



The European Law Students' Association



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*)

SUBMISSION OF THE RESPONDENT

PART A – General

TABLE OF CONTENTS

I	LIST OF REFERENCES.....	IV
A.	WTO and GATT Agreements.....	IV
B.	Other Treaties and Conventions.....	IV
C.	WTO Reports	IV
D.	WTO Documents	VI
E.	Books, Chapters and Journal Articles	VI
F.	Other Sources	VII
II	LIST OF ABBREVIATIONS.....	VIII
III	SUMMARY	1
IV	STATEMENT OF FACTS	3
V	LEGAL PLEADINGS.....	4
A.	Treaty Interpretation	4
B.	Russelia’s measures are not SPS measures.....	4
	(1) Russelia’s measures do not protect against ‘diseases’ or ‘disease-carrying’ or ‘disease-causing’ organisms.....	4
	(a) The identified epigenetic effects are not a disease	5
	(b) Cloned sheep and clone progeny are not ‘disease-carrying’ organisms.....	5
	(c) Cloned sheep and clone progeny are not ‘disease-causing’ organisms.....	5
	(2) The measures are not applied to protect against risks arising from ‘pests’.....	6
	(3) The measures are not applied to protect against risks arising from ‘additives, contaminants, toxins or disease-causing organisms in food’	6
C.	Russelia’s measures fall within SPS Art 5.7.....	6
D.	Russelia’s measures satisfy the requirements of SPS Art 5.7	8
E.	Russelia’s measures are based on a risk assessment pursuant to SPS Art 5.1	9
	(1) Russelia can rely on the 2010 Report	9
	(2) The 2010 Report is a risk assessment under SPS Annex A(4).....	9
	(3) Russelia’s measures are based on the 2010 report pursuant to SPS Art 5.1	11
F.	Russelia’s measures are not inconsistent with SPS Art 5.6.....	11

PART A – General

(1) SPS Art 5.6 does not apply to measures adopted under SPS Art 5.7 11

(2) Russelia’s measures comply with SPS Art 5.6..... 11

G. Russelia’s measures are consistent with SPS Art 2.212

H. Russelia’s measures are consistent with SPS Art 2.313

(1) Russelia’s measures do not arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin 13

(2) Russelia’s measures do not arbitrarily or unjustifiably discriminate between Aldousia and Russelia..... 14

(3) Russelia’s measures are not a disguised restriction on trade..... 14

I. Russelia’s measures are justified under GATT Art XX(b).....14

(1) GATT Art XX(b) is available to justify SPS-inconsistent measures..... 14

(2) The meaning of ‘necessary’ in GATT Art XX..... 16

(3) Russelia’s measures are necessary to protect human or animal life or health 16

(4) The requirements of the chapeau to GATT Art XX 17

(5) Russelia’s measures satisfy the requirements of the chapeau under GATT Art XX(b) 17

J. Russelia’s measures are justified under GATT Art XX(a).....17

(1) GATT Art XX(a) is available to justify inconsistency with the SPS 17

(2) Russelia’s measures are necessary to protect public morals 18

(3) Russelia’s measures satisfy the requirements of the chapeau under GATT Art XX(a) 19

VI REQUEST FOR FINDINGS20

PART A – General

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:
 - 2.1. *Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex 1A
 - 2.2. *General Agreement on Tariffs and Trade 1994*, Annex 1A
 - 2.3. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2

B. Other Treaties and Conventions

3. *Protocol on Biosafety to the Convention on Biological Diversity*, adopted 29 January 2000
4. *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

5. *Argentina—Footwear (EC)*: Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
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PART A – General

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13. **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 ABR WT/DS26/AB/R, WT/DS48/AB/R
14. **EC—Tariff Preferences**: Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
15. **Guatemala—Cement**: Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
16. **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
17. **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
18. **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
19. **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
20. **US—Continued Suspension**: Panel Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R
21. **US—Gambling**: Panel Report, *United States—Measures Affecting the Cross-Border*

PART A – General

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PART A – General

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41. *Oxford English Dictionary* (November 2010) <<http://www.oed.com>>

PART A – General

II LIST OF ABBREVIATIONS

2005 Report	Cloned Animals and Derivative Products: A Scientific Risk Assessment (2005)
2010 Report	Survey and Assessment of Risks Associated with Cloned Sheep and their 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>
DNA	Deoxyribonucleic acid
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Eg	<i>Exempli gratia</i>
Fn	Footnote
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
GATT 1947	<i>General Agreement on Tariffs and Trade 1947</i>
PR	Panel Report
RCBCA	Russelian Customs and Border Control Administration
SCNT	Somatic Cell Nuclear Transfer
SPS	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</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>

PART B – Substantive

III SUMMARY

1. Russelia’s measures are not SPS measures

- The CPS and its enforcement by the RCBCA are not SPS measures. Measures implemented to protect human or animal life or health are not necessarily SPS measures. Russelia’s measures are designed to protect human and animal life and health from risks arising from cloning. This is not a purpose covered by SPS Annex A(1).
- Russelia’s measures are not applied for an SPS purpose under Annex A(1)(a) or (c) as the epigenetic effects arising from cloning are not diseases. Cloned animals and progeny are therefore not disease-carrying organisms or disease-causing organisms.
- Russelia’s measures are not applied for an SPS purpose under Annex A(1)(b) as cloning does not result in the presence of ‘additives, contaminants, toxins or disease-causing organisms’ in animals or derivative products. Nor do they fall within Annex A(1)(d) as cloned sheep and progeny are not pests.

2. Russelia’s measures are consistent with SPS Art 5.7

- Insufficient scientific evidence exists to conduct a risk assessment pursuant to SPS Art 5.1 and Annex A(4). Russelia therefore has the right to adopt provisional measures under Art 5.7.
- Russelia’s measures are validly maintained under Art 5.7. The measures are based on available pertinent information and Russelia is seeking additional information for a more objective assessment of risk. Russelia has expressed its intention to review the measures within a reasonable period of time.

3. Alternatively, Russelia’s measures are based on a risk assessment (SPS Art 5.1)

- The 2010 Report is a valid risk assessment and can be relied upon. It satisfies both limbs of SPS Annex A(4). The Report evaluates the likelihood of the establishment or spread of the identified epigenetic effects according to SPS measures that might be applied. The Report also identifies potential adverse effects on human health arising from cloning and evaluates the possibility of these effects occurring.
- Russelia’s measures are based on the 2010 Report. There is a rational relationship between the Report and the measures and the former sufficiently supports the latter.

4. Russelia’s measures are consistent with SPS Art 5.6

- SPS Art 5.6 does not apply to Russelia’s measures because they fall within Art 5.7. In any case, Russelia’s measures comply with Art 5.6. Any less trade-restrictive alternative would fail

PART B – Substantive

to achieve Russelia's appropriate level of protection and is not reasonably available in light of Russelia's technical and economic capacity.

5. Russelia's measures comply with SPS Art 2.2

- Russelia's measures comply with SPS Arts 5.1 and 5.6. Therefore, they necessarily comply with Art 2.2 because Arts 5.1 and 5.6 are specific applications of Art 2.2.

6. Russelia's measures are consistent with SPS Art 2.3

- Russelia's measures do not arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin. Any discrimination is rationally connected to the purpose of protecting human life and health because cloned sheep may not exist in Zamyatin and imposing proof of ancestry requirements on importers of Zamyatinian sheep would impact on Russelia's food supply.

- Russelia's measures do not arbitrarily or unjustifiably discriminate between Aldousia and Russelia as Russelia has adopted internal measures to protect against risks arising from cloning.

7. Russelia's measures are justified under GATT Art XX(b)

- GATT Art XX(b) is available to justify SPS inconsistency as SPS obligations are subject to the right to regulate consistently with Art XX(b).

- Russelia's measures are necessary to protect human, animal life or plant life or health. Such protection is an important objective to which Russelia's measures contribute substantially and no reasonably available less trade-restrictive alternatives would achieve Russelia's appropriate level of protection.

- Russelia's measures satisfy the chapeau of Art XX(b). They are not arbitrarily or unjustifiably discriminatory as submitted in relation to SPS Art 2.3.

8. Russelia's measures are justified under GATT Art XX(a)

- The silence of the SPS on public morals indicates that GATT Art XX(a) is available to justify SPS inconsistent measures.

- Russelia's measures are necessary to protect public morals. Russelia views cloning as morally hazardous, and the protection of public morals is an important objective to which Russelia's measures contribute substantially.

- Russelia's measures satisfy the chapeau of Art XX(a). They do not arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin because Zamyatin, unlike Aldousia, is not engaged in cloning, which is the source of the threat to Russelia's public morals.

PART B – Substantive

IV STATEMENT OF FACTS

1. Russelia is a developing country WTO Member and a significant consumer of sheep and sheep products. Aldousia is a developed country WTO Member and a major sheep producer. Russelia maintains a small domestic sheep population but imports most of its sheep from Aldousia and Zamyatin, another developing country WTO Member.
2. In 1996, Aldousian researchers used SCNT to successfully clone a sheep. SCNT allows the creation of genetic replicas of selected animals, permitting the production of supposedly elite animals for further breeding. Several key markets in other jurisdictions have maintained moratoria on cloned animals, clone progeny, and products derived therefrom.
3. In 2000, Russelia suspended the importation and marketing of cloned animals and progeny pending the conduct of a full risk assessment and the collection of sufficient scientific evidence. The suspension statement noted that suspension was necessary to protect human, animal and plant life and health and the public morals of Russelian society.
4. In September 2005, the Russelian Ministry of Health issued the 2005 Report. This Report indicated that cloned animals and their derivative products could pose certain health risks. The Russelian Parliament subsequently adopted the CPS, imposing a general ban on the importation and marketing of cloned animals, their progeny and food products derived therefrom.
5. In April 2010, Aldousia began large-scale commercial cloning of sheep. In August 2010, it began introducing cloned stud rams into conventionally bred flocks of sheep in Aldousia. Within 10 years the majority of sheep in Aldousia is expected to be of cloned ancestry.
6. On 1 September 2010, the RCBCA began enforcing the CPS by requiring importers of Aldousian sheep and sheep products to prove that such imports are not of cloned origin or ancestry. Zamyatin has imposed a similar ban. As such, Russelia continues to import Zamyatinian sheep and sheep products.
7. On 15 September 2010, Russelia issued a risk assessment (the 2010 Report). Drawing upon new information, the 2010 Russelian Report specifically identifies the risks and areas of uncertainty of concern to Russelia.
8. On 1 October 2010, Russelia provided Aldousia with the 2010 Report and announced that it would launch two comprehensive ten-year programs to investigate risks associated with cloning.

PART B – Substantive

V 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’. The relevant customary rules include those in Arts 31¹ and 32² of the VCLT. The text of the relevant Agreement is to be interpreted in good faith³ according to its ordinary meaning⁴ and in light of its object, purpose, and context, which includes the preamble and annexes of the relevant Agreement.⁵ ‘Relevant rules of international law applicable in the relations between the Parties’⁶ may also be taken into account as interpretive aids, provided that they are binding on all WTO Members.⁷ Additionally, preparatory material relating to the relevant Agreement may be referred to in order to confirm an interpretation arrived at via the above methods.⁸

B. Russelia’s measures are not SPS measures

2. Russelia’s measures are not SPS measures because they are not applied for any of the purposes listed in SPS Annex A(1). The measures protect human and animal life and health from risks and uncertainties arising from cloning, and also protect public morals.⁹ However, not all measures designed to protect life or health are SPS measures.

(1) *Russelia’s measures do not protect against ‘diseases’ or ‘disease-carrying’ or ‘disease-causing’ organisms*

3. Measures applied to protect animal or plant life or health from the ‘entry, establishment or spread of diseases, disease-carrying or disease-causing organisms’ are SPS measures pursuant to Annex A(1)(a). The plural ‘diseases’ in Annex A(1)(a) indicates that SPS measures must be applied to protect against specific diseases, not to address general concerns that disease may arise. In *EC—Approval and Marketing of Biotech Products*, the Panel incorrectly held that the

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

² See eg ABR, *Japan—Agricultural Products II*, 10.

³ See eg *Japan—Alcoholic Beverages II*, fn 21.

⁴ ABR, *Japan—Alcoholic Beverages II*, 12.

⁵ See eg PR, *US—Section 110(5) Copyright Act*, [6.44]–[6.45].

⁶ VCLT, Art 31(3)(c).

⁷ PR, *EC—Approval and Marketing of Biotech Products*, [7.68].

⁸ VCLT Art 32; ABR, *US—Gambling*, [196].

⁹ ELSA Case, [12].

PART B – Substantive

SPS covers ‘potential adverse effects’ arising from imported products.¹⁰ Annex A(1)(a) rather requires consideration of the product itself, not its potential effects. Measures applied to protect against ‘adverse effects’ caused only indirectly by the introduction of a product are not SPS measures.

4. Russelia’s measures are not applied to protect against ‘diseases’ because epigenetic effects arising from cloning are not ‘diseases’. Nor are the measures applied to protect against ‘disease-causing’ or ‘disease-carrying’ organisms because cloned sheep and progeny cannot be described as ‘disease-causing’ or ‘disease-carrying’ organisms merely because they may be more susceptible to disease.

(a) The identified epigenetic effects are not a disease

5. Epigenetic effects are changes in gene expression as a result of the cloning process, even though the DNA sequence remains the same. The epigenetic effects identified in the 2010 Report may lead to increased disease susceptibility or to higher rates of birth mortality and abnormality, but are not themselves a disease.¹¹ A disease is ‘[a] pathological condition of the body that presents a group of clinical signs, symptoms, and laboratory findings peculiar to it and setting the condition apart as an abnormal entity differing from other normal or pathological conditions’.¹² The identified epigenetic effects do not fall within this definition because they cause generalized health problems rather than an organized and consistent set of ‘clinical signs’ and peculiar ‘symptoms’ amounting to a discrete pathological condition.

(b) Cloned sheep and clone progeny are not ‘disease-carrying’ organisms

6. As the identified epigenetic effects are not diseases, sheep potentially carrying these effects cannot be classified as ‘disease-carrying’ organisms.

(c) Cloned sheep and clone progeny are not ‘disease-causing’ organisms

7. That cloned sheep or clone progeny may be more susceptible to disease does not make them ‘disease-causing’ organisms. ‘Disease-causing’ organisms are organisms that directly cause disease, such as microbial agents.¹³ An animal carrying a specific disease falls within the definition of ‘disease-carrying’, not ‘disease-causing’. A broad interpretation of ‘disease-

¹⁰ PR, *EC—Approval and Marketing of Biotech Products*, [7.278].

¹¹ ELSA Case, [19(a)].

¹² PR, *EC—Approval and Marketing of Biotech Products*, [7.277].

¹³ See eg ABR, *Japan—Apples*, [134].

PART B – Substantive

causing’ would render ‘disease-carrying’ inutile, contrary to the principle of effectiveness.¹⁴

(2) *The measures are not applied to protect against risks arising from ‘pests’*

8. Measures may be SPS measures under Annex A(1)(a), (c) and (d) if they are applied to protect against ‘pests’. Cloned sheep and progeny are not pests within the ordinary meaning of the term. The dictionary meaning of ‘pest’ that is most appropriate in the context of the SPS,¹⁵ which relates to phytosanitary measures, is ‘[a]ny animal, esp. an insect, that attacks or infests crops, livestock, [or] stored goods’.¹⁶ Cloned sheep and progeny do not fall within this definition.

(3) *The measures are not applied to protect against risks arising from ‘additives, contaminants, toxins or disease-causing organisms in food’*

9. Russelia’s measures are not applied to protect against ‘additives, contaminants [or] toxins’ within the meaning of Annex A(1)(b). An ‘additive’ is foreign matter in food.¹⁷ A ‘contaminant’ is any substance added unintentionally.¹⁸ Cloning is genetic replication. No substances are added in the process, and Russelia is not concerned that substances may be added unintentionally. ‘Toxin’ refers to ‘any poisonous antigenic substance ... which causes disease when present at low concentration in the body’.¹⁹ Russelia is concerned that cloning may produce allergic reactions. However, ‘allergens’ are not ‘toxins’.²⁰ An allergen is a substance causing an allergic reaction in persons with hypersensitivity,²¹ not a substance that is generally toxic to humans.

C. Russelia’s measures fall within SPS Art 5.7

10. In the alternative, if the Panel finds that Russelia’s measures fall within the SPS, they are consistent with its requirements. The SPS provides two ways in which SPS measures can be supported. If sufficient scientific evidence exists to conduct a risk assessment in accordance with SPS Annex A(4), SPS Arts 2.2 and 5.1 together require that measures be based on scientific principles, maintained with sufficient scientific evidence and based on a risk assessment. If available scientific evidence is quantitatively or qualitatively ‘insufficient’²² to conduct a risk assessment, SPS Art 5.7 allows the adoption of provisional measures until a risk assessment can

¹⁴ ABR, *Japan—Alcoholic Beverages II*, 11–12, 17.

¹⁵ ABR, *China—Publications and Audiovisual Products*, [348].

¹⁶ *Oxford English Dictionary* (November 2010); cf PR, *EC—Approval and Marketing of Biotech Products*, [7.238].

¹⁷ PR, *EC—Approval and Marketing of Biotech Products*, [7.297].

¹⁸ PR, *EC—Approval and Marketing of Biotech Products*, [7.305], [7.312].

¹⁹ PR, *EC—Approval and Marketing of Biotech Products*, [7.321].

²⁰ Cf PR, *EC—Approval and Marketing of Biotech Products*, [7.337].

²¹ PR, *EC—Approval and Marketing of Biotech Products*, [7.334].

²² SPS Art 5.7; ABR, *Japan—Apples*, [179].

PART B – Substantive

be performed. If Russelia’s measures are subject to the SPS, they fall within Art 5.7.

11. Some types of scientific uncertainty are accounted for in Art 5.1. However, where a lack of available evidence means that risk cannot be assessed in conformity with Art 5.1, Art 5.7 applies. Risk assessments conducted pursuant to Art 5.1 must specifically identify the risks posed and assess the probability of their occurrence.²³ Where this cannot be done, Art 5.7 is enlivened.

12. In *Japan—Apples*, the AB drew a distinction between uncertainty and insufficiency.²⁴ In *US—Continued Suspension*, however, the Panel held that scientific uncertainty ‘does not automatically amount to a situation of insufficiency’,²⁵ suggesting that while some types of uncertainty would not amount to insufficiency, others might. This accords with the purpose of the SPS, reflected in the SPS Preamble, which is to balance trade liberalization with the protection of life and health. It is also supported by the precautionary principle, an emerging customary norm that which permits States to protect health and the environment even without clear evidence of the nature and extent of relevant risks.²⁶

13. The existence of sufficient scientific evidence must be assessed on a case-by-case basis.²⁷ Commercial scale cloning is a new technology.²⁸ Existing scientific research has been conducted in laboratory conditions²⁹ and does not cover risks that may arise in ‘the real world where people live and work and die.’³⁰ Such research is also heavily based on results obtained from small samples of cloned animals, bringing into question its scientific validity.³¹ Moreover, much of the existing evidence on cloning is sponsored by corporate stakeholders,³² who exercise significant influence on the types of research conducted and the studies made available to the public.³³ Such evidence is likely not objective and is therefore ‘qualitatively’ insufficient.³⁴

14. Few studies have focused specifically on the effects of cloning on sheep. Although a majority of scientists consider that studies conducted on cows and pigs can be extrapolated to

²³ SPS Annex A(4); ABR, *EC—Hormones*, [200]; ABR, *Japan—Apples*, [202].

²⁴ ABR, *Japan—Apples*, [184].

²⁵ PR, *US—Continued Suspension*, [7.631].

²⁶ See eg CPB Arts 1, 2.2; see also Gruszczynski (2010), 160.

²⁷ ABR, *Japan—Apples*, [179].

²⁸ Cf ABR, *Japan—Apples*, [180], [186]; see also Gruszczynski (2010), 192.

²⁹ ELSA Case, [13], [19(b)(2)].

³⁰ ABR, *EC—Hormones*, [187]; see also Mavroidis, Bermann and Wu (2010), 288.

³¹ PR, *Australia—Apples*, [7.289].

³² ELSA Case, [5]–[6].

³³ Howse and Horn (2009), 52–53.

³⁴ ABR, *Japan—Apples*, [179].

PART B – Substantive

sheep, a minority of scientists considers this to be impossible.³⁵ Members may determine that insufficient scientific evidence exists where a minority opinion ‘puts into question’ the relationship between evidence and relevant risks.³⁶ This is particularly so when a Member has set a high appropriate level of protection, as Russelia has.³⁷ Insufficiency must be assessed in light of Russelia’s level of protection and cannot be determined simply by looking to majority scientific evidence or to how other Members have interpreted the available evidence.³⁸

D. Russelia’s measures satisfy the requirements of SPS Art 5.7

15. Art 5.7 requires that SPS measures must: first, be adopted where ‘relevant scientific evidence is insufficient’ (as argued at paragraphs 10–14 above); second, be adopted ‘on the basis of available pertinent information’; third, not be maintained unless the Member seeks to obtain ‘additional information necessary for a more objective assessment of risk’; and fourth, be ‘review[ed] ... within a reasonable period of time’.³⁹

16. ‘[P]ertinent information’ is a lower threshold than ‘scientific evidence’.⁴⁰ Russelia’s 2010 Report takes into account studies that, while possibly falling below the threshold of scientific evidence required to found an Art 5.1 risk assessment due to their small sample sizes, satisfy the evidentiary threshold of ‘available pertinent information’. There is a ‘rational and objective relationship’⁴¹ between this evidence and Russelia’s measures because the measures respond to the threat to human and animal health disclosed by the information.⁴²

17. Russelia has sought additional information to conduct a more objective risk assessment⁴³ by requesting technical assistance from Aldousia and expressing willingness to permit the importation of Aldousian cloned stud rams and sperm for testing.⁴⁴ Russelia’s offer to cooperate with Aldousia demonstrates good faith.

18. Russelia has indicated its intention to review the measures within a reasonable period of time at the conclusion of its ten-year research programs. What constitutes a reasonable period

³⁵ ELSA Case, [19(b)].

³⁶ ABR, *US—Continued Suspension*, [677], [686].

³⁷ ABR, *US—Continued Suspension*, [685]–[686].

³⁸ ELSA Case, [4]; ABR, *US—Continued Suspension*, [695].

³⁹ SPS Art 5.7; ABR, *Japan—Agricultural Products II*, [89].

⁴⁰ ABR, *US—Continued Suspension*, [678]; see also Gruszczynski (2010), 204.

⁴¹ ABR, *US—Continued Suspension*, [678].

⁴² Scott (2007), 122; Gruszczynski (2010), 205.

⁴³ ABR, *Japan—Agricultural Products II*, [92].

⁴⁴ ELSA Case, [20]; see also ABR, *Japan—Agricultural Products II*, [92]; SPS Art 9.1.

PART B – Substantive

must be established on a case-by-case basis.⁴⁵ Here, ten years is reasonable given the novelty of the cloning technique⁴⁶ and its possible multi-generational effects. In the context of ‘low certainty’, ‘low consensus’ technologies such as cloning,⁴⁷ ten years is not unreasonable.

19. Russelia’s status as a developing country must also be taken into account in assessing the period within which its measures must be reviewed. Because Russelia lacks the scientific and technical capabilities necessary to assess cloning technology, it should be afforded more latitude than developed country Members with respect to maintaining precautionary measures. This accords with the general recognition in the SPS that developing country Members may have greater difficulty implementing SPS measures and assessing SPS risks.⁴⁸

E. Russelia’s measures are based on a risk assessment pursuant to SPS Art 5.1

20. If the Panel finds that sufficient scientific information exists so that Russelia’s measures are subject to SPS Art 5.1, Russelia’s measures comply with Art 5.1 because they are based on the 2010 Report, which satisfies the definition of a ‘risk assessment’ in SPS Annex A(4). Although Russelia believes that insufficient evidence exists to found a reliable risk assessment, it has undertaken an assessment of all available evidence in accordance with Art 5.1.

(1) Russelia can rely on the 2010 Report

21. Russelia can rely on the 2010 Report even though it was issued after Russelia adopted its measures. The words ‘based on an assessment’ in Art 5.1 require consideration of whether, at the time of the hearing,⁴⁹ the responding party can show that a risk assessment exists that ‘reasonably support[s]’ the measure in that there is a rational connection between the measure and the scientific evidence.⁵⁰ There is no ‘grandfathering provision’ in the SPS regulating measures adopted prior to 1995.⁵¹ A strict chronological reading of ‘based on’ would therefore have the ‘dubious retroactive effect’ of rendering such measures illegal.⁵²

(2) The 2010 Report is a risk assessment under SPS Annex A(4)

22. Annex A(4) provides for two types of risk assessment.⁵³ Paragraph (a) of the 2010 Report

⁴⁵ ABR, *Japan—Agricultural Products II*, [93].

⁴⁶ Cf ABR, *Japan—Apples*, [180], [186].

⁴⁷ Gruszczynski (2006), 392; Winickoff et al (2005), 115–116; ELSA Case, [3].

⁴⁸ SPS Preamble, paragraph 7; SPS Arts 5.6, 9, 10.

⁴⁹ PR, *EC—Approval and Marketing of Biotech Products*, [7.3034].

⁵⁰ ABR, *EC—Hormones*, [193].

⁵¹ ABR, *EC—Hormones*, [128]–[130].

⁵² Trebilcock and Howse (2005), 211.

⁵³ Van den Bossche (2008), 853.

PART B – Substantive

is a ‘risk assessment’ within the first limb of Annex A(4). To satisfy the first limb, a risk assessment must: first, identify the relevant disease or pest with sufficient precision; second, evaluate the likelihood of entry, establishment or spread of the disease or pest, and of associated potential biological and economic consequences; and third, evaluate this likelihood according to the SPS measures that might be applied.⁵⁴ The 2010 Report highlights risks associated with epigenetic effects and outlines particular biological consequences, including increased birth mortality rates and abnormalities in young sheep. The Report also ascribes a qualitative probability to the risk by describing it as not merely hypothetical.⁵⁵ That the probability is ‘low’ does not preclude Russelia from adopting preventative measures, as there is no ‘minimum threshold’ of risk that must be surpassed before an SPS measure may be adopted.⁵⁶ Moreover, although the AB has indicated that all possible measures must be canvassed,⁵⁷ a ban is the only available measure in light of the risk and Russelia’s status as a developing country.⁵⁸

23. Paragraph (b) of the 2010 Report is a risk assessment within the meaning of the second limb of Annex A(4). It identifies possible immune dysfunction and genetic mutations resulting from cloning and evaluates ‘the potential for adverse effects’ on human health arising from consuming cloned sheep and/or derivative products. ‘Potential’ means possibility rather than probability.⁵⁹ The identification of possible risks to human health is therefore sufficient evaluation of their ‘potential’.

24. The Panel should adopt a deferential approach when evaluating Russelia’s measures under Art 5.1.⁶⁰ The Panel must make an ‘objective assessment’ of the facts.⁶¹ However, Russelia’s measures should be reviewed in light of its own risk assessment and level of protection.⁶² Russelia’s concerns relate to an area of considerable scientific complexity and novelty, and factual misinterpretations may occur in evaluating the scientific evidence. A Panel may consult with experts in assessing scientific evidence, but its role is ‘not to perform [its] own risk

⁵⁴ ABR, *Japan—Agricultural Products II*, [113].

⁵⁵ ABR, *Australia—Salmon*, [124]–[125].

⁵⁶ ABR, *EC—Hormones*, [186].

⁵⁷ ABR, *Japan—Apples*, [208].

⁵⁸ Cf ABR, *Japan—Apples*, [207]–[209].

⁵⁹ ABR, *EC—Hormones*, [184]; ABR, *US—Continued Suspension*, [569].

⁶⁰ Guzman (2007), 216; Prevost and Van Den Bossche (2005), 353; Du (2010), 452.

⁶¹ DSU Art 11; ABR, *EC—Hormones*, [116]–[117].

⁶² Du (2010), 452.

PART B – Substantive

assessment to see if [it] could reach the same conclusion’.⁶³

(3) *Russelia’s measures are based on the 2010 report pursuant to SPS Art 5.1*

25. An SPS measure is ‘based on’ a risk assessment for the purposes of Art 5.1 if there is a rational relationship between the measure and the risk assessment. Whether a rational relationship exists is ‘to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.’⁶⁴ There is a rational relationship between Russelia’s measures and the 2010 Report because the Report identifies health risks arising from sheep and sheep products of cloned origin. Moreover, the more serious risks are to life and health, the less demanding the ‘rational relationship’ requirement.⁶⁵ In this case, the risks that concern Russelia threaten human and animal health with potentially serious consequences, and are identified by respected scientists drawing upon international research.⁶⁶ The quality of the evidence and the seriousness of the risks demonstrate a rational connection between the risk assessment and Russelia’s measures.

F. Russelia’s measures are not inconsistent with SPS Art 5.6

(1) *SPS Art 5.6 does not apply to measures adopted under SPS Art 5.7*

26. Art 5.6 does not apply to Russelia’s measures because they fall within the scope of Art 5.7. Art 5.7 is a ‘qualified exemption’ from all the requirements in Art 2.2.⁶⁷ The position of the last comma before ‘except’ indicates that Art 5.7 is exempted from all 3 limbs of Art 2.2.⁶⁸ Since Art 5.6 is a ‘specific application’ of the first limb of Art 2.2, exemption of measures supported under Art 5.7 from the requirements in Art 2.2 excludes also the application of Art 5.6.⁶⁹

(2) *Russelia’s measures comply with SPS Art 5.6*

27. Even if SPS Art 5.6 applies to measures falling within Art 5.7, Russelia’s measures are consistent with Art 5.6. Art 5.6 requires Members to ensure that SPS measures ‘are not more trade-restrictive than required to achieve their appropriate level of [SPS] protection’. SPS fn 3 clarifies that ‘a measure is not more trade-restrictive than required unless there is another

⁶³ Du (2010), 452; see also ABR, *US—Continued Suspension*, [598].

⁶⁴ ABR, *Japan—Agricultural Products II*, [84].

⁶⁵ Van den Bossche (2008), 844; see also ABR, *Japan—Apples*, [163].

⁶⁶ ELSA Case, [19].

⁶⁷ PR, *EC—Approval and Marketing of Biotech Products*, [7.3000].

⁶⁸ Scott (2007), 111.

⁶⁹ PR, *EC—Approval and Marketing of Biotech Products*, [7.1433]; PR, *Japan—Agricultural Products II*, [8.71].

PART B – Substantive

measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of [SPS] protection and is significantly less restrictive to trade'. Further, Members have a sovereign right to determine their own appropriate level of protection.⁷⁰ Russelia has set a high level of protection.⁷¹

28. Alternatives such as education programs or product labeling would fail to achieve Russelia's appropriate level of protection, and fail to take into account Russelia's technical and economic capabilities. Deficiencies in existing sampling methods and technology and Russelia's inability to conduct its own scientific research in the area mean that information available on cloned sheep does not provide a confidence level consistent with Russelia's high level of human and animal health protection. Given the lack of information available to raise awareness of health risks associated with cloned animals, labeling of cloned products would fail to achieve Russelia's appropriate level of protection. Such labeling would also be costly and not economically feasible in light of Russelia's status as a developing country.

G. Russelia's measures are consistent with SPS Art 2.2

29. If the Panel finds that Russelia's measures comply with SPS Arts 5.1 and 5.6, they necessarily comply with Art 2.2. The AB has insisted that Arts 2.2 and 5.1 be 'constantly read together'.⁷² There is no discernible difference between the requirement in Art 2.2 that SPS measures not be 'maintained without sufficient scientific evidence' (a 'rational or objective relationship'⁷³) and the requirement in Art 5.1 that SPS measures be 'based on' a risk assessment (an 'objective relationship'⁷⁴). Moreover, Art 5.1 is a specific application of the final two limbs of Art 2.2,⁷⁵ so that compliance with Art 5.1 satisfies at least the last two limbs of Art 2.2.⁷⁶ Similarly, Art 5.6 is a specific application of the first limb of Art 2.2,⁷⁷ such that compliance with Art 5.6 implies compliance with that limb. Therefore, if the Panel finds Russelia's measures consistent with Arts 5.1 and 5.6, it must also find them consistent with Art 2.2.

⁷⁰ SPS Preamble; SPS Annex A(5); see also ABR, *EC—Hormones*, [124]; ABR, *Australia—Salmon*, [199].

⁷¹ ELSA Case, [12].

⁷² ABR, *EC—Hormones*, [180].

⁷³ ABR, *Japan—Agricultural Products II*, [73].

⁷⁴ ABR, *EC—Hormones*, [189].

⁷⁵ ABR, *Japan—Agricultural Products II*, [82].

⁷⁶ ABR, *Australia—Salmon*, [137]; PR, *EC—Approval and Marketing of Biotech Products*, [7.1439]; see also Scott (2007), 112.

⁷⁷ PR, *EC—Approval and Marketing of Biotech Products*, [7.1433]; PR, *Japan—Agricultural Products II*, [8.71].

PART B – Substantive

H. Russelia’s measures are consistent with SPS Art 2.3

30. SPS Art 2.3 provides that SPS measures must not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail and must not be applied in a manner constituting a disguised restriction on trade. Art 2.3 reflects the requirements of the chapeau to GATT Art XX, reformulated as positive obligations rather than as part of an exception.⁷⁸ In *Brazil—Retreaded Tyres*, the AB said that discrimination under Art XX would be arbitrary or unjustifiable ‘when the reasons given for this discrimination bear no rational connection’ to one of the objectives listed in the paragraphs of Art XX.⁷⁹ According to the SPS Preamble, the SPS elaborates on Art XX(b), which concerns measures for the protection of human, animal or plant life or health. Further, SPS Art 2.1 confirms that Members have a right to pursue this objective. The relevant objective in assessing whether an SPS measure arbitrarily or unjustifiably discriminates under Art 2.3 is therefore the protection of human, animal or plant life or health.

(1) *Russelia’s measures do not arbitrarily or unjustifiably discriminate between Aldousia and Zamyatin*

31. Russelia’s enforcement of its measures against Aldousia but not Zamyatin is not arbitrary or unjustifiable discrimination because it is rationally connected to the purpose of protecting human life and health. Cloned sheep might not be present in Zamyatin. The industry reports that are the sole evidence of this are not reliable because they may be influenced by powerful Aldousian cloning companies such as Podsnap, which have a strong interest in undermining Russelia’s stance on cloning.⁸⁰ The measures are applied to meet Russelia’s high level of health protection by protecting its people from the negative effects of sheep and sheep products of cloned origin. However, sheep products form an important part of Russelia’s food supply.⁸¹ Russelia is a developing country with minimal domestic ovine production and is now reliant on Zamyatinian imports to meet its needs. As such, requiring importers of sheep and sheep products from Zamyatin to prove that such imports are not of cloned origin would compromise Russelia’s food supply, thus endangering human life and health. In light of these detrimental consequences and the unreliability of the industry reports, Russelia’s decision not to require proof of ancestry

⁷⁸ ABR, *Australia—Salmon*, [250]–[251].

⁷⁹ ABR, *Brazil—Retreaded Tyres*, [227].

⁸⁰ ELSA Case, [4]–[6], [16].

⁸¹ ELSA Case, [9].

PART B – Substantive

in relation to Zamyatinian ovine imports does not constitute arbitrary or unjustifiable discrimination because it protects life and health.

(2) *Russelia's measures do not arbitrarily or unjustifiably discriminate between Aldousia and Russelia*

32. In addition to prohibiting arbitrary or unjustifiable discrimination between other Members, SPS Art 2.3 requires Members to ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between 'their own territory and that of other Members'. Thus, measures may arbitrarily or unjustifiably discriminate where a Member is not applying equivalent internal measures to protect against the risks to which its SPS measures relate.⁸² Russelia's measures do not arbitrarily or unjustifiably discriminate between Aldousia and Russelia because: first, cloned animals do not exist in Russelia, meaning the risks to which Russelia's SPS measures relate do not exist in its territory; and second, the CPS imposes an internal marketing ban as well as an import ban on cloned animals, progeny and products, demonstrating that Russelia has implemented internal protections against cloning-related risks.⁸³

(3) *Russelia's measures are not a disguised restriction on trade*

33. The term 'disguised restriction on trade' embraces 'arbitrary or unjustifiable discrimination'.⁸⁴ Therefore, that Russelia's measures do not arbitrarily or unjustifiably discriminate indicates that these measures are not disguised restrictions on trade. Further, Russelia's willingness to respond to Aldousia's concerns by conducting the 2010 risk assessment, as well as its willingness to collaborate with Aldousia in conducting future research programs, confirm that its measures are maintained in good faith and are not disguised restrictions on trade.⁸⁵

I. Russelia's measures are justified under GATT Art XX(b)

(1) *GATT Art XX(b) is available to justify SPS-inconsistent measures*

34. GATT Art XX(b) allows Members to justify measures that are 'necessary to protect human, animal or plant life or health', subject to the requirements of the chapeau. In *China—Publications and Audiovisual Products*, the AB found that Art XX was available to justify inconsistency with an agreement other than GATT, China's Accession Protocol, because the

⁸² ABR, *Australia—Salmon*, [247], [255].

⁸³ ELSA Case, [14].

⁸⁴ ABR, *US—Gasoline*, 25.

⁸⁵ ELSA Case, [18], [20].

PART B – Substantive

Protocol provided that its obligations were subject to ‘China’s right to regulate trade in a manner consistent with the WTO Agreement’, including Art XX.⁸⁶ The SPS contains two key indications that SPS obligations are subject to the right to regulate consistently with Art XX(b), and therefore that Art XX(b) is available to justify SPS-inconsistent measures. First, the Preamble to the SPS begins with an affirmation that ‘no Member should be prevented from adopting or enforcing measures’ conforming to the requirements of Art XX(b). This affirmation provides context to the substantive provisions of the SPS and confirms that the SPS was not intended to displace Art XX(b). Second, SPS Art 2.4 provides that measures conforming to the SPS ‘shall be presumed to be in accordance’ with GATT 1994, ‘in particular the provisions of Article XX(b).’ The word ‘presumed’ in Art 2.4 should be interpreted according to its ordinary meaning to raise a rebuttable presumption, particularly because it has this meaning in SPS Art 3.2.⁸⁷ Thus, Art 2.4 leaves open the possibility that a complainant may prove that an SPS-consistent measure is nevertheless GATT-inconsistent by rebutting that presumption, including the presumption that the measure meets the requirements of Art XX(b).⁸⁸ Thus, Art 2.4 indicates that in the case of differing results under the SPS and Art XX(b), the latter provision determines whether the measure in question is WTO-consistent. Further, the function of Art XX(b) as an exception supports a conclusion that if complainants may rebut a presumption of compliance with Art XX(b), respondents may prove that their SPS measures satisfy the requirements of Art XX(b) and are therefore WTO-consistent despite inconsistency with the SPS.

35. The General Interpretative Note to Annex 1A to the WTO Agreement provides that in the event of ‘conflict’ between GATT and another agreement, the latter will prevail. However, ‘conflict’ means instances where ‘adherence to the one provision will lead to a violation of the other provision’.⁸⁹ No such conflict arises here, so the Interpretative Note does not apply.⁹⁰

36. In *US—Poultry (China)*, the Panel nevertheless found that an SPS-inconsistent measure could not be justified under Art XX(b) because the SPS ‘explains [Article XX(b)] in detail’ such that Art XX(b) is coterminous with the SPS when applied to SPS measures.⁹¹ The Panel’s

⁸⁶ Protocol on the Accession of the People's Republic of China, Art 5.1; ABR, *China—Publications and Audiovisual Products*, [233].

⁸⁷ ABR, *EC—Hormones*, [170].

⁸⁸ Marceau and Trachtman (2002), 871.

⁸⁹ ABR, *Guatemala—Cement*, [65].

⁹⁰ PR, *US—Poultry (China)*, fn 724.

⁹¹ PR, *US—Poultry (China)*, [7.481].

PART B – Substantive

findings should not be followed. The Panel failed to take the first paragraph of the SPS Preamble into account and assumed that the presumption of inconsistency in Art 2.4 was a conclusive presumption, overlooking the AB’s finding that the similar presumption in Art 3.2 is rebuttable.⁹² Further, the Panel’s findings suggest that Art XX(b) incorporates the SPS when applied to SPS measures,⁹³ contrary to the finding of the Panel in *EC—Hormones (US)* that the SPS contains obligations that go ‘significantly beyond’ Art XX(b).⁹⁴ Finally, the Panel’s findings are problematic in that they suggest that the requirements of Art XX(b) might be substantially different when applied to SPS measures as opposed to non-SPS measures.

(2) *The meaning of ‘necessary’ in GATT Art XX*

37. The meaning of ‘necessary’ in GATT Art XX falls on a continuum between ‘making a contribution to’ and ‘indispensable’ to the objective in question, but is significantly closer to the latter.⁹⁵ To assess whether a measure is necessary, Panels should first assess the importance of the values embodied in the relevant paragraph of Art XX and then weigh and balance the measure’s contribution to achieving its objective with its trade restrictiveness in the light of that importance.⁹⁶ If this leads to a preliminary conclusion that the measure is necessary, Panels should consider second whether less trade restrictive alternatives exist that would achieve the Member’s level of protection.⁹⁷ This assessment should also be made ‘in the light of the importance of the objective pursued’.⁹⁸ Thus, a margin of appreciation corresponding to the measure’s importance applies to *both* stages of the necessity test.

(3) *Russelia’s measures are necessary to protect human or animal life or health*

38. The objective Russelia seeks to achieve is the protection of human and animal life and health from a range of risks and uncertainties arising from a new technology that fundamentally alters the way in which animals are farmed. That objective is ‘vital and important in the highest degree.’⁹⁹ Russelia has selected a high level of protection from those risks and uncertainties,¹⁰⁰ and Russelia’s measures contribute substantially to achieving its level of protection by

⁹² PR, *US—Poultry (China)*, [7.67], [7.473]–[7.474].

⁹³ PR, *US—Poultry (China)*, [7.482].

⁹⁴ PR, *EC—Hormones (US)*, [8.38].

⁹⁵ ABR, *Korea—Beef*, [161].

⁹⁶ ABR, *China—Publications and Audiovisual Products*, [240].

⁹⁷ ABR, *Brazil—Retreaded Tyres*, [140].

⁹⁸ ABR, *China—Publications and Audiovisual Products*, [240].

⁹⁹ ABR, *EC—Asbestos*, [172]; see also ABR, *Brazil—Retreaded Tyres*, [144].

¹⁰⁰ ELSA Case, [12].

PART B – Substantive

preventing cloned animals, progeny and their products from entering Russelia’s food supply. Russelia acknowledges that its measures are trade-restrictive, but after weighing and balancing this with its contribution to Russelia’s objective in light of the importance of that objective, the Panel should make a preliminary finding that the measures are necessary.

39. Russelia relies on its submissions regarding SPS Art 5.6 at paragraphs 26–28 above to show that no reasonably available less trade-restrictive alternatives exist that would achieve its level of protection. However, the assessment of importance as an overarching factor under Art XX(b) distinguishes it from Art 5.6. Thus, Russelia’s measures may still be ‘necessary’ under GATT Art XX(b) even if they are more trade-restrictive than ‘required’ under SPS Art 5.6.

(4) *The requirements of the chapeau to GATT Art XX*

40. The chapeau to Art XX requires that measures falling within one of its paragraphs must not be ‘applied in a manner constituting a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’. Whether discrimination is ‘arbitrary or unjustifiable’ should be determined ‘in the light of the objective of the measure’: discrimination will be arbitrary or unjustifiable when the reasons for the discrimination ‘bear no rational connection’ to the objective pursued by the Member.¹⁰¹

(5) *Russelia’s measures satisfy the requirements of the chapeau under GATT Art XX(b)*

41. Russelia relies on its submissions regarding SPS Art 2.3 at paragraphs 30–33 above to explain why its measures are also consistent with the chapeau to GATT Art XX.

J. Russelia’s measures are justified under GATT Art XX(a)

(1) *GATT Art XX(a) is available to justify inconsistency with the SPS*

42. The silence of the SPS on public morals indicates that GATT Art XX(a) is available to justify measures that would otherwise be SPS-inconsistent. By providing for general exceptions, Art XX allows Members to pursue policy goals of recognized importance.¹⁰² These exceptions ensure that ‘each Member’s inherent power to regulate’¹⁰³ is not disciplined to such an extent that it cannot pursue legitimate objectives. Thus, Art XX describes a ‘line of equilibrium’ between the right of Members to insist on compliance with substantive provisions with the right of Members to regulate consistently with Art XX.¹⁰⁴

¹⁰¹ ABR, *Brazil—Retreaded Tyres*, [227].

¹⁰² ABR, *US—Shrimp*, [121].

¹⁰³ ABR, *China—Publications and Audiovisual Products*, [222].

¹⁰⁴ ABR, *US—Shrimp*, [159].

PART B – Substantive

43. Art XX(a) provides an avenue for Members to justify measures that are ‘necessary to protect public morals’ and meet the requirements of the chapeau. The SPS contains no provisions on public morals. Where one provision of a covered agreement contains a right or obligation on which an applicable provision of another agreement is silent, the ‘omission must have some meaning’.¹⁰⁵ In *Argentina—Footwear*, the AB held that a requirement relating to safeguards in GATT Art XIX that is not reflected in the Agreement on Safeguards is nevertheless binding on Members because both agreements are part of a single treaty (the WTO Agreement) that must be read as ‘an *inseparable package* of rights and disciplines’.¹⁰⁶ Thus, silence in agreements on trade in goods that deal with a particular subject matter should not be interpreted as subsuming or negating applicable provisions of GATT.¹⁰⁷

44. This logic applies to exceptions as well as to rights and obligations. The characterization of a provision as an exception does not diminish the right of Members to adopt measures in accordance with the provision’s terms.¹⁰⁸ In concluding the SPS, Members should not be presumed to have agreed that measures could not be justified under Art XX(a) merely because they fall within the SPS.¹⁰⁹ Measures may have more than one of the policy objectives listed in Art XX, including the protection of life or health and the protection of public morals.¹¹⁰

(2) *Russelia’s measures are necessary to protect public morals*

45. 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’.¹¹¹ The content of ‘public morals’ therefore varies from country to country. For this reason, Russelia should have wide discretion to determine which issues engage questions of public morality. Further, cloning is a morally controversial subject in the international community. Several other jurisdictions and markets have introduced moratoria on products of cloned origin.¹¹²

46. Russelia considers cloning to be a threat to public morals on three grounds. First, the commercial cloning of sheep could lead to increasingly extensive genetic modifications of animals, and perhaps even humans. Russelia finds this prospect abhorrent. Second, Russelia

¹⁰⁵ ABR, *Japan—Alcoholic Beverages II*, [38].

¹⁰⁶ ABR, *Argentina—Footwear*, [81] (emphasis in original); affirmed in ABR, *US—Steel Safeguards*, [275].

¹⁰⁷ ABR, *Argentina—Footwear*, [83].

¹⁰⁸ ABR, *EC—Tariff Preferences*, [98].

¹⁰⁹ Cf ABR, *Brazil—Desiccated Coconut*, 5.

¹¹⁰ ABR, *US—Shrimp*, [127]–[128].

¹¹¹ PR, *US—Gambling*, [6.465].

¹¹² ELSA Case, [3].

PART B – Substantive

views the decision to take risks in the face of scientific uncertainty as a decision with moral elements. In each case, the question for regulators is whether the benefits of a new technology are such that it is worth taking the risk that it may entail unknown negative effects. And third, Russelia objects to the higher rates of birth mortality, abnormalities and disease susceptibility found in cloned animals.¹¹³ The cloning process inflicts unnecessary suffering on animals.

47. Applying the necessity test set out at paragraph 37 above, the protection of public morals is a highly important value.¹¹⁴ Although Russelia's measures are trade-restrictive, they contribute substantially to the protection of public morals by preventing Russelian industry and consumers from contributing to the market for a technology Russelia views as morally hazardous. Weighing and balancing these factors in light of the importance of the value at stake, the Panel should make a preliminary finding that the measures are necessary to protect public morals. Further, no reasonably available less trade-restrictive alternatives exist that would achieve Russelia's high level of protection. Public education programs and labeling are not viable alternatives because Russelia seeks to protect public morals *on behalf* of the Russelian community by banning cloned animals, progeny and products.

(3) *Russelia's measures satisfy the requirements of the chapeau under GATT Art XX(a)*

48. Russelia's measures seek to protect both human, animal or plant life or health pursuant to Art XX(b) and public morals pursuant to Art XX(a). The chapeau therefore applies differently to Russelia's measures depending on whether they are characterized under Art XX(b) or Art XX(a). The measures could fail to meet the requirements of the chapeau under Art XX(b), and yet meet its requirements under Art XX(a) if they discriminate for a purpose with a rational connection to the protection of public morals.¹¹⁵

49. Russelia's measures are not arbitrarily or unjustifiably discriminatory when characterized under Art XX(a) because while Aldousia is engaged in cloning on a commercial scale, Zamyatin is not engaged in cloning at all. Even if a small number of cloned sheep do exist in Zamyatin, Russelian consumers would not contribute to the market for cloning by purchasing their progeny or derivative products. Therefore, there is a rational reason connected to the protection of public morals for Russelia's non-enforcement of the CPS against Zamyatin.

¹¹³ ELSA Case, [19(a)].

¹¹⁴ ABR, *US—Gambling*, [301].

¹¹⁵ ABR, *Brazil—Retreaded Tyres*, [227].

PART B – Substantive

VI REQUEST FOR FINDINGS

Russelia requests the Panel to find in this matter that:

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

Therefore, Russelia requests that the Panel should make no recommendation to the DSB, as Russelia is in full conformity with its obligations under the WTO Agreement.