

Team: 018R

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

*Table of Contents***A. GENERAL**

| | |
|---------------------------------------|-----|
| List of References..... | III |
| I. Treaties..... | III |
| II. Cases..... | III |
| 1. WTO Appellate Body Reports..... | III |
| 2. WTO Panel Reports..... | IV |
| 3. GATT Reports..... | V |
| III. Articles and Contributions..... | V |
| IV. Materials..... | V |
| List of Abbreviations..... | VII |

B. SUBSTANTIVE

| | |
|--|----------|
| Statement of Facts..... | 1 |
| Summary of Arguments..... | 2 |
| Identification of WTO Measures at Issue..... | 4 |
| Legal Pleadings..... | 4 |
| I. THE CPS IS CONSISTENT WITH RUSSELIA’S SPS OBLIGATIONS..... | 4 |
| II. THE CPS IS CONSISTENT WITH ART. 5.1 OF THE SPS AGREEMENT..... | 4 |
| a) Russelia has conducted a risk assessment | 5 |
| b) Russelia's risk assessment meets the definition of a risk assessment | 5 |
| c) Russelia's risk assessment takes into account risk assessment techniques developed by international organizations and meets the requirements of Art. 5.2 | 6 |
| <i>i. Russelia's risk assessment complies with techniques developed by the relevant international organizations</i> | <i>6</i> |
| <i>ii. Russelia's risk assessment complies with Art. 5.2</i> | <i>7</i> |
| d) The CPS is based on Russelia’s risk assessment | 7 |
| III. THE CPS IS CONSISTENT WITH ART. 2.2 OF THE SPS AGREEMENT..... | 8 |
| 1. The CPS is applied to the extent necessary | 8 |
| a) The CPS is maintained with sufficient scientific evidence | 9 |

| | | |
|-----|---|----|
| i. | <i>The Russelian Reports collectively provide scientific evidence</i> | 9 |
| ii. | <i>Russelia's collective evidence is scientific</i> | 9 |
| b) | Russelia's scientific evidence is sufficient | 10 |
| 2. | In the alternative, Russelia is exempt from its obligations under Art. 2.2 by its compliance with Art. 5.7 of the SPS Agreement | 11 |
| a) | There is insufficient scientific evidence about the effects of cloned sheep | 11 |
| b) | The CPS was adopted on the basis of available pertinent information from relevant international organizations | 12 |
| c) | Russelia plans to obtain additional information necessary for a more objective assessment of risk of cloned animals | 12 |
| d) | Russelia will review the CPS within a reasonable period of time | 12 |
| e) | This Panel should consider the well-established "precautionary principle" when interpreting Art. 5.7 of the SPS Agreement | 13 |
| IV. | RUSSELIA DOES NOT VIOLATE ART. 5.6 OF THE SPS AGREEMENT | 13 |
| 1. | There is no reasonable alternative measure to the CPS that is available, taking into account Russelia's technical and economic feasibility | 14 |
| 2. | There is no other SPS measure that achieves Russelia's appropriate level of protection | 14 |
| 3. | There is no SPS measure that is <i>significantly</i> less trade restrictive than the CPS | 15 |
| V. | RUSSELIA DOES NOT VIOLATE ART. 2.3 OF THE SPS AGREEMENT | 15 |
| 1. | The CPS does not discriminate between Members..... | 15 |
| 2. | The conditions in Aldousia and Zamyatin are neither identical nor similar | 16 |
| 3. | Even if conditions are similar in Aldousia and Zamyatin, the CPS is a justified discriminatory measure | 16 |
| 4. | The CPS does not constitute a disguised restriction of trade | 17 |
| VI. | THE CPS IS JUSTIFIED UNDER ART. XX(a) OF THE GATT 1994 | 17 |
| 1. | Russelia's measures are necessary to protect public morals..... | 18 |
| 2. | Russelia's measures are applied equally to countries where the same conditions prevail and do not constitute a disguised restriction on international trade. | 18 |
| | Request for Findings | 20 |

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- (2) *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183.
- (3) *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187.
- (4) *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401.
- (5) *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.
- (6) *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 UNTS 493.

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- (3) *Brazil – Measures Affecting the Importation of Retreaded Tyres (Complaint by the European Communities)* (2007), WTO Doc WT/DS332/AB/R (Appellate Body Report).
- (4) *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Complaint by the European Communities)* (2008), WTO Doc WT/DS321/AB/R (Appellate Body Report).
- (5) *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc WT/DS135/AB/R (Appellate Body Report).
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- (12) *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report).

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- (2) *Australia – Measures Affecting the Importation of Salmon (Complaint by Canada)* (1998), WTO Doc WT/DS18/R (Panel Report).
- (3) *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada (Complaint by Canada)* (2000), WTO Doc WT/DS18/RW (Panel Report).
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- (6) *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1997), WTO Doc WT/DS48/R/CAN (Panel Report).
- (7) *Japan – Measures Affecting the Importation of Apples (Complaint by the United States)* (2003), WTO Doc WT/DS245/R (Panel Report).
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- (10) *United States – Certain Measures Affecting Imports of Poultry from China (Complaint by China)* (2010), WTO Doc WT/DS392/R (Panel Report).
- (11) *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (1998), WTO Doc WT/DS58/R (Panel Report).

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- (2) Gabrielle Marceau & Joel P. Trachtman, “The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade” (2002) 36 *Journal of World Trade* 811 at pp 811-878.
- (3) Gareth T. Davies, “Morality Clauses and Decision-Making in Situations of Scientific Uncertainty: The Case of GMOs” (2007) 6(2) *World Trade Review* 249 at pp 258-259.
- (4) Owen McIntyre & Thomas Mosedale, “The Precautionary Principle as a Norm of Customary International Law” (1997) 9 *Journal of Environmental Law* 231 at pp 234, 238.
- (5) Robert Howse & Elisabeth Turk, “The WTO Impact on Internal Regulations: A Case Study of the *Canada – EC Asbestos* Dispute” (2006) *Trade and Human Health and Safety*, Cambridge University Press, pp 77-132.
- (6) Tomer Broude, “Genetically Modified Rules: The Awkward Rule-Exception-Right Distinction and EC-Biotech” (2007) 6(2) *World Trade Review* at 215 pp 215-230.
- (7) William J. Davey, “Reflections on the Appellate Body Decision in the *Hormones* Case and the Meaning of the SPS Agreement” (2006) *Trade and Human Health and Safety*, Cambridge University Press, pp 118-132.

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- (1) Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary*, (New York: Oxford University Press, 2007) at pp 110-128, 140-162.

- (2) Laura Nielsen, *The WTO, Animals, and PPMs (Series on International Law and Development)*, (Leiden, Netherlands: Koninklijke Brill NV, 2007) at pp 126-132, 154-161, 162-165, 167-174.
- (3) *The Oxford English Dictionary*, 2d ed, *sub verbo* “necessary”.
- (4) United Nations Conference on the Human Environment, *Rio Declaration on Environment and Development*, UNEP/UNCED, UN Doc A/CONF.152/36/Rev.1 (1992).

List of Abbreviations

| | |
|------------|---|
| AB | Appellate Body |
| Art. | Article/Articles |
| ASA | Aldousian Sheepbreeders Association |
| CPS | Cloning Precaution Statute |
| DSB | Dispute Resolution Body |
| DSU | Dispute Resolution Understanding |
| eds | editors |
| ELSA | Expert League of Scientists in Aldousia |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Trade and Tariffs |
| OIE | World Organization for Animal Health |
| p/pp | page/pages |
| para/paras | paragraph/paragraphs |
| PR | Panel Report |
| SPS | Sanitary and Phytosanitary |
| RCBCA | Russelian Customs and Border Control Administration |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

Statement of Facts

1. Aldousia is a developed country. It is the only jurisdiction that conducts large-scale commercial sheep cloning. Through Podsnap, a company jointly owned by the Government of Aldousia and the Aldousian Sheepbreeders Association (ASA), Aldousia exports cloned sheep to sheepbreeders in domestic and international markets. Within ten years, most Aldousian sheep will be of cloned ancestry.
2. Russelia is a developing country. It is a significant consumer of sheep products from Aldousia and Zamyatin. Russelia is concerned about the potential human and animal health risks posed by cloned animals and their progeny. This concern engages three issues: First, the lack of scientific findings regarding the effects of cloning on animals and their derivative products; second, the potential impact of cloned sheep on domestic herds and bloodlines; third, the Russelian people's belief that cloned animals are morally repugnant and that an import ban is necessary to maintain public health and morals.
3. In 2005, Russelia enacted the Cloning Precaution Statute (CPS) that introduced a general ban on the importation and marketing of any cloned animals and their progeny for the purpose of breeding and/or slaughter and of any food products derived from cloned animals or their progeny. The CPS was enacted in 2005 and enforcement began in 2010. Enforcement coincided with the conclusion of a risk assessment that comprised of two reports.
4. The “Cloned Animals and Derivative Products: A Scientific Risk Assessment” (2005 Russelian Report) is a qualitative scientific risk assessment that found that cloned animals and their derivatives may pose risks to human and animal health.
5. The “Survey and Assessment of Risks Associated with Cloned Sheep and Derivative Products” (2010 Russelian Report) identified specific risks and the qualitative probability of their occurrence. In parallel with the 2010 Russelian Report, the Russelian Customs and Border Control Administration (RCBCA) began enforcing the CPS by barring entry of sheep and derivatives unless the importer can prove that the goods were not cloned animals, their progeny or derivatives. Enforcement of the CPS has meant that cloned sheep and sheep products have been barred from Russelia.
6. Russelia asserts that cloned animals, their progeny and derivatives pose a threat to human and animal life or health. Because the two countries have failed to resolve the dispute, Aldousia has requested the establishment of a panel according to Art. 6 of the Dispute Settlement Understanding (DSU), alleging various violations of WTO Agreements.

Summary of Arguments

Russelia complies with Art. 5.1 of the SPS Agreement because the CPS is based on a risk assessment comprising the 2005 Russelian Report and the 2010 Russelian Report.

- Russelia's risk assessment meets the definition of a risk assessment because it identified adverse effects of cloning and gave a qualitative indication of likelihood of occurrence. The 2010 Russelian Report found that cloned sheep face increased health risks.
- The risk assessment complies with Art. 5.1 because it is consistent with techniques developed by the World Organization for Animal Health (OIE). Further, the risk assessment complies with the requirements of Art. 5.2.
- The CPS is based on Russelia's risk assessment because there is a rational and objective relationship between the findings of Russelia's risk assessment and the CPS.

Russelia is consistent with Art. 2.2 of the SPS Agreement because it is necessary to protect non-cloned sheep and is maintained with sufficient and scientific evidence.

- Russelia's evidence is scientific because it was based on international research published in scientific journals that involved scientific methods and came to the conclusion that an import ban may reduce or eliminate the risks posed by cloning.
- The CPS is maintained on sufficient scientific evidence. Russelia's risk assessment studied currently available evidence. Further, because the evidence identified irreversible risks, Russelia is justified in introducing prudent measures to reduce or eliminate the risks.
- *Even if* Russelia is found to be in breach of Art. 2.2 of the SPS Agreement, Russelia is exempt from its Art. 2.2 obligations through its compliance with Art. 5.7.
- Russelia adopted the CPS in reaction to the findings of the 2005 Russelian Report.
- Russelia plans on obtaining additional information necessary for a more objective risk assessment of cloned animals. As a result of the 2010 Russelian Report (which condones the CPS), Russelia launched two 10-year research programs to investigate the risks of cloned animals.
- 10 years is a reasonable period of time for a developing country like Russelia to review the CPS. 10 years is also necessary to observe long-term health effects of cloned animals, genetic mutations and unknown risks of cloning.

Russelia does not violate Art. 5.6 of the SPS Agreement because there is no reasonable alternative to the CPS available.

- Given the technical and economic realities in Russelia, any other alternative would impose too heavy a financial burden (e.g. using Russelia's own resources to ensure all imported sheep are not cloned and safe for consumption). Russelia's objective in enacting the CPS is to preserve human and animal life or health; a pursuit that is regarded as both vital and important in the highest degree.
- There is no alternative SPS measure that is significantly less restrictive to trade than the CPS.

Russelia does not violate Art. 2.3 of the SPS Agreement because the conditions in Aldousia and Zamyatin are neither identical nor similar.

- First, Aldousia has integrated a large stock of cloned rams into its conventionally bred flocks of sheep, whereas Zamyatin only introduced a small number of cloned rams. Second, Aldousia is the only jurisdiction that is cloning on a commercial scale or basis. Zamyatin is not cloning animals on a similar scale. Third, Aldousia stated that it aims to export cloned stud rams. Zamyatin expressed no such intention.
- *Even if* conditions are identical or similar, the CPS is not an arbitrary or unjustifiable discriminatory measure because there is a difference in the scale of cloned sheep production and integration between Aldousia and Zamyatin. Russelia faces a higher risk of importing cloned sheep from Aldousia than Zamyatin. This justifies a higher level of protection against Aldousian exports.
- The CPS is not a disguised restriction of trade. It is a genuine effort to protect Russelia from the possible risks of cloned sheep.

If Russelia is found to be in breach of its SPS obligations, the CPS can be justified under Art. XX(a) of the GATT.

- The purpose of the CPS is not adequately covered by the SPS Agreement. The CPS should be viewed as a separate measure which can be assessed under the GATT.
- The CPS is designed to protect Russelia's moral beliefs regarding cloned animals and their consumption by humans pursuant to Art. XX(a) of the GATT. The CPS limits sheep imports to conventionally bred sheep because this is necessary to protect Russelia's public morals and respect Russelia's state sovereignty.

Identification of WTO Measures at Issue

Measure 1: The CPS imposes an import ban on cloned animals, their progeny and derivative products.

Measure 2: The RCBCA enforcement of the CPS bars entry of sheep and sheep products unless the exporter can prove the animals, their progeny and their derivatives are not of cloned ancestry.

Legal Pleadings

I. THE CPS IS CONSISTENT WITH RUSSELIA'S SPS OBLIGATIONS

1. The CPS is an SPS measure within the meaning of the SPS Agreement. The CPS and its enforcement are consistent with Arts. 5.1, 2.2, 5.7, 5.6 and 2.3 of the SPS Agreement.

2. Annex A(1) defines an SPS measure. In *US – Poultry*, the Panel held that an SPS measure is one which is applied to achieve a purpose set forth in subparagraphs (a) through (d) and which falls within the scope of the second part of Annex A(1).¹

3. The CPS is an SPS measure. It is a *law* enacted to protect animal and human life or health from potential adverse effects of cloned animals.

4. In *EC – Hormones*, the Panel held that the SPS Agreement will apply if: “(i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade”²

5. The SPS Agreement applies because the CPS is an SPS measure that affects international trade. Russelia is entitled to benefit from the rights granted by both the SPS Agreement and Art. XX of the General Agreement on Tariffs and Trade (GATT).

II. THE CPS IS CONSISTENT WITH ART. 5.1 OF THE SPS AGREEMENT

6. The Appellate Body (AB) has held that Art. 2.2 and 5.1 of the SPS Agreement should be read together. Art. 5.1 is a specific application of the basic obligations contained in Art. 2.2.³ Thus, measures inconsistent with Art. 5.1 are presumptively inconsistent with Art. 2.2.⁴

7. Art. 5.1 of the SPS Agreement requires that Members ensure their SPS measures are “based on an assessment... of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

¹ *United States – Certain Measures Affecting Imports of Poultry from China (Complaint by China)* (2010), WTO Doc WT/DS392/R at para 7.120 (Panel Report) [*US – Poultry (PR)*].

² *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1997), WTO Doc WT/DS48/R/CAN at para 8.39 (Panel Report) [*EC – Hormones (PR)*].

³ *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1998), WTO Doc WT/DS48/AB/R at para 180 (Appellate Body Report) [*EC – Hormones (AB)*].

⁴ *Australia – Measures Affecting Importation of Salmon (Complaint by Canada)* (1998), WTO Doc WT/DS18/AB/R at para 138 (Appellate Body Report) [*Australia – Salmon (AB)*].

Further, Art. 5.2 should be read with Art. 5.1 because it “instructs WTO Members how to conduct a risk assessment”.⁵

8. Therefore, Art. 5.1 sets out a three part test: (i) a risk assessment; (ii) a consideration of risk assessment techniques developed by relevant international organizations as well as Art. 5.2 requirements; and (iii) the SPS measure must be based on the risk assessment. The CPS meets these requirements.

a) Russelia has conducted a risk assessment

9. In *Australia – Salmon (Article 21.5)*, the Panel held that a measure was based on a risk assessment even when the final report was published after the measure was enacted.⁶ The final published report did not alter the “substance or conclusions” of earlier draft reports.⁷

10. The Panel should view the 2010 Russelian Report as a continued part of Russelia’s risk assessment that justifies the CPS’s enforcement. This report was an update because additional information became available. It did not alter the substance or conclusions of the 2005 Russelian Report, which studied the effects of cloning and recommended an import prohibition. The 2005 Russelian Report was a risk assessment and the basis for the CPS and the 2010 Russelian Report was a supplement published after the measure.

b) Russelia's risk assessment meets the definition of a risk assessment

11. Annex A(4) establishes three requirements for a risk assessment. First, the risk assessment must identify the disease and potential biological and economic consequences. Second, it must evaluate the likelihood of entry as well as associated biological and economic consequences. Third, it must evaluate the likelihood of entry, establishment or spread of the disease according to the SPS measures which might be applied.⁸

12. In *EC – Hormones*, the AB found that a risk assessment can be qualitative or quantitative.⁹ A qualitative risk assessment should identify the risks and contain a best estimate of their likelihood based on incomplete data.¹⁰ Further, the AB held that risk assessments may consult mainstream scientific views as well as “the opinions of scientists

⁵ *US- Poultry (PR)*, *supra* note 1 at para 7.171.

⁶ *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada (Complaint by Canada)* (2000), WTO Doc WT/DS18/RW at para 7.74-7.77 (Panel Report) [*Australia – Salmon Art. 21.5(PR)*].

⁷ *Ibid* at para 7.77.

⁸ *Australia – Salmon (AB)*, *supra* note 4 at para 121.

⁹ *EC – Hormones (AB)*, *supra* note 3 at para 186.

¹⁰ Gareth T. Davies, “Morality Clauses and Decision-Making in Situations of Scientific Uncertainty: The Case of GMOs” (2007) 6(2) *World Trade Review* 249 at 258-259.

taking a divergent view.”¹¹

13. Russelia’s qualitative risk assessment fulfills the three requirements of a risk assessment. First, the 2010 Russelian Report identified cloning as a source of epigenetic effects. Second, cloned sheep or their progeny could enter Russelian territory because Russelia imports a significant amount of sheep and sheep products from Aldousia. Third, both Russelian Reports concluded that an import prohibition is required to prevent the identified risks from occurring.

c) Russelia's risk assessment takes into account risk assessment techniques developed by international organizations and meets the requirements of Art. 5.2

i. Russelia's risk assessment complies with techniques developed by the relevant international organizations

14. Annex A(3)(b) identifies the World Organization for Animal Health (OIE) as the relevant international organization for guidance on a risk assessment studying animal health.

15. Art. 2.1.3 of the OIE's Terrestrial Animal Health Code 2010 (TAHC) includes four important risk assessment principles: (i) both qualitative and quantitative risk assessment methods are valid; (ii) a risk assessment should be based on the best information that is in accordance with scientific thinking. It should be well-documented and supported with references to scientific literature and expert opinion; (iii) risk assessments should document uncertainties, assumptions made and the effects of these on the final risk estimate; and (iv) a risk assessment should be updated when additional information becomes available.

16. Russelia's risk assessment complies with the aforementioned principles. First, both reports employed qualitative methods. Second, both reports were based on research conducted around the world and the 2010 Russelian Report was based on well-documented information that was published in scientific journals. Further, both reports included Russelian and Zamyatin scientific opinion. Third, the 2010 Russelian Report documented uncertainties that arise from a lack of scientific data. It also acknowledged that its authors considered divergent scientific opinion but noted that the effect of this evidence is speculative or inconclusive. Fourth, the 2005 Russelian Report was the initial stage of Russelia's risk assessment. The 2010 Russelian Report was an update as additional information became available.

¹¹ EC – Hormones (AB), *supra* note 3 at para 194.

ii. Russelia's risk assessment complies with Art. 5.2

17. In *Australia – Apples*, the AB held that Art. 5.1 requires a risk assessment to take into account Art. 5.2.¹² Russelia's risk assessment fulfills this requirement. It considered mainstream and divergent available scientific data. It also considered relevant ecological and environmental conditions, noting that all existing data concerns laboratory, rather than normal farming conditions.

d) The CPS is based on Russelia's risk assessment

18. In *EC – Hormones*, the AB held that an SPS measure is “based on” a risk assessment, as required by Art. 5.1, if there is an objective relationship between the measure and the risk assessment that sufficiently warrants the SPS measure at issue.¹³ The measure does not need to conform to the results of the risk assessment.¹⁴ It only needs to be based on it.¹⁵ Further, a measure can be “based on” a risk assessment even when “based on” divergent views. This is particularly applicable “where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety”.¹⁶

19. There is an objective and rational relationship between the conclusions of the Russelian risk assessment and the enforcement of the CPS for two reasons.

20. First, as part of Russelia's risk assessment, the 2005 Russelian Report concluded that cloning may pose health risks. This conclusion as well as Russelia's prudence in protecting human and animal health sufficiently warrant a ban on the importation of cloned animals, their progeny and derivatives. There is an objective relationship between the CPS and 2005 Russelian Report.

21. Second, the 2010 Russelian Report identified specific life-threatening risks to cloned animals and their progeny. There is an objective and rational relationship between the conclusions of the 2010 Russelian Report and enforcement of the CPS.

22. Russelia's risk assessment meets the definition of a risk assessment per Annex A(4) of the SPS Agreement. It also considered standards set by international organizations and the requirements of Art. 5.2. There is a rational relationship between the risk assessment and the CPS. Thus, the CPS is based on a risk assessment consistent with Art. 5.1.

¹² *Australia – Measures Affecting the Importation of Apples from New Zealand (Complaint by New Zealand)* (2010), WTO Doc WT/DS367/AB/R at para 206 (Appellate Body Report) [*Australia – Apples (AB)*].

¹³ *EC – Hormones (AB)*, *supra* note 3 at paras 189-194.

¹⁴ *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Complaint by the European Communities)* (2008), WTO Doc WT/DS321/AB/R at para 528 (Appellate Body Report).

¹⁵ *EC – Hormones (AB)*, *supra* note 3 at paras 189-194.

¹⁶ *Ibid.*

III. THE CPS IS CONSISTENT WITH ART. 2.2 OF THE SPS AGREEMENT

23. In *Australia – Salmon*, the AB held that measures inconsistent with Art. 5.1 are presumptively inconsistent with Art. 2.2.¹⁷ The CPS is consistent with Art. 5.1. It is also consistent with the basic obligations in Art. 2.2. In particular, the CPS is applied only to the extent necessary and is based on scientific and sufficient evidence.

1. The CPS is applied to the extent necessary

24. The phrase from the SPS Agreement “to the extent necessary” has not been interpreted by the Dispute Settlement Body (DSB). Given the similarity of subject matters, the jurisprudence on GATT Art. XX regarding “necessity” provides useful guidance to the interpretation of this provision.

25. GATT Art. XX(b) allows a Member to enact measures “necessary to protect human, animal or plant life or health”. In *US – Gasoline*, the Panel held that “necessary” means that the measure introduced must be necessary to achieve the Member's policy objective.¹⁸ Further, in *Korea – Beef*, the AB held that the word “necessary” refers to multiple degrees of necessity.¹⁹ A measure that is not indispensable may be “necessary” after balancing: (i) the contribution made by the compliance measure to the enforcement of the law or regulation at issue; (ii) the importance of the common interests or values protected by that law or regulation; and (iii) the accompanying impact of the law or regulation.²⁰

26. Under this test, the CPS is necessary for three reasons. First, Russelia's policy objective is to protect human and animal health from risks posed by cloning. The CPS ban is indispensable to its policy objective. Second, the CPS prohibition protects the interests and values of Russelians who believe cloning is morally wrong. Third, the CPS does not significantly affect international trade. It affects Aldousian sheep because Aldousia *chose* to clone commercially.

27. Additionally, in *Korea – Beef* the AB held that if an alternative measure is available after balancing the “necessary” factors, the existing measure is not “necessary.” Because Russelia's policy objective is to completely prevent consumption of derivatives of cloned animals and inter-breeding, there is no appropriate alternative measure.

28. Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT) confirms the

¹⁷ *Australia – Salmon (AB)*, *supra* note 4 at para 138.

¹⁸ *US – Standards for Reformulated and Conventional Gasoline (Complaint by Brazil and Venezuela)* (1996), WTO Doc WT/DS2/R at para 6.22 (Panel Report) [*US – Gasoline (PR)*].

¹⁹ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by Australia and the United States)* (2000), WTO Doc WT/DS161,169/AB/R at para 161 (Appellate Body Report) [*Korea – Beef (AB)*].

²⁰ *Ibid* at para 164.

guidance provided by AB jurisprudence on the term “necessary”. The ordinary meaning of the term “necessary” is “needed to be done, achieved... essential”.²¹ An SPS measure is consistent with Art. 2.2 obligations where its application is “needed or essential to protect human, animal or plant life or health.” This initial interpretation is consistent within the context of the Preamble of the SPS Agreement, which provides that no “Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health”.

29. The CPS and its enforcement are necessary for two reasons. First, as part of Russelia's risk assessment, the 2010 Russelian Report highlights the serious risks of cloning. Cloned sheep and their progeny have higher birth mortality rates and are more susceptible to illness and birth abnormalities. Second, the novelty of the cloning technique poses many questions regarding future risks to animal health, and the potential for these risks to be transmitted to humans. To protect human and animal health, cloned sheep, their progeny and derivatives must remain banned within Russelian territory.

a) The CPS is maintained with sufficient scientific evidence

i. The Russelian Reports collectively provide scientific evidence

30. Art. 2.2 requires that an SPS measure be based on scientific evidence. In this case, Russelia has completed two scientific reports about the risks associated with cloning, which together comprise a comprehensive risk assessment based on scientific evidence.

ii. Russelia's collective evidence is scientific

31. In *EC – Hormones*, the AB found that requiring sufficient scientific evidence ensures that a measure is not a disguised restriction on international trade but is necessary to protect human life or health and based on scientific evidence.²² In *Japan – Apples*, the Panel held that scientific evidence is “evidence gathered through scientific methods”.²³ It “may include evidence that a particular risk may occur... as well as evidence that a particular requirement may reduce or eliminate that risk”.²⁴ Russelia’s evidence is scientific for three reasons.

32. First, Russelia emphasizes that the 2005 Russelian Report was based on international research which involved scientific methods. This research was sufficient to enact the CPS. The evidence in the 2010 Russelian Report was based on experiments and analysis published

²¹ *The Oxford English Dictionary*, 2d ed, *sub verbo* “necessary”.

²² *EC – Hormones (AB)*, *supra* note 3 at para 177.

²³ *Japan - Measures Affecting the Importation of Apples (Complaint by the United States)* (2003), WTO Doc WT/DS245/R at para 8.92 (Panel Report) [*Japan – Apples (PR)*].

²⁴ *Ibid.*

in scientific journals. Since this evidence was specifically gathered through scientific methods, Russelia has scientific evidence to justify enforcement of the CPS.

33. Second, the 2005 and 2010 Russelian Reports both assessed the potential for risk. The 2005 Report found that the potential for risk occurrence is of low probability but at a level that is higher than merely hypothetical. The 2010 Report found the potential small but not negligible.

34. Third, in *Japan – Apples*, the Panel held that the requirement of scientific evidence can be fulfilled by a finding that a measure may reduce or eliminate future risks.²⁵ In this case, both reports came to the conclusion that an import ban on cloned animals, their progeny and derivatives is required to eliminate the risks posed by cloning.

b) Russelia’s scientific evidence is sufficient

35. Art. 2.2 requires that an SPS measure be necessary and based on sufficient scientific evidence. In *Japan – Agricultural Products*, the AB held that “sufficient” is ordinarily a quantity or extent that is adequate for a certain purpose.²⁶ Thus, “sufficient” in Art. 2.2 requires a “rational or objective relationship between the SPS measure and the scientific evidence”.²⁷

36. In the context of Art. 2.2, Members may act with prudence even when the potential for risk is low. The AB has held that when read together, the sixth paragraph of the Preamble and Art. 3.3 of the SPS “explicitly recognize the right of Members to establish their own appropriate level of sanitary protection” and that Panels should bear in mind that “responsible, representative governments commonly act from perspectives of prudence and precaution” where irreversible risks are concerned.²⁸

37. Russelia has traditionally sought a high level of human and animal health. The 2005 and 2010 reports identified specific risks posed by cloning as well as probabilities for risk occurrence. The CPS was a prudent action because irreversible damage is possible. There is a rational and objective relationship between the CPS and the sufficient scientific evidence.

38. Because the CPS is necessary to protect human and animal life or health and Russelia's scientific evidence is sufficiently connected to the CPS, the CPS meets the requirements of Art. 2.2 of the SPS Agreement.

²⁵ *Ibid.*

²⁶ *Japan – Measures Affecting Agricultural Products (Complaint by the United States)* (1999), WTO Doc WT/DS76/AB/R at para 73 (Appellate Body Report) [*Japan – Agricultural Products (AB)*].

²⁷ *Japan – Agricultural Products (AB)*, *supra* note 26 at para 84.

²⁸ *EC – Hormones (AB)*, *supra* note 3 at para 124.

2. In the alternative, Russelia is exempt from its obligations under Art. 2.2 by its compliance with Art. 5.7 of the SPS Agreement

39. The AB in *Japan – Agricultural Products* held that Art. 5.7 of the SPS Agreement is a “qualified exemption” to a country’s obligations under Art. 2.2.²⁹ The AB identified four cumulative requirements that an SPS measure must meet to ensure compliance with Art. 5.7: (i) the measure is imposed in a situation where relevant scientific information is insufficient; (ii) the measure is adopted on the basis of available pertinent information; (iii) the member which adopted the measure seeks to obtain the additional information necessary for a more objective assessment of risk; and (iv) the member which adopted the measure reviews the measure within a reasonable period of time.³⁰

a) There is insufficient scientific evidence about the effects of cloned sheep

40. The CPS is based on *all currently available* evidence. If the Panel finds that this evidence is insufficient, then the CPS is not based on a risk assessment. This finding alone would confirm that there is insufficient scientific evidence about the effects of cloning. This fulfills the insufficiency requirement under Art. 5.7.

41. There is limited information about the safety of food or products originating from cloned animals or their progeny. Unlike in *Japan – Apples*, where Japan had accumulated a large quantity of high-quality scientific evidence on the risks of transmission of fire blight through apple fruit over the past 200 years,³¹ Russelia has not been able to conduct sufficient research on cloned animals and only had 10 years to start accumulating information on the risks of cloning.³²

42. Though the ELSA Report claims there are no risks, there is a reasonable apprehension of bias that undermines its reliability. Two of the five authors are directors of Podsnap and thus, directly benefit from international acceptance of cloned sheep.³³ The AB in *US – Hormones Retaliation* has emphasized that the determination of the sufficiency of scientific evidence to perform a risk assessment must be a rigorous and *objective* process.³⁴ The ELSA Report fails to fulfill that requirement.

²⁹ *Japan – Agricultural Products (AB)*, *supra* note 28 at para 80.

³⁰ *Ibid* at para 89.

³¹ *Japan – Measures Affecting the Importation of Apples (Complaint by the United States)* (2003), WTO Doc WT/DS245/AB/R at para 173 (Appellate Body Report) [*Japan – Apples (AB)*].

³² *The Case* at para 10.

³³ *Ibid* at para 7.

³⁴ *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (Complaint by the European Communities)* (2008), WTO Doc WT/DS320/AB/R at para 686 (Appellate Body Report) [*US – Hormones (AB)*].

b) The CPS was adopted on the basis of available pertinent information from relevant international organizations

43. The CPS was adopted on the basis of the 2005 Russelian Report. This Report determined that cloning poses risks to human and animal health. Russelia compiled the 2005 Russelian Report based on “opinions expressed by Russelian and Zamyatinian scientists with respect to *research conducted in research centres around the world.*”³⁵

44. The findings of the 2005 Russelian Report differ from the ELSA Report. However, the AB in *EC – Hormones* found that countries may conduct a risk assessment based on mainstream scientific opinion as well as “opinions of scientists taking a divergent view”.³⁶ The AB further held that governments may impose an SPS measure based on divergent opinions if the risk involved is life-threatening and could pose a clear and imminent threat to public health and safety.³⁷ The 2005 Russelian Report found that cloning poses risks to human and animal life or health.

c) Russelia plans to obtain additional information necessary for a more objective assessment of risk of cloned animals

45. Russelia is seeking additional information germane to conducting a risk assessment on cloned animals, as required by Art. 5.7. The 2010 Russelian Report justifies the temporary CPS and advocates undertaking further research to address outstanding issues.³⁸ Russelia has responded by launching two comprehensive 10-year research programs that will investigate the risks of cloning.³⁹ Russelia welcomes Aldousian assistance in conducting these projects and would permit the importation of cloned stud rams and sperm for the purpose of scientific research.⁴⁰

d) Russelia will review the CPS within a reasonable period of time

46. 10 years is a reasonable timeframe to study concerns regarding cloned animals. It is vital for researchers to examine a number of generations of cloned animals to fully assess the potential long-term health effects that result from cloning. Researchers also need a longer period of time to observe genetic mutations in future generations of cloned animals.

47. Art. 12 of the DSU requires the Panel to take into account the needs of developing countries. Art. 10.1 of the SPS Agreement explicitly requires Members to take into account

³⁵ *The Case* at para 13.

³⁶ *EC – Hormones (AB)*, *supra* note 3 at para 194.

³⁷ *Ibid.*

³⁸ *The Case* at para 19(c).

³⁹ *The Case* at para 20.

⁴⁰ *Ibid.*

the special needs of developing country Members when applying SPS measures. Russelia is a developing country with a low budget⁴¹ and may require more time than a developed country to reach certain scientific findings. The Panel should consider Russelia's limitations and realize that 10 years is already an ambitious timeframe.

e) This Panel should consider the well-established “precautionary principle” when interpreting Art. 5.7 of the SPS Agreement

48. The precautionary principle is reflected in Art. 5.7, and thus the Panel should consider the principle when interpreting Art. 5.7.⁴² A hallmark of the precautionary principle is the allocation of the burden of proof. In the absence of scientific consensus that an action or policy is harmful, the burden of proof that an action is *not* harmful falls on the party proposing a novel technique.⁴³ Thus, the onus is on Aldousia to prove that cloned animals are not harmful to human health.

IV. RUSSELIA DOES NOT VIOLATE ART. 5.6 OF THE SPS AGREEMENT

49. Art. 5.6 of the SPS Agreement prohibits SPS measures that are more trade restrictive than necessary to achieve a Member's chosen level of protection, taking into account technical and economic feasibility. Case law from the GATT era is relevant to the analysis of the SPS Agreement, as legal history under the GATT has continuing relevance to the new WTO system.⁴⁴

50. The AB in *Australia – Salmon* set out a three-part test from its reading of Art. 5.6, and subsequent jurisprudence has followed that interpretation.⁴⁵ The test consists of three cumulative elements to establish a violation of Art. 5.6: (i) there is an alternative SPS measure that is reasonably available taking into account technical and economic feasibility; (ii) there is an alternative SPS measure which achieves the Member's chosen level of protection; and (iii) there is an alternative SPS measure that is significantly less restrictive to trade.⁴⁶

51. To successfully show that Russelia has violated Art. 5.6 of the SPS Agreement, there must be an alternative SPS measure which satisfies all three elements of the above test.

According to *Japan – Agricultural Products* and *EC – Hormones*, the burden of proof is on

⁴¹ *The Case* at para 20.

⁴² *EC – Hormones (AB)*, *supra* note 3 at para 124.

⁴³ Owen McIntyre & Thomas Mosedale, “The Precautionary Principle as a Norm of Customary International Law” (1997) 9 *Journal of Environmental Law* 231 at 234, 238.

⁴⁴ *Japan – Taxes on Alcoholic Beverages (Complaint by Canada, European Communities, United States)* (1996), WTO Doc WT/DS8,10,11/AB/R at p. 14 (Appellate Body Report) [*Japan – Alcohol (AB)*].

⁴⁵ *Australia – Measures Affecting the Importation of Apples from New Zealand (Complaint by New Zealand)* (2010), WTO Doc WT/DS367/R at paras 7.1096-1098 (Panel Report) [*Australia – Apples (PR)*].

⁴⁶ *Australia – Salmon (AB)*, *supra* note 4 at para 194.

the complainant.⁴⁷

52. Aldousia cannot label Russelia's CPS measure as overly trade restrictive based on the notion that the measure is not scientifically justified. Whether a measure is scientifically justified is "distinct from its alleged trade restrictiveness".⁴⁸

53. The CPS is the least trade restrictive measure available to ensure the health and safety of Russelian citizens. Russelia has not imposed an absolute ban on imports of sheep and sheep products from Aldousia. Russelia is banning certain sheep on the *condition* of having been cloned or derived from cloned animals. Thus, Russelia's CPS import ban is consistent with the findings of the AB in *Australia – Apples*. A measure that restricts imports to a certain *condition* of apples (mature, symptomless) is acceptable and is not regarded as overly trade restrictive.⁴⁹

1. There is no reasonable alternative measure to the CPS that is available, taking into account Russelia's technical and economic feasibility

54. The first element of this test is the requirement for the Panel to consider whether an alternative measure is technically and economically feasible for Russelia. The CPS is the *only* measure that Russelia can afford as a developing country with limited resources.⁵⁰

55. According to *Korea – Beef*, the more vital or important the value pursued is, the more crucial it is that the alternative measure achieves the same ends.⁵¹ No other measure would achieve the same end as the CPS. The objective of the CPS is to preserve human health through elimination or reduction of health risks posed by cloned animals. This value is both vital and important in the highest degree.⁵²

2. There is no other SPS measure that achieves Russelia's appropriate level of protection

56. The second element of this test requires the complainant to demonstrate an alternative SPS measure which achieves the Member's chosen level of protection. Every WTO Member has the right to determine its appropriate level of protection.⁵³ Russelia has adopted a *high* level of human and animal health protection.⁵⁴ Such a qualitative standard is acceptable as the

⁴⁷ *Japan – Agricultural Products (AB)*, *supra* note 28 at para 122; *EC – Hormones (AB)*, *supra* note 3 at para 98.

⁴⁸ *Australia – Apples (PR)*, *supra* note 46 at paras 7.1398.

⁴⁹ *Australia – Apples (PR)*, *supra* note 11 at para 7.1263.

⁵⁰ *The Case* at para 9.

⁵¹ *Korea – Beef (AB)*, *supra* note 20 at paras 163.

⁵² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc WT/DS135/AB/R at para 172 (Appellate Body Report) [*EC – Asbestos (AB)*].

⁵³ *Japan – Measures Affecting Agricultural Products (Complaint by the United States)* (1998), WTO Doc WT/DS76/R at para 8.81 (Panel Report) [*Japan – Agricultural Products (PR)*].

⁵⁴ *The Case* at para 12.

AB in *Australia-Salmon* held that there is no obligation to determine the appropriate level of protection in quantitative terms.⁵⁵

57. The CPS reflects Russelia's high level of protection. A high level of protection means next to zero risk of entry by a cloned animal. This standard requires exporters to prove their goods are not cloned animals.

3. There is no SPS measure that is *significantly* less trade restrictive than the CPS

58. To satisfy the third element of the Art. 5.6 test, the complainant must establish that an alternative measure is *significantly* less restrictive to trade.⁵⁶ In assessing whether an alternative measure is significantly less trade restrictive, previous panels have analyzed increased market access.⁵⁷

59. There is no appropriate alternative measure to the CPS that significantly increases market access. For example, limiting inspections to a select random sampling of imported sheep would fail to meet Russelia's high level of protection and fail to significantly increase market access.

60. The CPS is the least trade restrictive measure available to ensure Russelia's high level of protection. The CPS is not an absolute ban, but rather a ban on a certain *type* of sheep. Previous jurisprudence found that a measure banning certain types of a product is not inconsistent with WTO obligations.

V. RUSSELIA DOES NOT VIOLATE ART. 2.3 OF THE SPS AGREEMENT

61. The Panel in *Australia – Salmon* identified three elements that must be met to find a violation of Art. 2.3: (i) the measure discriminates between Members; (ii) the discrimination is arbitrary or unjustifiable; and (iii) identical or similar conditions prevail in the territory of the Members compared.⁵⁸ Art. 2.3 prohibits a disguised restriction on trade. The DSB has not addressed the meaning of arbitrary or unjustifiable discrimination and disguised restriction on international trade in the context of Art. 2.3. Since there is an overlap of these concepts in Art. 2.3 and Art. 5.5 of the SPS Agreement, the more expansive jurisprudence of Art. 5.5 should guide the analysis.

1. The CPS does not discriminate between Members

62. The CPS would apply equally to Aldousia and Zamyatin if their conditions were identical and similar. If Zamyatin began introducing mass numbers of cloned sheep into its

⁵⁵ *Australia – Salmon (AB)*, *supra* note 4 at para 206.

⁵⁶ *Australia – Apples (PR)*, *supra* note 46 at para 7.1264.

⁵⁷ *Ibid* at paras 7.1351.

⁵⁸ *Australia – Salmon Art. 21.5 (PR)*, *supra* note 7 at para 7.111.

flocks, and declared its intention to export cloned sheep on a large scale, the CPS would be applied to Zamyatin in the manner it is applied to Aldousia.

2. The conditions in Aldousia and Zamyatin are neither identical nor similar

63. It is inaccurate to compare Aldousia and Zamyatin. Identical or similar conditions do not prevail in Aldousia and Zamyatin for three reasons.

64. First, only a small number of cloned rams were introduced into flocks in Zamyatin for reproduction processes. In contrast, Aldousia purposely integrated a large stock of cloned rams into its flocks of sheep. The ELSA Report indicates that within 10 years, the majority of sheep raised in Aldousia will be of cloned ancestry. The high degree of proliferation and integration of cloned sheep in Aldousia is incomparable to the small number of cloned rams present in Zamyatin.

65. Second, Zamyatin is not commercially producing cloned sheep. Aldousia is the only jurisdiction where cloning on a commercial basis occurs.⁵⁹ A commercial exporter like Aldousia will not likely track or identify whether cloned sheep are being exported to Russelia.

66. Third, Aldousia and Zamyatin have different stated aims for their cloned rams. Aldousia intend to accelerate the process of gaining genetically desirable traits in sheep and thereby gain a competitive edge on international markets by exporting those genetically desirable sheep.⁶⁰ Zamyatin has not stated the same ambition.

3. Even if conditions are similar in Aldousia and Zamyatin, the CPS is a justified discriminatory measure

67. Even if the Panel finds that conditions in Aldousia and Zamyatin are similar and the enforcement of the CPS is discriminatory, this does not imply a breach of Art. 2.3. Art. 2.3 only condemns discrimination that is arbitrary or unjustifiable. In *EC – Hormones*, the Panel held that the presence of a higher risk could legitimize a higher level of protection, in this case discrimination between Aldousia and Zamyatin.⁶¹

7. The discrimination against Aldousia is justifiable for two reasons. First, the difference in scale of cloned sheep production calls for a higher level of protection against Aldousian sheep exports. Second, the difference in the way cloned rams are incorporated into Aldousia's conventionally bred flocks gives Aldousia less control over the type of sheep it is exporting. Even if Aldousia wanted to limit its exports to conventionally bred sheep, the way cloned

⁵⁹ *The Case* at para 3.

⁶⁰ *The Case* at para 8.

⁶¹ *EC – Hormones (PR)*, *supra* note 2 at para 8.193.

rams are incorporated into Aldousia's conventionally bred flocks makes it impossible for Aldousia to do so without a thorough check on each sheep (as requested by the CPS).

68. If no CPS enforcement were in place, the risk of a cloned ram from Aldousia entering Russelia would be much higher than a cloned ram entering from Zamyatin, given the scale of Aldousia's cloning practices in its country and the diminished control Aldousia has over the type of sheep it is exporting. The higher risk calls for a higher level of protection. Therefore, if the Panel finds the CPS discriminatory, Russelia is still not in breach of Art. 2.3.

4. The CPS does not constitute a disguised restriction of trade

69. The objective in enacting the CPS is to protect human and animal life or health. The CPS is not "a disguise to conceal the pursuit of trade-restrictive objectives."⁶² It is a genuine effort to protect Russelian citizens and animals.

70. A disguised restriction would likely alter trade flows in a manner that benefits the importing Member, in this case Russelian sheepbreeders.⁶³ Sheepbreeders in Russelia are not in a more advantageous position because of the CPS. Russelia only has a small domestic production of sheep,⁶⁴ and thus cannot significantly benefit from a disguised restriction of trade.

VI. THE CPS IS JUSTIFIED UNDER ART. XX(a) OF THE GATT 1994

71. If the Panel finds that Russelia breached its SPS obligations, the CPS is justified under Art. XX(a) of the GATT. According to *EC – Biotech*, if the purpose of a measure is not covered by the SPS Agreement, the measure may be viewed as a separate measure which can be assessed under a WTO agreement other than the SPS Agreement, in this case, the GATT.⁶⁵ The CPS was enacted to protect human and animal life or health as well as to uphold the country's public morals.⁶⁶ The health protection purpose of the CPS is justified under the SPS Agreement. The public morals purpose of the CPS is justified under Art. XX(a) of the GATT.

72. The Panel in *Thailand – Cigarettes* determined that the applicable standard of necessity under Art. XX of the GATT is the lack of alternative measures an importing Member could reasonably be expected to employ to achieve its health policy objectives.⁶⁷

⁶² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2000), WTO Doc WT/DS135/R at para 8.236 (Panel Report) [*EC – Asbestos (PR)*].

⁶³ *Brazil – Measures Affecting the Importation of Retreaded Tyres (Complaint by the European Communities)* (2007), WTO Doc WT/DS332/AB/R at para 237 (Appellate Body Report) [*Brazil – Tyres (AB)*].

⁶⁴ *The Case* at para 9.

⁶⁵ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Complaint by Argentina, Canada and the United States)* (2006), WTO Doc WT/DS291,292,293/R at para 7.165 (Panel Report) [*EC – Biotech (PR)*].

⁶⁶ *The Case* at para 11; ELSA Clarification Q12.

⁶⁷ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Complaint by the United States)*

The AB in *Korea – Beef* found that the word “necessary” can mean “making a contribution to”.⁶⁸ Thus, a measure does not need to be absolutely necessary to be valid.

1. Russelia’s measures meet the Art. XX(a) exception

73. Art. XX(a) requires that a measure be necessary to protect public morals. Russelia’s advisory statement took a precautionary stance towards cloned animals because anti-cloning is a basic tenet of public morals in Russelian society.⁶⁹ Although *US – Gambling* dealt with Art. XIV of the General Agreement on Trade in Services (GATS), that provision is worded similarly to Art. XX of GATT⁷⁰ and can inform the Art. XX analysis.

74. In the first step of the analysis, the Panel in *US – Gambling* examined whether the measure at issue was designed to protect public morals. In *US – Gambling*, the AB held that Members should be given scope to define and apply for themselves “the concepts of ‘public morals’... in their respective territories, according to their own systems and scales of values.”⁷¹ Russelia adopted the CPS because of the country’s moral beliefs regarding cloned animals.

75. In the second step of the analysis, the Panel in *US – Gambling* determined whether the measure was necessary to protect public morals. In *Korea – Beef*, the AB held that a measure was “necessary” in the context of Art. XX of the GATT through a process of weighing and balancing a series of factors.⁷² Such factors included the relative importance of the interests and values furthered by the measure at issue.⁷³ The realization of Russelia’s public morals is very important. The fundamental principle of state sovereignty necessitates respect for a state’s laws, morals and beliefs. The CPS protects Russelia’s public morals. This is permitted under Art. XX(a) of the GATT.

2. Russelia’s measures fits within the chapeau of Art. XX

76. To fall within the chapeau of Art. XX of the GATT, the measures: (i) must apply equally to countries where the same conditions prevail; and (ii) do not constitute a disguised restriction of international trade.

77. First, the conditions in Aldousia and Zamyatin are not the same in terms of scale and

(1990), GATT Doc DS10/R at para 75 (Panel Report).

⁶⁸ *Korea – Beef (AB)*, *supra* note 20 at para 161.

⁶⁹ *The Case* at para 11.

⁷⁰ *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2005), WTO Doc WT/DS 285/AB/R at para 291 (Appellate Body Report) [*US – Gambling (AB)*].

⁷¹ *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2004), WTO Doc WT/DS285/R at para 6.461 (Panel Report) [*US – Gambling (PR)*].

⁷² *Korea – Beef (AB)*, *supra* note 20 at para 164.

⁷³ *EC – Asbestos (AB)*, *supra* note 52 at para 172.

control of cloned sheep. The differences in the number of cloned sheep present in Aldousia justify a higher level of protection against Aldousian sheep exports.

78. Second, the CPS is not a disguised restriction on international trade. It is a genuine effort at protecting Russelian human and animal life or health from the possible risks of cloned animals and their progeny. The CPS was also adopted to protect Russelian public morals. The CPS aims to meet those purposes rather than to restrict international trade.

79. *Even if* the Panel holds that the conditions in Aldousia and Zamyatin are the same, Russelia does not unjustifiably discriminate between Members, as previously demonstrated in the Art. 2.3 analysis.

Request for Findings

80. Russelia requests that the Panel advise the DSB to find the CPS and its enforcement in full compliance with Arts. 2.2, 2.3, 5.1, 5.6 and Annex A(4) of the SPS Agreement. In the alternative, Russelia's CPS measure is justified under Art. 5.7 of the SPS Agreement and Art. XX(a) of the GATT 1994.