



The European Law Students' Association



Team: 059

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 COMPLAINANT

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Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994 (*SPS Agreement*)

General Agreement on Tariffs and Trade, 15 April 1994 (GATT 1994)

Understanding on Rules and Procedures Governing Settlement of Disputes, 15 April 1994 (DSU)

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List of Abbreviations

2005 Russelian Report	Cloned Animals and Derivative Products: A Scientific Risk Assessment
2010 Russelian Report	Survey and Assessment of Risks Associated with Cloned Sheep and Derivative Products
Art.	Article
AB	Appellate Body
ABR	Appellate Body Report
CPS	Cloning Precaution Statute
ELSA	Expert League of Scientists in Aldousia
GATT	General Agreement on Tariffs and Trade 1994
Podsnap	Podsnap Inc.
PR	Panel Report(s)
RCBCA	Russelian Customs and Border Control
SCNT	Somatic Cell Nuclear Transfer
SPS measures	Sanitary and Phytosanitary Measures
<i>SPS Agreement</i>	Agreement on the Application of Sanitary and Phytosanitary Measures
TRIMS	Agreement on Trade-Related Investment Matters
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

Summary

Claims related to the SPS Agreement

- The CPS and its enforcement fall within the scope of application of the *SPS Agreement*
 - The CPS and its enforcement constitute SPS measures within the meaning of Annex A(1)(a) and Annex A(1)(b) of the *SPS Agreement*, and affect international trade;
- The CPS and its enforcement are inconsistent with Art. 2.2 of the *SPS Agreement*
 - CPS and its enforcement are not necessary to protect human and animal health, because they do not contribute to meeting Russelia's level of human and animal protection, they are extremely trade-restrictive, and there are less trade-restrictive alternatives reasonably available;
 - The CPS and its enforcement are not based on scientific principles and are maintained without sufficient scientific evidence, because there is no rational relationship between the measures and the 2005 and 2010 Russelian Reports;
- The CPS and its enforcement are inconsistent with Art. 5.1 of the *SPS Agreement*, and consequently, Art. 2.2 of the *SPS Agreement*
 - The CPS and its enforcement are not based on a proper risk assessment, as appropriate to the circumstances because the 2005 and 2010 Russelian Reports do not constitute proper risk assessments within the meaning of Annex A(4) of the *SPS Agreement*;
- The CPS and its enforcement are inconsistent with Art. 5.6 of the *SPS Agreement*
 - The CPS and its enforcement are more trade-restrictive than required, because there are alternative SPS measures reasonably available that take into account technical and economic feasibility, that achieve Russelia's appropriate level of protection, and are significantly less trade-restrictive;
- The CPS and its enforcement do not fall within the scope of Art. 5.7 of the *SPS Agreement*
 - The CPS and its enforcement are not provisional measures, because they were not imposed in a situation of insufficient scientific evidence, have not been adopted on the basis of available pertinent information, Russelia does not seek to obtain additional information necessary for a more objective assessment of risk, and the measures are not subject to review within a reasonable period of time;

- The enforcement of the CPS is inconsistent with Art. 2.3 of the *SPS Agreement*
 - The enforcement of the CPS constitutes arbitrary and unjustifiable discrimination, because it lacks flexibility, has been imposed unilaterally, and is not applied equally to Aldousia and Zamyatin, where identical or similar conditions prevail;
 - The enforcement of the CPS constitutes a disguised restriction on international trade, because of its design, structure and architecture.

Claims related to the GATT 1994

- The inconsistency of the CPS and its enforcement with the *SPS Agreement* cannot be justified by Art. XX of the GATT 1994
 - A breach of the *SPS Agreement* cannot be justified by a general exception under the GATT 1994;
- The CPS and its enforcement cannot be justified under either Art. XX(a) nor (b) of the GATT 1994
 - The CPS and its enforcement do not meet the requirements of Art. XX(a) and (b), and the requirements of the chapeau of Art. XX of the GATT 1994;
 - The CPS and its enforcement do not fall within the scope of Art. XX(a) of the GATT 1994, because they are not aimed at the protection of public morals and are not necessary to fulfil that policy objective;
 - The CPS and its enforcement are not necessary to fulfil the policy objective of Art. XX(b) of the GATT 1994;
 - The enforcement of the CPS does not meet the requirements of the chapeau of Art. XX of the GATT 1994, because it constitutes arbitrary and unjustifiable discrimination, and a disguised restriction on trade.

Statement of Facts

Aldousia is a developed country and a Member of the World Trade Organization (WTO). It is a world leader in bio- and agro-technological research and a forerunner in the area of animal cloning. In 1996, Aldousian researchers successfully cloned a female sheep using an innovative process known as Somatic Cell Nuclear Transfer (SCNT). SCNT allows for the production of elite animals exhibiting particularly desirable traits, such as increased milk production and superior quality meat. Through the selection of particular traits, the offspring of cloned animals may also be more resistant to certain diseases which normally affect their species, thus reducing the costs of production associated with the traditional breeding process. In January 2010, the Expert League of Scientists in Aldousia (ELSA) issued the 2010 ELSA Report indicating no differences between the safety of food originating from cloned animals and from traditionally bred animals. Podsnap Inc. (Podsnap), an Aldousian company has perfected techniques for the large-scale cloning of sheep. In August 2010, Podsnap began introducing cloned stud rams into conventionally bred flocks of sheep in Aldousia, in order to accelerate the process of producing sheep with genetically desirable traits. This will improve Aldousia's economy, given that an important part of the country's export income comes from ovine products.

One of Aldousia's most important trading partners is Russelia, a WTO Member. Although it is a significant consumer of sheep products, Russelia only maintains a small domestic production, relying on sheep imports from Aldousia and Zamyatin, another WTO Member. In September 2005 the Russelian Ministry of Health commissioned the report 'Cloned Animals and Derivative Products: A Scientific Risk Assessment' (2005 Russelian Report), which did not identify any specific risks associated with cloning. At the end of September 2005, Russelia adopted the Cloning Precaution Statute (CPS), a ban on the importation and marketing of cloned sheep and sheep products. Since 1 September 2010, the Russelian Customs and Border Control Administration (RCBCA) began enforcing the CPS against Aldousia. Although Zamyatin introduced a similar ban on 15 September 2010, shortly before its application about 100 Aldousian cloned stud rams were imported to Zamyatin for the purpose of reproduction. Despite the presence of cloned sheep in Zamyatin, the importation of Zamyatinian sheep and sheep products to Russelia remains unaffected by the CPS and RCBCA enforcement activities. On 15 September 2010, Russelia issued the 'Survey and Assessment of Risks Associated with Cloned Sheep and Derivative Products' (2010 Russelian Report), which acknowledged that the evidence of risks to human and animal health posed by cloning is inconclusive or speculative.

Identification of the WTO Measures at Issue

Measure 1: The CPS, a general importation and marketing ban on any cloned animals and their progeny for the purpose of their subsequent breeding and/or slaughter and on any derivative food products.

Measure 2: The enforcement of the CPS by the RCBCA, which consists in barring the entry of sheep and sheep products from Aldousia, unless the importer can prove that the goods were not cloned animals or their progeny, or derivatives thereof, by producing evidence of the ancestry of the animal or animal product in question.

Legal Pleadings

Claim 1. The CPS and its enforcement fall within the scope of application of the SPS Agreement

Aldousia submits that the CPS and its enforcement fall within the scope of application of the *SPS Agreement* because they are (i) SPS measures as defined in Annex A(1) of the *SPS Agreement* and (ii) directly or indirectly affect international trade.¹

1.1 The CPS and its enforcement constitute SPS measures as defined in Annex A(1) of the SPS Agreement

The definition of an SPS measure is contained in Annex A(1) of the *SPS Agreement*. In *Australia - Apples*, the Appellate Body (AB) determined whether a measure fell under this definition by looking at (i) whether it served one of the purposes set forth in Annex A(1)(a) to (d) of the *SPS Agreement*, and was of (ii) the type listed in the second part of Annex A(1).² Aldousia submits that the CPS and its enforcement fulfil both of these requirements.

1.1.1 The purpose of the CPS and its enforcement fall under Annex A(1)(a) of the SPS Agreement

Annex A(1)(a) of the *SPS Agreement* provides that SPS measures can be applied to protect animal health within the territory of the WTO Member from risks arising from the entry, establishment or spread of *pests, diseases, disease-carrying organisms or disease-causing organisms*. In *EC – Approval and Marketing of Biotech Products*, the Panel look at the ordinary dictionary derived meaning of the term *pest* and extended it to include *other harm* caused by gene transfer.³ Therefore, since cloned animals can act as pathways for the

¹ PR, *US – Poultry*, [7.82]; PR, *EC-Hormones (Canada)*, [8.39]; PR, *EC-Hormones (US)*, [8.36].

² ABR, *Australia-Apples*, [173-5].

³ PR, *EC – Approval and Marketing of Biotech Products*, [7.240].

introduction of a gene posing a risk to the life or health of other animals, they can thus be considered pests within the meaning of Annex A(1)(a) of the *SPS Agreement*.⁴

The Panel noted that the World Health Organization defines a *disease-carrying organism* as a ‘vector’ and a *disease-causing organism* as a ‘pathogen’.⁵ The 2010 Russelian Report identified the potential for cloned sheep to act as vectors or pathogens for illnesses and infections. Therefore, the CPS and its enforcement are aimed at protecting animal health from pest or disease risks under Annex A(1)(a) of the *SPS Agreement*.

1.1.2 The purpose of the CPS and its enforcement fall under Annex A(1)(b) of the SPS Agreement

Annex A(1)(b) of the *SPS Agreement* provides that SPS measures can be applied to protect human or animal health within the territory of a WTO Member against risks arising from *additives or contaminants in food*. The Panel has held that ‘genes [...] that are eaten or being used as an input into processed foods, can be considered “additives in foods” within the meaning of Annex A(1)(b)’.⁶ The process of SCNT involves transferring the nucleus of a differentiated somatic cell into an oocyte that has had its nucleus removed. Thus, the genes transferred through SCNT can be considered additives in food.

Regarding the term ‘contaminants’ in food, the Codex defines a contaminant as ‘any substance *not intentionally* added to food, which is present in such food as a result of the production [...]’.⁷ Therefore, while the genes added to cloned animals may not be contaminants in and of themselves, the proteins produced through the unintended expression of modified genes such as genetic mutations in sheep are contaminants within the meaning of Annex A(1)(b) of the *SPS Agreement*, if these proteins infect or pollute the food product.⁸ Russelia regards these proteins as such, and hence, the CPS and its enforcement are aimed at protecting human health against risks from contaminants in food, therefore falling under Annex A(1)(b) of the *SPS Agreement*.

1.1.3 The CPS and its enforcement are the type of measures listed under Annex A(1) of the SPS Agreement

According to Annex A(1) of the *SPS Agreement*, SPS measures include all relevant laws, decrees, regulations, requirements and procedures. The CPS fulfils the type requirement because it is a law adopted by the Russelian Parliament. In *Australia - Apples*, the AB held

⁴ PR, EC – *Approval and Marketing of Biotech Products*, [7.255].

⁵ *Ibid.*, [7.277].

⁶ *Ibid.*, [7.301].

⁷ Codex General Standard for Contaminants and Toxins in Food (Codex Stan 193-1995) (Rev.1-1997), Art. 1-3.

⁸ PR, EC – *Approval and Marketing of Biotech Products*, [7.313].

that a procedure to implement the actual measure is an SPS measure.⁹ Thus the enforcement of the CPS satisfies the type requirement under Annex A(1) of the *SPS Agreement*.

1.2 The CPS and its enforcement affect international trade

Aldousia argues that it cannot be contested that an import ban, such as the CPS, affects international trade.¹⁰ Although the enforcement of the CPS is directed only against Aldousia, it also affects international trade.

Therefore, the CPS and its enforcement are measures falling within the scope of application of the *SPS Agreement*.

Claim 2. The CPS and its enforcement are inconsistent with Art. 2.2 of the *SPS Agreement*

Aldousia submits that the CPS and its enforcement are inconsistent with Art. 2.2 of the *SPS Agreement*, because Russelia should ensure that its SPS measures are (i) applied only to the extent necessary to protect human, animal or plant life or health, (ii) based on scientific principles, and (iii) not maintained without sufficient scientific evidence. Aldousia argues that the CPS and its enforcement do not meet any of these requirements.¹¹

2.1 The CPS and its enforcement are not necessary to protect human and animal health

Aldousia invites the Panel to draw inspiration from Art. XX(b) of the GATT 1994 for the interpretation of *necessary*. This is because the *SPS Agreement* elaborates rules for the application of provisions of the GATT 1994 which relate to SPS measures, in particular Art. XX(b).¹² The *necessary* requirement, as clarified under the GATT 1994 requires a weighing and balancing of (i) the importance of the interests or values at stake, (ii) the extent of the contribution to the achievement of the measure's objective, and (iii) its trade-restrictiveness.¹³ Thereafter, one must determine whether there is an alternative measure that achieves the same level of protection and is less trade-restrictive.¹⁴ While Aldousia does not dispute that the protection of human and animal health is an important objective, when weighed and balanced against the other two elements of the test, and assessed against the last criterion, the CPS and its enforcement cannot be regarded as necessary.

⁹ ABR, *Australia - Apples*, [180-1].

¹⁰ PR, *EC – Approval and Marketing of Biotech Products*, [8.23].

¹¹ *Ibid.*, [7.3392].

¹² Preamble of the *SPS Agreement*; PR, *US-Poultry*, [7.479].

¹³ ABR, *Brazil-Retreaded Tyres*, [178].

¹⁴ ABR, *Brazil - Retreaded Tyres*, [178].

2.1.1 The CPS and its enforcement do not contribute to a high level of human and animal health protection

Russelia's objective is to ensure a high level of human and animal health protection. Aldousia argues that because there is no difference between the safety of cloned sheep and their traditionally bred counterparts, the CPS does not contribute to this objective. Furthermore, Russelia has not enforced the CPS against Zamyatin, despite the fact that Zamyatinian flocks contain cloned sheep. Therefore, the enforcement of the CPS also does not meaningfully contribute to Russelia's objective.

2.1.2 The CPS and its enforcement are extremely trade-restrictive

A full import ban, such as the CPS, is the most trade-restrictive measure possible. The customs requirements imposed by the RCBCA are also very trade-restrictive, requiring all Aldousian exporters to produce evidence of the ancestry of their sheep and sheep products, which in turn necessitates that they ensure traceability throughout the production chain.

2.1.3 There are less trade-restrictive alternatives 'reasonably available'

Aldousia submits that there are 'reasonably available' alternative measures that Russelia can employ as a developing country, which will achieve its high level of human and animal health protection. Alternatives include (i) requiring the labelling of cloned animals, their progeny and derivative products, and (ii) requiring the sterilization of cloned animals and their traceability. A labelling measure will achieve a high level of human protection because it provides basic information on a product's safety and nutritional information. The sterilization of cloned animals will prevent any harmful inheritable epigenetic effects from appearing in progeny.

Aldousia argues that these alternative measures will be significantly less trade-restrictive than a full import ban. These measures will be less burdensome for Russelia to implement because part of the regulatory burden will be shifted to exporting countries which will be required to label or sterilize and trace their cloned animals.

2.2 The CPS and its enforcement are not based on scientific principles

The scientific principle requirement is to be understood as requiring a certain scientific *quality* from both scientific evidence and risk assessment.¹⁵ The quality of the scientific evidence and the risk assessments presented by Russelia will be discussed in Section 2.3 and Claim 3, which show that the CPS and its enforcement are not based on scientific principles.

¹⁵ Gruszczynski (2006), 9.

2.3 The CPS and its enforcement are maintained without sufficient scientific evidence

While Aldousia does not contest that the 2005 and 2010 Russelian Reports constitute scientific evidence, this evidence is not *sufficient* within the meaning of Art. 2.2 of the *SPS Agreement*. Sufficient scientific evidence requires a *rational relationship* between the SPS measure and the scientific evidence.¹⁶ This will depend upon the measure at issue and the *quality* and *quantity* of the scientific evidence.¹⁷ Sufficient scientific evidence must also confirm the existence of a risk which the measure is supposed to address.¹⁸

Aldousia argues that the 2005 Russelian Report does not constitute sufficient scientific evidence because there is no *rational relationship* between the CPS and its enforcement on the one hand, and the scientific evidence contained in the 2005 Russelia Report on the other. The 2005 Russelian Report did not identify any *specific* risks associated with cloned animals. This affects the *quality* of the scientific evidence, which does not confirm the existence of any specific risks that the CPS and its enforcement are to address.

Aldousia also argues that the 2010 Russelian Report does not constitute sufficient scientific evidence because there is no *rational relationship* between the CPS and its enforcement on the one hand, and the scientific evidence contained in the 2010 Russelian Report on the other. First, the majority of scientific evidence relating to risks was inconclusive or speculative, affecting the *quality* of the evidence presented. Second, there was a limited *quantity* of available scientific data with respect to sheep. In *Japan-Apples*, the AB confirmed that there was a proportionality test for sufficient scientific evidence, and found that rigorous SPS measures are disproportional to ‘negligible risks’.¹⁹ Thus, the CPS and its burdensome enforcement by the RCBCA are clearly disproportionate to the ‘inconclusive and speculative’ risks identified in the 2010 Russelian Report.

Therefore, the CPS and its enforcement are inconsistent with Art. 2.2 of the *SPS Agreement*.

Claim 3. The CPS and its enforcement are inconsistent with Art. 5.1 of the *SPS Agreement*, and consequently, Art. 2.2 of the *SPS Agreement*

Aldousia submits that the CPS and its enforcement are inconsistent with Art. 5.1 of the *SPS Agreement*, because they are not based on a risk assessment as appropriate to the circumstances. Two distinct issues must be addressed, (i) whether there is a ‘risk assessment’ within the meaning of Annex A(4) of the *SPS Agreement*; and (ii) whether the SPS measure

¹⁶ ABR, *Japan - Agricultural Products II*, [84].

¹⁷ *Ibid.*

¹⁸ PR, *Japan-Apples*, [8.104].

is ‘based on’ this risk assessment.²⁰ There are two types of risk assessment defined in Annex A(4) of the *SPS Agreement*. Russelia based the CPS and its enforcement on two purported risk assessments, the 2005 Russelian Report and the 2010 Russelian Report. Aldousia contends that neither Report meet the requirements for either type of risk assessment, as shall be demonstrated below. Since the CPS and its enforcement are not ‘based on’ a proper risk assessment, the measures are also, by implication, inconsistent with Art. 2.2 of the *SPS Agreement*.²¹

3.1 The 2005 and 2010 Russelian Reports do not constitute proper risk assessments for pest or disease risks

Aldousia submits that the 2005 and 2010 Russelian Reports do not constitute proper risk assessments for pest or disease risks because they failed to (i) identify the pests or diseases whose entry, establishment or spread Russelia wants to prevent, as well as the associated potential biological and economic consequences; (ii) evaluate the likelihood of entry of these pests or diseases and the associated biological and economic consequences; and (iii) evaluate the likelihood of entry of these pests or diseases according to the SPS measures that might be applied.²²

3.1.1 The potential biological consequences identified in the 2005 Russelian Report were not ‘specific’

A risk assessment must be specific to the particular type of risk at issue, and not merely show a general risk of harm.²³ The 2005 Russelian Report did not identify any *specific* biological consequences, and therefore, failed to meet the specificity requirement.

3.1.2 Neither the 2005 nor the 2010 Russelian Reports identified economic consequences

Aldousia submits that neither the 2005 nor the 2010 Russelian Reports identified any economic consequences associated with the entry of pests or diseases, which are directly and unequivocally relevant to this type of risk assessment.²⁴

3.1.3 The 2005 and 2010 Russelian Reports did not evaluate the likelihood of entry of pests or diseases and the associated biological and economic consequences

Aldousia submits that the 2005 and 2010 Russelian Reports did not evaluate the likelihood of entry of the pests or diseases that Russelia wants to prevent, as well as the associated biological and economic consequences. The AB equated the word ‘likelihood’

¹⁹ ABR, *Japan-Apples*, [164].

²⁰ PR, EC-Approval and Marketing of Biotech Products, [7.3019].

²¹ ABR, *Australia-Salmon*, [209].

²² *Ibid.*, [121].

²³ ABR, *EC-Hormones*, [200].

with ‘probability’ for this type of risk assessment.²⁵ This evaluation must be carried out with some degree of specificity to a particular pest or disease.²⁶ Aldousia argues that the 2005 Russelian Report did not evaluate the *probability* that any specific risk might materialise from the entry of pests or diseases and therefore, failed to evaluate the likelihood of entry of pests or diseases and the associated consequences.

While the 2010 Russelian Report did identify and evaluate a specific risk to animal health, Aldousia argues that the 2010 Russelian Report lent more weight to the uncertainty regarding future risks. This resulted in general and vague statements of a mere *possibility* of adverse effects occurring. These statements constituted neither a quantitative nor a qualitative assessment of likelihood, which was the kind of evaluation rejected by the AB in *Australia-Salmon*.²⁷ Aldousia invites the Panel to adopt the same approach in finding that the 2010 Russelian Report failed to evaluate the likelihood of entry of pests or diseases under this requirement.

3.1.4 The 2005 and 2010 Russelian Reports did not evaluate the likelihood of entry of pests or diseases according to the SPS measures that might be applied

A risk assessment for pests or diseases must also evaluate alternative SPS measures which might be applied.²⁸ Neither the 2005 nor the 2010 Russelian Report evaluated possible alternatives to a full import ban in relation to the likelihood of entry of pests or disease. Moreover, Aldousia submits that the 2010 Russelian Report was a risk assessment carried out for the purpose of justifying the CPS and its enforcement *ex post facto*.²⁹ Therefore, the 2005 and 2010 Russelian Reports are not proper risk assessments for pest or disease risks.

3.2 The 2005 and 2010 Russelian Reports do not constitute proper risk assessments for food-borne risks

Aldousia submits that the 2005 and 2010 Russelian Reports do not constitute proper risk assessments for food-borne risks because they failed to: (i) identify the adverse effects on human health arising from the presence of additives or contaminants in cloned food products; and (ii) if such adverse health effects exist, evaluate the potential of occurrence of these effects.³⁰ While the 2010 Russelian Report identified some potential adverse effects to human health arising from cloned food products, no ascertainable risk was identified.

²⁴ Annex A(4) of the *SPS Agreement*.

²⁵ ABR, *EC-Hormones*, [184]; ABR, *Australia-Salmon*, [123].

²⁶ PR, *Australia-Salmon*, [8.75-80].

²⁷ ABR, *Australia-Salmon*, [127-131].

²⁸ PR, *Japan-Apples*, [8.283].

²⁹ ABR, *Japan-Apples*, [208].

³⁰ PR, *EC-Hormones*, [8.98]; ABR, *EC-Hormones*, [184-6].

3.2.1 The 2005 and 2010 Russelian Reports did not identify any ‘ascertainable’ adverse effects on human health arising from the presence of additives or contaminants in food

The risk identified in risk assessments needs to be ascertainable, and not a theoretical uncertainty.³¹ *In casu*, the 2005 Russelian Report did not identify any *specific* risks to human health arising from cloned food products. While the 2010 Russelian Report identified *potential* adverse effects to human health arising from cloned food products, these potential consequences are vague and uncertain, due to the general lack of data with regard to cloned sheep. Therefore, no *specific and ascertainable* adverse effects on human health arising from cloned food products have been identified by either the 2005 or 2010 Russelian Reports.

3.2.2 Even if such adverse health effects existed, the 2005 and 2010 Russelian Reports did not evaluate the potential of occurrence of these effects

The ordinary meaning of ‘potential’ relates to ‘possibility’ in the context of the SPS Agreement.³² As stated in Section 3.1.1, a risk assessment needs to be *specific* to the particular type of risk at issue. Scientific evidence of ‘general studies’ that do not focus on or address the particular kind of risks at stake is not acceptable.³³ Thus, a general study on ‘certain risks’ posed by cloned animals and derivative products in the 2005 Russelian Report cannot satisfy the specificity condition of a risk assessment. In addition, the 2010 Russelian Report did not *specifically evaluate* the potential of occurrence of the human health effects identified. Therefore, neither the 2005 nor the 2010 Russelian Reports meet the requirement for assessing the *potential of occurrence* of human health effects, and are not proper risk assessments for food-borne risks.

3.3 Even if the 2005 and 2010 Russelian Reports were considered proper risk assessments, the CPS and its enforcement are not ‘based on’ the Reports

For an SPS measure to be ‘based on’ a risk assessment, there must be a certain *objective relationship* between the risk assessment and the SPS measure.³⁴ The scientific conclusions of the risk assessment must ‘sufficiently warrant’ the SPS measure.³⁵ The 2005 Russelian Report concluded that the risks to human and animal health were of a ‘low probability’. The 2010 Russelian Report concluded that the existence of risks to human and animal health were ‘inconclusive or speculative’. Therefore, the scientific conclusions of both the Russelian Reports do not ‘sufficiently warrant’ the CPS, a full import and marketing ban.

³¹ ABR, *EC-Hormones*, [186].

³² *Ibid.*, [184].

³³ *Ibid.*, [200].

³⁴ *Ibid.*, [189].

³⁵ *Ibid.*, [193].

The proportionality test from *Japan – Apples*, as explained in Section 2.3 may also be deduced from the interpretation adopted by the AB under Art. 2.2 of the *SPS Agreement* and the similar language used for Art. 2.2 and Art. 5.1 of this agreement. *In casu*, there is a clear disproportionality between the conclusions reached by the Russelian Reports on the one hand, and the rigorous nature of the CPS, and its burdensome enforcement by the RCBCA on the other. Therefore, these measures are not ‘based on’ the 2005 or 2010 Russelian Reports.

3.4 The 2005 and 2010 Russelian Reports were based on unreliable minority scientific opinions

Since Russelia relied on minority scientific opinions in conducting its risk assessments, the question whether such opinions constitute ‘legitimate science’ from respected or qualified sources according to the standards of the relevant scientific community has greater prominence.³⁶ Aldousia argues that the scientific minority opinions relied upon by Russelia do not constitute ‘legitimate science’ because their findings are speculative and inconclusive.

3.5 The phrase ‘as appropriate to the circumstances’ does not relieve Russelia from complying with Art. 5.1 of the *SPS Agreement*

The phrase ‘as appropriate to the circumstances’ does not provide Russelia additional flexibility in this case of scientific uncertainty, nor can it supersede its substantive obligation under Art. 5.1 of the *SPS Agreement* to base its measures on a risk assessment.³⁷ Methodological difficulties do not excuse Russelia from properly performing a risk assessment.³⁸

Therefore, the CPS and its enforcement are inconsistent with Art. 5.1 and Annex A(4) of the *SPS Agreement*.

Claim 4. The CPS and its enforcement are inconsistent with Art. 5.6 of the *SPS Agreement*

Aldousia submits that the CPS and its enforcement are inconsistent with Art. 5.6 of the *SPS Agreement*, because they are more trade-restrictive than required. This provision is violated if there are alternative SPS measures, which (i) is reasonably available, taking into account technical and economic feasibility; (ii) achieves the WTO Member’s appropriate level of SPS protection; and (iii) is significantly less restrictive to trade than the contested

³⁶ ABR, *Australia - Apples*, [221].

³⁷ *Ibid.*, [237]; ABR, *Australia – Salmon*, [130]; PR, *EC - Approval and Marketing of Biotech Products*, [7.3032].

³⁸ ABR, *Australia – Apples*, [237].

measure.³⁹ Aldousia argues that there are alternative SPS measures that meet these three requirements, because they are more trade-restrictive than required

4.1 There are alternative SPS measures reasonably available that take into account technical and economic feasibility

As stated in Section 2.1.3, there are reasonably available alternative measures. Aldousia submits that these alternative measures take into account technical and economic feasibility, because they shift the technical and economic burden from Russelia to the exporting countries.

4.2 These alternative measures achieve Russelia's appropriate level of protection

As demonstrated in Section 2.1.3, these alternative measures achieve Russelia's high level of human and animal health protection.

4.3 These alternative measures are significantly less trade-restrictive than the CPS and its enforcement

As stated in Section 2.1.2, the CPS and its enforcement are extremely trade-restrictive. Unlike the CPS and its enforcement, labelling, sterilization of cloned sheep and ensuring traceability will not prohibit the importation and marketing of cloned animals and derivative food products. Hence, these alternative measures are significantly less trade-restrictive than the CPS and its enforcement.

Therefore, the CPS and its enforcement are inconsistent with Art. 5.6 of the *SPS Agreement*.

Claim 5. The CPS and its enforcement do not fall within the scope of Art. 5.7 of the *SPS Agreement*

Aldousia submits that the CPS and its enforcement do not fall within the scope of Art. 5.7 of the *SPS Agreement*, and thus are not exempt from the scientific disciplines of Art. 2.2 and 5.1 of the *SPS Agreement*. Under this provision, four cumulative requirements for provisional measures need to be fulfilled. The measure must: (i) be imposed where there is insufficient scientific evidence, (ii) be adopted on the basis of available pertinent information, (iii) not be maintained unless the WTO Member seeks to obtain additional information necessary for a more objective assessment of risk, and (iv) be subject to review within a reasonable period of time.⁴⁰

³⁹ ABR, *Australia – Salmon*, [194].

⁴⁰ ABR, *Japan - Agricultural Products II*, [89]; PR, *Japan - Apples*, [176].

5.1 The CPS and its enforcement were not imposed in a situation of insufficient scientific evidence

Aldousia argues that the CPS and its enforcement were not imposed in a situation of insufficient scientific evidence, because the body of available scientific evidence allowed the performance of an adequate risk assessment as required under Art. 5.1 of the *SPS Agreement*.⁴¹ Insufficiency should be determined at the time a provisional measure was adopted.⁴² Relevant scientific evidence was available when the CPS and its enforcement were imposed, because researchers around the world conducted successful cloning since 1996. Therefore, there was no situation of insufficient scientific evidence at the time the CPS and its enforcement were imposed.

5.2 The CPS and its enforcement have not been adopted on the basis of available pertinent information

Aldousia submits that the CPS and its enforcement have not been adopted on the basis of available pertinent information. Art. 5.7 of the *SPS Agreement* refers to a ‘more objective assessment of risk’, which suggests that provisionally adopted SPS measures must be based on a risk assessment that takes into account ‘available pertinent information’.⁴³ The ‘pertinent information’ must reasonably support the provisional measure.⁴⁴ While Aldousia contends that at the time the CPS was adopted and its enforcement implemented, there was no preliminary indication of risk to human and animal health from cloned animals. Although the 2005 Russelian Report stated that risks to human and animal health should be considered of low probability, it did not identify any *specific* risks associated with animal cloning and thus cannot be said to contain information reasonably supporting the CPS and its enforcement.

5.3 Russelia does not seek to obtain additional information necessary for a more objective assessment of risk

Aldousia contends that Russelia does not seek to obtain the additional information in order to conduct ‘a more objective assessment of risk’. This phrase refers to a risk assessment which satisfies the definition provided in Annex A(4) of the *SPS Agreement*, or at least which is closer to satisfying this definition than the consideration of ‘available pertinent information’.⁴⁵ A WTO Member is required to take *active steps* in order to obtain additional

⁴¹ ABR, *Australia – Apples*, [239]; reiterating ABR, *Japan - Apples*, [179].

⁴² ABR, *Canada – Continued Suspension*, [676-677]; PR, *EC – Approval and Marketing of Biotech Products*, [7.3255].

⁴³ PR, *EC – Approval and Marketing of Biotech Products*, [7.2992].

⁴⁴ Gruszczynski (2006), 22.

⁴⁵ ABR, *Japan - Agricultural Products II*, [92]; PR, *EC - Approval and Marketing of Biotech Products*, [7.2988].

information that is relevant for both the risk in question and the prospect risk assessment.⁴⁶ It is not sufficient that a provisional SPS measure provides an obligation to pursue further research. Rather, it is the *actual behaviour* of the Member that matters.⁴⁷

While Russelia has announced that it will launch two comprehensive research programs, designed to seek additional information for a more objective risk assessment, Aldousia contests the validity of this assertion. Although Russelia had five years following the adoption of the CPS to take active steps to obtain information, additional research was only conducted in parallel with the commencement of its enforcement on 1 September 2010. The 2010 Russelian Report was performed in a very short time span in response to critical remarks from Aldousia concerning the lack of sufficient scientific basis for the CPS. In light of the respondent's conduct, Aldousia argues that Russelia's assurances to seek additional information are merely a pretext to keep its measures in place.

5.4 The CPS and its enforcement are not subject to review within a reasonable period of time

Aldousia submits that the CPS and its enforcement are not subject to review within a reasonable period of time.⁴⁸ The reasonable period of time depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure.⁴⁹

In casu, Russelia announced its intention to launch two 10-year research programs that would investigate the risks. Aldousia argues that 10 years is not a reasonable period of time, because first, it is not difficult to obtain additional information, since the state of science on cloning is developing relatively fast. Second, as stated in Section 2.1.2, the CPS and its enforcement are extremely trade-restrictive. Thus, considering the rapid development of science and the nature of these SPS measures, a 10-year review period is not reasonable.

Therefore, the CPS and its enforcement do not fall within the scope of a provisional measure under Art. 5.7 of the *SPS Agreement*, and are not exempted from the scientific obligations of Art. 2.2 and Art. 5.1 of the *SPS Agreement*.

Claim 6. The enforcement of the CPS is inconsistent with Art. 2.3 of the *SPS Agreement*

Aldousia submits that the enforcement of the CPS is inconsistent with Art. 2.3 of the *SPS Agreement*. The first sentence of this provision prohibits SPS measures that arbitrarily or unjustifiably discriminate between WTO Members where identical or similar conditions

⁴⁶ Gruszczynski (2006), 130-1.

⁴⁷ *Ibid.*, [131].

⁴⁸ ABR, *Japan - Agricultural Products II*, [89]; ABR, *Japan - Apples*, [176].

⁴⁹ ABR, *Japan - Agricultural Products II*, [93].

prevail. The second sentence prohibits the *application* of an SPS measure, in a manner constituting a disguised restriction on trade.

6.1 The enforcement of the CPS constitutes arbitrary and unjustifiable discrimination

Aldousia submits that the enforcement of the CPS constitutes arbitrary and unjustifiable discrimination between Aldousia and Zamyatin. For a measure to constitute arbitrary and unjustifiable discrimination, three requirements must be established: (i) the measures discriminate between the territories of WTO Members other than Russelia, or between Russelia and another WTO Member; (ii) the discrimination is arbitrary or unjustifiable; and (iii) identical or similar conditions prevail in the territory of the WTO Members compared.⁵⁰

6.1.1 The enforcement of the CPS discriminates between the territories of Aldousia and Zamyatin

Aldousia submits that the enforcement of the CPS discriminates between the territories of Aldousia and Zamyatin, because it bars the entry of cloned sheep, their progeny and sheep products from Aldousia by requiring proof of ancestry, while the importation of cloned sheep, their progeny and sheep products from Zamyatin remains unaffected.

6.1.2 The discrimination is arbitrary and unjustifiable

Aldousia submits that the discrimination is *arbitrary* and *unjustifiable*. Aldousia invites the Panel to draw inspiration from the interpretation of the AB in *US - Shrimp* concerning the terms ‘arbitrary’ and ‘unjustifiable’ as mentioned in the chapeau of Art. XX of the GATT 1994.⁵¹ Aldousia argues that the discrimination is *arbitrary*, because the enforcement of the CPS is not flexibly implemented. The rigid and unbending requirement to prove the ancestry of all sheep and sheep products imported to Russelia constitutes arbitrary discrimination.⁵²

Unjustifiable discrimination is established on the basis that Russelia did not avoid unilateralism.⁵³ Aldousia submits that Russelia failed to make serious good faith efforts to enter into negotiations for a multilateral solution prior to its enforcement.⁵⁴

In addition, the differential treatment cannot be explained by a rationale that is directly related to the objective of the measure in addressing SPS risks.⁵⁵ The objective of the enforcement of the CPS is to protect human and animal life or health from risks associated

⁵⁰ ABR, *Australia – Salmon (Art. 21.5 – Canada)*, [251].

⁵¹ ABR, *US – Shrimp*, [177].

⁵² *Ibid.*

⁵³ *Ibid.* [172].

⁵⁴ *Ibid.*

⁵⁵ ABR, *Brazil - Retreaded Tyres*, [227].

with cloning. The exemption of Zamyatinian sheep from the enforcement measures undermines this objective. Therefore, the discrimination is arbitrary and unjustifiable.

6.1.3 Identical or similar conditions prevail in the territories of Aldousia and Zamyatin

Aldousia submits that identical or similar conditions prevail in the territories of Aldousia and Zamyatin, because both territories breed cloned sheep or their progeny. About 100 Aldousian cloned stud rams were imported and introduced into Zamyatinian sheep flocks in order to use them in the reproduction process. Therefore, some Zamyatinian sheep and sheep products bear the same potential risks as Aldousian sheep and sheep products, arising from cloning. The same risk conditions prevail in the territories of Aldousia and Zamyatin and thus, should be regulated equally.

Therefore, the enforcement of the CPS arbitrarily and unjustifiably discriminates between the territories of Aldousia and Zamyatin.

6.2 The enforcement of the CPS constitutes a disguised restriction on international trade

Aldousia submits that the manner in which Russelia applies the CPS constitutes a disguised restriction on trade. In the absence of case law, Aldousia invites the Panel to draw inspiration from the interpretation of the similar requirement in the chapeau of Art. XX of the GATT 1994. Aldousia submits that the ‘design, structure and architecture’ of the enforcement of the CPS constitutes a disguised restriction on trade, because it is enforced exclusively against Aldousia.⁵⁶

Therefore, the enforcement of the CPS is inconsistent with Art. 2.3 of the *SPS Agreement*.

Claim 7. The inconsistency of the CPS and its enforcement with the *SPS Agreement* cannot be justified by Art. XX of the GATT 1994

Aldousia submits that Art. XX of the GATT 1994 cannot be used to justify a breach of the *SPS Agreement*. Whereas the *Agreement on Trade-Related Investment Matters (TRIMS)* refers back to exceptions under the GATT 1994, stating that these ‘shall apply, as appropriate, to the provisions of this Agreement’, the *SPS Agreement* does not do so.⁵⁷ Although Art. 3.2 of the *SPS Agreement* states that SPS measures which conform to the *SPS Agreement* are automatically presumed to be consistent with the GATT 1994, the Panel in *EC – Hormones* stated that ‘nowhere is consistency with GATT presumed to be consistency with the *SPS Agreement*.’⁵⁸ Therefore, a breach of the *SPS Agreement* cannot be justified under the GATT 1994.

⁵⁶ PR, *EC – Asbestos*, [8.236].

⁵⁷ See *TRIMS Agreement*, Art. 3.

⁵⁸ PR, *EC – Hormones (US)*, [8.42].

Claim 8. The CPS and its enforcement are not justified under either Art. XX(a) or (b) of the GATT 1994

Should the Panel disagree with Claim 7, Aldousia submits that the CPS and its enforcement cannot be justified under Art. XX(a) or (b) of the GATT 1994. When invoking Art. XX of the GATT 1994, Russelia bears the burden to prove that the measures at issue are provisionally justified under paragraphs (a) to (j) of Art. XX of the GATT 1994, and the requirements of the chapeau of Art. XX.⁵⁹ Aldousia argues that the CPS and its enforcement do not meet these requirements.

8.1 The CPS and its enforcement are not provisionally justified under Art. XX(a) of the GATT 1994

Aldousia submits that the CPS and its enforcement are not provisionally justified under Art. XX(a) of the GATT 1994 because they are not (i) aimed at the protection of public morals and (ii) not necessary to fulfil that policy objective.⁶⁰

8.1.1 The CPS and its enforcement are not designed to protect public morals

Although Russelia asserts that the CPS is designed to protect public morals, the fact that it permits the importation of cloned stud rams from Aldousia for the purpose of scientific research discredits such an assertion. Clearly, it is equally immoral to import and market cloned animals as it is to use them for scientific research. Therefore, Aldousia contends that the CPS is not aimed at the protecting public morals but rather at disguising a restriction on trade. The enforcement of the CPS by the RCBCA is also not designed to protect public morals because it allows the importation and marketing of cloned sheep from Zamyatin.

8.1.2 The enforcement of the CPS by the RCBCA is not necessary to fulfil the policy objective listed in Art. XX(a) of the GATT 1994

Applying the necessary test set out in Section 2.1, Aldousia submits that the CPS and its enforcement are not necessary to protect public morals given the availability of less trade-restrictive alternatives. A labelling and certification measure can protect public morals by allowing consumers to choose whether they want to purchase products derived from cloned sheep. An analogy can be made to 'slavery-free chocolate'. If consumers consider cloning immoral, they will not purchase cloned sheep and sheep products. This measure will be significantly less trade-restrictive than a full import ban, and is reasonably available for Russelia to implement, as stated in Section 2.1.3. Therefore, the CPS and its enforcement are not justified under Art. XX(a) of the GATT 1994.

⁵⁹ ABR, *Brazil - Retreaded Tyres*, [139].

8.2 The CPS and its enforcement are not provisionally justified under Art. XX(b) of the GATT 1994

In order for a measure to be provisionally justified under Art. XX(b) of the GATT 1994, it must be (i) designed to protect life or health of humans, animals or plants; and (ii) necessary to fulfil that policy objective.⁶¹ While Aldousia does not dispute that the CPS and its enforcement are aimed at the protection of human and animal life or health, the measures are not necessary to fulfil this policy objective, as demonstrated in Section 2.1. Thus, the CPS and its enforcement are not provisionally justified under Art. XX(b) of the GATT 1994.

8.3 The enforcement of the CPS by the RCBCA does not meet the requirements of the chapeau of Art. XX of the GATT 1994

If the Panel would find that the CPS and its enforcement are provisionally justified, Aldousia submits that the CPS cannot be justified under the chapeau of Art. XX of the GATT 1994. The chapeau sets out two requirements to prevent ‘abuse of exceptions’.⁶² The enforcement of the CPS does not meet these requirements because it constitutes (i) ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, and a (ii) ‘disguised restriction of international trade’.

8.3.1 The enforcement of the CPS constitutes unjustifiable and arbitrary discrimination

For the reasons outlined in Section 6.1.2 and 6.1.3, the enforcement of the CPS constitutes *unjustifiable* and *arbitrary* discrimination.⁶³

8.3.2 The enforcement of the CPS constitutes a disguised restriction on international trade

In order to meet the second requirement of the chapeau of Art. XX of the GATT 1994, the respondent must show that the measure does not constitute a disguised restriction on international trade. In *EC – Asbestos*, the Panel stated that ‘a restriction which formally meets the requirements of Art. XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.’⁶⁴ As argued in Sections 6.2 and 8.1.1, the CPS is a disguised restriction on international trade.

Therefore, since the CPS and its enforcement do not meet the requirements of the chapeau, the CPS and its enforcement are not justified under either Art. XX(a) or (b) of the GATT 1994.

⁶⁰ PR, *China – Audiovisuals*, [7.750-7.768].

⁶¹ PR, *Brazil - Retreaded Tyres*, [7.40-7.41].

⁶² ABR, *US – Gasoline*, [22].

⁶³ ABR, *US – Shrimp*, [177].

⁶⁴ PR, *EC – Asbestos*, [8.236].

Requests for Findings

Aldousia requests the Panel to find that:

- the Cloning Precaution Statute and its enforcement by the Russelian Customs Border Control Authority constitute SPS measures within the meaning of the *SPS Agreement*;
- the Cloning Precaution Statute is inconsistent with Article 2.2, 5.1 and 5.6 of the *SPS Agreement*, and does not fall within the scope of Article 5.7 of the *SPS Agreement*;
- the enforcement of the Cloning Precaution Statute by the Russelian Customs Border Control Authority is inconsistent with Article 2.2, 5.1, 5.6 and 2.3 of the *SPS Agreement* and does not fall within the scope of Article 5.7 of the *SPS Agreement*;
- the Cloning Precaution Statute is not justified under Article XX(a) or Article XX(b) of the GATT 1994;
- the enforcement of the Cloning Precaution Statute by the Russelian Customs Border Control Authority is not justified under Article XX(a) or Article XX(b) of the GATT 1994.

Aldousia therefore requests that the Panel recommend to the Dispute Settlement Body that it request Russelia to bring the Cloning Precaution Statute, and the enforcement of the Cloning Precaution Statute by the Russelian Customs Border Control Authority, into conformity with its obligations under the *SPS Agreement*.