts XX(b) or XX(a)**

*(1) The SPS controls the meaning of GATT Art XX(b) in respect of SPS measures*

36. According to the SPS Preamble, the SPS ‘elaborate[s] rules for the application of... Article XX(b)’. Thus, the SPS controls the meaning of GATT Art XX(b) in respect of SPS measures, meaning an SPS-inconsistent measure cannot be justified under Art XX(b).<sup>96</sup> The negotiating history of the SPS confirms this interpretation: the negotiators understood the purpose of the SPS to be the ‘strengthening of GATT rules and disciplines, in particular Article XX(b)’.<sup>97</sup> The principle of *lex specialis* also supports this interpretation. *Lex specialis derogat legi generali* is an interpretative principle of international law to which Panels may have regard.<sup>98</sup> According to the principle, the meaning of applicable specific provisions controls that of general provisions.<sup>99</sup> The SPS is *lex specialis* of Art XX(b) in respect of SPS measures and therefore controls its meaning.<sup>100</sup>

*(2) Russelia’s measures are not ‘necessary to protect human, animal or plant life or health’ (GATT Art XX(b))*

37. Even if the SPS does not control the meaning of GATT Art XX(b), Russelia’s measures are still not ‘necessary’. Because Russelia’s measures are SPS measures, they fall within the subject matter of Art XX(b) in that their objective is the protection of human, animal or plant life or health. However, they are not necessary to achieve that objective. In the context of Art XX, ‘necessary’ means significantly closer to indispensable than to merely making a contribution to the objective in question.<sup>101</sup> To determine whether a measure is necessary, a Panel should weigh and balance the importance of the measure’s objective with its contribution to that objective and the extent to which the measure restricts international trade.<sup>102</sup> If this results in a preliminary

<sup>94</sup> Emphasis added.

<sup>95</sup> PR, *US—Poultry (China)*, [7.481]; PR, *EC—Approval and Marketing of Biotech Products*, fn 343.

<sup>96</sup> PR, *US—Poultry (China)*, [7.481].

<sup>97</sup> MTN.GNG/NG5/10, [3].

<sup>98</sup> ABR, *EC—Bananas III*, [204]; PR, *US—1916 Act (Japan)*, [6.269].

<sup>99</sup> *Serbian Loans*, [52]; PR, *US—1916 Act (Japan)*, [6.75].

<sup>100</sup> PR, *US—Poultry (China)*, [7.66].

<sup>101</sup> ABR, *Korea—Beef*, [161].

<sup>102</sup> ABR, *Korea—Beef*, [162]–[164]; ABR, *US—Gambling*, [305]–[308]; ABR, *Brazil—Retreaded Tyres*, [156]; ABR, *China—Publications and Audiovisual Products*, [242].



conclusion that the measure is necessary, Panels should next consider whether a less trade-restrictive alternative is reasonably available that would achieve the same level of protection.<sup>103</sup>

(a) Russelia's measures fail the weighing and balancing test of necessity

38. The protection of human or animal life or health is important, but Russelia's measures contribute very little to achieving that objective. The only specific health risk that Russelia points to is a very small possibility of negative epigenetic effects that may be heritable.<sup>104</sup> The other risks Russelia points to are unsubstantiated hypotheses. Further, there is no evidence that Russelia's measures have actually contributed to the protection of human or animal life or health. When a respondent cannot demonstrate that a measure materially contributes to its objective, the measure should be assessed according to whether it is apt to achieve that objective.<sup>105</sup> If a Member chooses to adopt a very trade-restrictive measure, it must ensure the measure is 'carefully designed' so that other elements in the weighing and balancing assessment outweigh its restrictive effects.<sup>106</sup>

39. Russelia's measures are highly trade-restrictive. In banning the importation of cloned sheep and derivative products, Russelia prevents Aldousian farmers from utilizing a competitive new technology, developed by Aldousian scientists. Further, in requiring proof of ancestry to an infinite number of generations, Russelia ensures that many Aldousian sheep that are not clone progeny will be captured by the ban because their ancestry is unclear. Finally, the 'infinite generations' requirement has the effect of encouraging other countries, such as Zamyatin, to impose bans on Aldousian imports. If they did not do so, they would risk Russelia enforcing its ban against their exports on the basis that progeny of cloned animals would be likely to enter their territories from Aldousia. For these reasons, Russelia's measures are not necessary.

(b) Less trade-restrictive measures would achieve Russelia's level of protection

40. Reasonably available alternatives exist that are less trade-restrictive and that would achieve Russelia's chosen level of protection. In this regard, Aldousia relies on its submissions at paragraphs 24–25 above with respect to SPS Art 5.6 and submits that measures that are inconsistent with Art 5.6 because a less trade-restrictive alternative is available cannot be 'necessary' under GATT Art XX(b). SPS fn 3 provides that alternatives must be 'significantly

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<sup>103</sup> ABR, *Brazil—Retreaded Tyres*, [156].

<sup>104</sup> ELSA Case, [19(a)].

<sup>105</sup> ABR, *Brazil—Retreaded Tyres*, [151]; ABR, *China—Publications and Audiovisual Products*, [253].

<sup>106</sup> ABR, *China—Publications and Audiovisual Products*, [310].

less restrictive to trade'<sup>107</sup> to demonstrate a violation of Art 5.6, while any degree of reduced trade-restrictiveness is sufficient under Art XX(b).<sup>108</sup> Therefore, a finding of inconsistency with Art 5.6 necessarily implies that a less trade-restrictive measure is available under Art XX(b), but a measure could also be 'not more trade-restrictive than required' under Art 5.6 and yet still not be 'necessary' under Art XX(b).

(3) *Russelia's measures are not 'necessary to protect public morals' (GATT Art XX(a))*

41. Russelia cannot simply assert that its measures are designed to protect public morals. It must provide evidence that cloning raises issues of public morality in Russelia. In *US—Gambling*, the Panel defined 'public morals' as denoting 'standards of right and wrong conduct maintained by or on behalf of a community or nation' and looked to evidence, including Congressional reports and hearings, to establish whether the measures in question fell within the scope of that definition.<sup>109</sup> The AB implicitly endorsed this approach.<sup>110</sup> The only evidence that cloning might raise moral issues in Russelia is the 2000 Advisory Statement, which stated that the precautionary suspension of cloned imports was 'a basic requirement of public morals' *until* sufficient scientific evidence was collected and a full risk assessment conducted.<sup>111</sup> Sufficient scientific evidence is now available for the reasons set out at paragraphs 9–10 above, and Russelia describes its 2010 Report as a risk assessment.<sup>112</sup> Thus, the conditions that may have raised an issue of public morals for Russelia no longer exist. Apart from this, there is no indication that the Russelian public objects to cloning, nor is there evidence that moratoria on cloning in other jurisdictions are indicative of concern about its morality. Zamyatin, for example, appears to have imposed its ban simply to prevent detriment to its export market to Russelia.<sup>113</sup>

42. Applying the first stage of the necessity test set out at paragraph 37 above, Russelia's measures are not 'necessary' because while the protection of public morals is important,<sup>114</sup> there is no evidence that Russelia's measures contribute to that objective. Further, Russelia's measures are highly trade-restrictive.

43. Even if Russelia objects to cloning *per se*, apart from any health concerns, less trade-

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<sup>107</sup> Emphasis added.

<sup>108</sup> ABR, *Korea—Beef*, [165]–[166].

<sup>109</sup> PR, *US—Gambling*, [6.465], [6.482]–[6.487]; PR, *China—Publications and Audiovisual Products*, [7.759].

<sup>110</sup> ABR, *US—Gambling*, [296], [298]–[299].

<sup>111</sup> ELSA Case, [11].

<sup>112</sup> ELSA Case, [18].

<sup>113</sup> ELSA Case, [16].

<sup>114</sup> ABR, *US—Gambling*, [301].

restrictive measures are reasonably available to achieve its level of protection. First, the CPS could be confined to banning cloned imports from companies actually engaged in cloning, thus ensuring that Russelian consumers do not provide market support for the cloning industry.<sup>115</sup> Second, the CPS could be confined so that it does not apply to countries not engaged in cloning, meaning countries such as Zamyatin would not feel compelled to impose their own anti-cloning bans on Aldousian imports for fear of having their own exports subjected to Russelia's ban.

*(4) Russelia's measures do not satisfy the requirements of the chapeau*

44. As argued at paragraph 29, SPS Art 2.3 incorporates the requirements of the chapeau to GATT Art XX. Thus, Aldousia's submissions with respect to SPS Art 2.3 demonstrate that Russelia's measures fail to meet the requirements of the chapeau under Art XX(b).

45. Russelia's measures also fail to meet the requirements of the chapeau in connection with Art XX(a). Russelia's enforcement of the CPS against Aldousian but not Zamyatinian imports constitutes arbitrary or unjustifiable discrimination because it bears no rational connection to the protection of public morals.<sup>116</sup> The risks and uncertainties that Russelia asserts require a precautionary approach are identical whether the animal or product of cloned origin is from Aldousia, Zamyatin or Russelia. Russelia may also be enforcing its measures in a discriminatory manner merely because Aldousia engages in cloning while Zamyatin does not. Such discrimination is unjustifiable because Russelia is subjecting Aldousian farmers who are not engaged in cloning to additional certification procedures and preventing them from importing clone progeny into Russelia.<sup>117</sup> Zamyatinian farmers who are also not engaged in cloning, and who also may have clone progeny in their flocks, are not subject to any such barriers to trade. Further, the extension of the CPS to animals and products with any precedent cloned ancestor is arbitrary or unjustifiable because the import or marketing of progeny several generations removed from a cloned ancestor would not substantially contribute to the market for cloning.

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<sup>115</sup> Cf ABR, *US—Shrimp*, [165].

<sup>116</sup> ABR, *Brazil—Retreaded Tyres*, [227].

<sup>117</sup> ABR, *US—Shrimp*, [175].

## **VII REQUEST FOR FINDINGS**

Aldousia requests the Panel to find in this matter that:

1. The CPS and its enforcement by the RCBCA are SPS measures because they fall within SPS Annex A(1) and affect international trade.
2. SPS Art 5.7 does not apply, and Russelia's measures are inconsistent with SPS Arts 5.1 and 2.2.
3. If SPS Art 5.7 does apply, Russelia's measures do not satisfy its requirements.
4. Russelia's measures are inconsistent with SPS Art 5.6.
5. Russelia's measures are inconsistent with SPS Art 2.3.
6. Russelia's measures cannot be justified under either GATT Art XX(b) or Art XX(a).

Aldousia therefore asks the Panel to recommend that the DSB request Russelia to bring the challenged measures into conformity with its obligations under the WTO Agreement.