

ELSA Moot Court Competition (EMC2)  
on WTO Law

Case 2014-2015

***Viridium – Measures Affecting the Agricultural Sector***

by Nicolas Lamp  
Assistant Professor, Queen's University

**BENCH MEMORANDUM**

# I. SUMMARY OF THE FACTS OF THE CASE, INCLUDING CLARIFICATIONS

## 1. Parties to the dispute

1. The case concerns a dispute between two WTO member countries: Viridium is a small developed country and Ruberia is a large developed country.

## 2. Background to the dispute

2. The background to the dispute is a radical change in the agricultural policies of Viridium. Viridium has recently suffered a devastating natural disaster which has resulted in the destruction of a large part of Viridium's agricultural infrastructure and has killed most of its farm animals. The effects of the disaster were exacerbated by the presence of industrial farming in Viridium, as the disaster has caused spills of manure and wastewater from several Concentrated Animal Feeding Operations (CAFOs) which threaten to pollute rivers and lakes in some areas of Viridium.

3. In the wake of the disaster, the hitherto obscure Green party has captured a majority of the seats in parliament, and has formed a new government. The Green party campaigned on a promise to rebuild Viridium's agricultural sector in a sustainable manner and, in particular, to prevent the re-emergence of industrial farming in Viridium. To implement this promise, the new parliament has passed the Agricultural Reconstruction and Reform Act (ARRA).

## 3. The measure at issue: the Agricultural Reconstruction and Reform Act (ARRA)

### a. Preamble

4. Recitals 1-4 of the Preamble of the ARRA explain the objectives of the Act as follows:

*Cognizant* that the terrible disaster that has come over our nation provides us with a limited and temporary opportunity to build the kind of world we want to live in;

*Recognizing* that only a radical break with past farming practices will permit the development of a sustainable agricultural sector;

*Convinced* that the humane treatment of animals is a matter of ethical responsibility for human beings in general;

*In the belief* that products derived from animals that are raised and handled in a humane manner are tastier and of better quality; ...

### b. Substantive requirements

5. Article 2 of the ARRA prescribes minimum space allowances for cattle, hogs, and poultry, and prohibits the use of battery cages for hens. Article 3 provides that

cattle, hogs, and poultry must be transported and slaughtered in accordance with the regulations stipulated in Annex 2 to the ARRA. Among other requirements, Annex 2 provides that meat processing plants must have non-slip flooring (the adequacy of flooring is assessed by fall rates, which must not exceed 1 per cent), that electric prods may not be used except in exceptional cases (defined as less than 5 per cent of animals), that animals must have access to water while in holding pens, that holding pens may only be filled up to 75 per cent of capacity to give the animals space to move, and that curved single file chutes must be used to facilitate movement of livestock to the stunner.

**c. Import/sale prohibition, transition periods, and exemptions**

6. Article 4 of the ARRA stipulates that the importation and sale of meat and any other products derived from animals that have been raised or processed under conditions that do not meet the requirements of Articles 2 and 3 of the ARRA will be prohibited after a transitional period. This transitional period is one year in the case of developed countries (including Viridium and Ruberia) and three years in the case of developing countries. Only least-developed countries and countries with less than 0.15 hectares of arable land per capita are exempt from the requirements of Article 2 of the ARRA. (Both Viridium and Ruberia have more than 0.15 hectares of arable land per capita.) At the time of the panel request, none of the transitional periods had expired.

7. Viridium’s government is currently working on implementing regulations for the ARRA. These will be issued before the expiry of the transitional period for developed countries.

**4. Market shares in agricultural products and compliance with the ARRA**

8. It is anticipated that the ARRA will fundamentally transform Viridium’s agricultural sector, since more than 50 per cent of Viridium’s pre-disaster production of beef and about 70 per cent of its pre-disaster production of eggs would not meet the ARRA’s requirements.

9. In Ruberia about 40 per cent of cattle are raised in CAFOs that do not fulfil the minimum space requirements imposed by Article 2 of the ARRA. 80 per cent of the eggs produced in Ruberia come from hens that are held in battery cages. Ruberia has in place regulations regarding the transport and slaughter of farm animals that are substantially equivalent to the regulations in Annex 2 of the ARRA. Tables 1 and 2 provide an overview of the proportion of ARRA-compliant and non-ARRA-compliant production of beef and eggs in Viridium and Ruberia, respectively.

Table 1: ARRA compliance of beef

Beef produced in ...	ARRA compliant	Non-ARRA compliant
Viridium	50%	50%
Ruberia	60%	40%

Table 2: ARRA compliance of eggs

Eggs produced in ...	ARRA compliant	Non-ARRA compliant
Viridium	30%	70%
Ruberia	20%	80%

[Note to Panellists: The participants have been advised that this (pre-disaster) market share data should be used as the basis for legal claims.]

10. Ruberia’s agricultural production exceeds Viridium’s by a large margin. Before the adoption of the ARRA, exports from Ruberia supplied 70 per cent of all beef sold in Viridium and 80 per cent of the eggs sold in Viridium. Except for small quantities of beef and eggs imported from other sources, the remainder of the demand for beef and eggs in Viridium is met from domestic production.

[Note to Panellists: The participants have not explicitly been told to proceed on the assumption that, at the time when the ARRA was adopted, the mix of ARRA-compliant/non-compliant beef in Ruberia’s beef exports to Viridium corresponded to the mix of ARRA-compliant/non-compliant beef in Ruberia’s overall beef production (namely, 60 per cent/40 per cent). While this would be a reasonable assumption, the participants could also make assumptions that are more favourable to their respective positions. Thus, Viridium could proceed on the assumption that the share of ARRA-compliant beef in Ruberia’s exports to Viridium is higher than the share of ARRA-compliant beef in Ruberia’s domestic production, which would make the argument that the ARRA has a detrimental impact on Ruberian beef less plausible (see the discussion in para. 45 below). Ruberia could make the opposite assumption. Given that all these assumptions are equally fair, arguments should be evaluated on the basis of whether the participants show an understanding of the implications of the different assumptions for their respective positions.]

## **5. Additional requirements imposed by Viridium’s largest food retailers**

11. Article 5 of the ARRA provides that private retailers that sell animal products may implement more stringent standards than provided for in the ARRA.

12. The association of Viridium’s largest food retailers (which together control 80 per cent of the market for the products in question) has announced its own standards pursuant to which they will, as of now, only source animal products that fulfil the requirements of Articles 2 and 3 of the ARRA, irrespective of whether they originate in a developing or least-developed country or a country with less than 0.15 hectares of arable land per capita.

## **6. Guidelines adopted by the World Animal Welfare Council (WAWC)**

### **a. Membership**

13. Viridium and Ruberia are both members of the World Animal Welfare Council (WAWC), an international organization devoted to the promotion of animal welfare. The WAWC has 35 member states. The WAWC is open for accession to any state or

customs territory that is prepared to promote animal welfare in accordance with its available resources. The only precondition for accession to the WAWC is a state's or customs territory's self-declared preparedness to promote animal welfare in accordance with its available resources. In order to join, a state or customs territory has to declare its intent to join to the WAWC secretariat. The consent of the existing members of the WAWC is not required.

14. All except five current members of the WAWC are developed countries, while 10 additional developing countries are observers in the organization.

### **b. Development and adoption of the guidelines**

15. At the core of the WAWC's mission is the provision of technical assistance to developing countries to improve animal welfare in their farming sectors. In addition to its technical assistance activities, the WAWC has recently also adopted guidelines for minimum space allowances for cattle, hogs, and poultry. The minimum space allowances recommended in the WAWC's guidelines are significantly lower (i.e., less generous to the animals) than the requirements of the ARRA.

16. The guidelines are the result of a long process of discussion and consultation about good regulatory practice among experts from WAWC member states. Initially, these discussions were held informally on the side lines of the WAWC's annual general meetings. As the idea of developing the guidelines crystallized, however, the process became more formalized, and non-member states as well as the public were given the opportunity to comment on the draft guidelines.

17. The WAWC guidelines are non-binding recommendations. As reflections of "good regulatory practice", they embody what the participating experts regarded as a defensible compromise between animal welfare concerns and economic efficiency.

18. While the WAWC's normal practice is to take decisions by consensus, the guidelines on minimum space allowances were heavily contested and were adopted by a narrow majority of members. A sizeable minority of the WAWC's member states regarded the minimum space allowances recommended in the guidelines as insufficient and argued for more generous allowances.

19. The WAWC guidelines were adopted while Viridium's previous government was in power. Both Viridium and Ruberia voted in favour of the guidelines.

## II. INTRODUCTION AND OVERVIEW

20. The case revolves around a number of unresolved and topical issues in WTO law. Governments today face a number of challenges – climate change, the obesity crisis, increasing concerns about the welfare of animals – and need to reconcile their regulatory response to these challenges with their obligations under WTO law. Against this backdrop, recent WTO disputes under the TBT Agreement and the GATT 1994 have caused a considerable degree of anxiety among WTO Members, scholars and members of the public. Commentators increasingly question whether WTO law is adequately equipped to distinguish measures that pursue legitimate regulatory goals from measures that are essentially protectionist. Can a list of exceptions (in the GATT 1994) that was drafted almost seventy years ago do justice to the regulatory realities of the 21st century? And, conversely, is there a danger that, in an effort to accommodate those realities, the exceptions are hollowed out and stretched to a degree that makes international trade law lose all traction?

21. These anxieties about the GATT 1994 are compounded by the fact that the effectiveness of the “new” disciplines on regulation embodied in the TBT Agreement is still very much in doubt. First, the range of measures that are subject to these disciplines is turning out to be relatively limited. Second, the potential reach of the main regulatory innovation of the TBT Agreement – the harmonization of technical regulations through international standards – is circumscribed by the imperative to ensure that international standardizing bodies operate in a manner that is inclusive and transparent. Third, some WTO Members have expressed concerns that an important part of regulatory activity – namely, standard setting by powerful private actors – can escape the disciplines of WTO law entirely. The case brings these legal issues into sharp relief.

22. The measure at issue in the case is a law that prescribes certain production methods partly out of a concern with the characteristics of the final product. Participants will need to argue over the degree of nexus that is required between a production method and the characteristics of the final product in order for the measure prescribing the production method to qualify as a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement – an issue that was left unresolved in the recent *EC – Seal Products* dispute and that has far-reaching implications for the coverage of the TBT Agreement.

23. Moreover, participants will have to develop arguments on whether an international body with very limited membership that is not normally engaged in standardization activities can qualify as an “international standardizing body” for the purposes of the TBT Agreement. The participants will thus need to apply the interpretation of that concept developed by the Appellate Body in the *US – Tuna II (Mexico)* dispute and will need to consider, in particular, whether such a body can be said to have “recognized activities in standardization” – again, an issue with implications for the reach of one of the core disciplines of the TBT Agreement.

24. Thirdly, participants will have to develop interpretations of the provisions obliging WTO Members to take “reasonable measures” to ensure compliance of private bodies with the provisions of the TBT Agreement – an issue that has so far

not been considered in the jurisprudence, but that is of great concern to many WTO Members, especially developing countries.

25. The questions that the participants will have to grapple with under the GATT 1994 are similarly challenging. Under Article III:4 of the GATT 1994, the participants will have to debate what it means for a measure to have a “detrimental impact” on the competitive opportunities of imported products in a scenario in which the absolute value of imported products affected by the measure exceeds the absolute value of affected domestic like products, but the share of domestic products that is adversely affected by the measure is higher than the share of affected imported products. On the facts of the present case, this scenario could be present in the case of beef.

26. The participants will also have to confront the complexities entailed by the different legal standards of the non-discrimination obligations in the GATT 1994 and the TBT Agreement. In its recent ruling in *EC – Seal Products*, the Appellate Body has made it clear that a complainant does *not* need to show that a detrimental impact on imports does not stem exclusively from a legitimate regulatory distinction in order to prove a violation of the non-discrimination obligations in Article I:1 and Article III:4 of the GATT 1994 – a showing that is required to prove that a not *de jure* discriminatory measure violates Article 2.1 of the TBT Agreement. The perceived greater difficulty of proving a violation of Article 2.1 of the TBT Agreement as compared to Article I:1/Article III:4 of the GATT 1994 led one of the complainants in *EC – Seal Products* to abandon its claim under Article 2.1 of the TBT Agreement and to focus on its discrimination claims under the GATT 1994. Would this be a plausible strategy for the complainant in this case as well? Arguably not, because one of the discrimination claims that the complainant is pursuing might well concern *de jure* discrimination – the measure at issue on its face grants certain advantages to some countries and not to others. And a *de jure* discrimination claim is still harder to defend under the TBT Agreement than under the GATT 1994, given that there is no general exceptions clause in the TBT Agreement and that a showing that the detrimental impact does not stem exclusively from a legitimate regulatory distinction is not required in the case of *de jure* discriminatory measures.

27. When acting as respondents, the participants will further need to decide whether to defend the measure under Article XX(a) of the GATT 1994 as a measure necessary to protect public morals, or under Article XX(b) of the GATT 1994 as a measure necessary to protect human, animal or plant life or health, or both. In making this choice, participants will have to grapple with the different evidentiary challenges posed by the respective exceptions. How plausible is it to argue, for example, that there are “public morals” in support of the requirements imposed by the measure in the respondent country, given that the requirements represent a recent and fundamental change in policy resulting from a change in government? How should this be weighed against the fact that the new government campaigned on a promise to enact those requirements?

28. Finally, the participants will have to consider whether a measure that distinguishes between WTO Members according to their level of development gives rise to “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” for the purposes of the chapeau of Article XX of the GATT 1994.

### III. WEIGHT OF CLAIMS

The following table is based on the score sheet for the written submissions and indicates the relative weight that the panel may wish to give to the different claims and their elements. The weight is based on the novelty and complexity of claims.

<b>1. GATT Article I:1</b> <ul style="list-style-type: none"> <li>• Measure covered by Article I:1 – 0.5 points</li> <li>• Likeness – 0.5 points</li> <li>• Advantage – 0.5 points</li> </ul>	<b>5 %</b> (1.5 points)	<b>GATT 1994 total: 33 %</b>
<b>2. GATT Article III:4</b> <ul style="list-style-type: none"> <li>• Measure covered by Article III:4 – 0.5 points</li> <li>• Likeness – 1 point</li> <li>• Detrimental impact – 1 point</li> </ul>	<b>8 %</b> (2.5 points)	
<b>3. GATT Article XX – Subparagraphs</b> <ul style="list-style-type: none"> <li>• Identification of objective(s) – 0.5 points</li> <li>• Contribution analysis – 1 point</li> <li>• Trade restrictiveness – 0.5 points</li> <li>• Identification/rebuttal of alternative measures – 1 point</li> </ul>	<b>10 %</b> (3 points)	
<b>4. GATT Article XX – Chapeau</b> <ul style="list-style-type: none"> <li>• Whether the same conditions prevail – 1 point</li> <li>• Arbitrary or unjustifiable discrimination:               <ul style="list-style-type: none"> <li>○ Relationship between discrimination and objective – 1.5 points</li> <li>○ Relevance of the principle of special and differential treatment – 0.5 points</li> </ul> </li> </ul>	<b>10 %</b> (3 points)	
<b>5. TBT Agreement Annex 1.1</b> <ul style="list-style-type: none"> <li>• Document – 0.5 points</li> <li>• Related PPMs:               <ul style="list-style-type: none"> <li>○ ARRA’s requirements as PPMs – 1 point</li> <li>○ Relationship of PPMs to product characteristics – 2 points</li> <li>○ Discussion of context/negotiating history – 0.5 points</li> </ul> </li> <li>• Mandatory compliance – 0.5 points</li> </ul>	<b>15 %</b> (4.5 points)	<b>TBT Agreement total: 66 %</b>
<b>6. TBT Agreement Article 2.1 – MFN</b> <ul style="list-style-type: none"> <li>• Likeness – 0.5 points</li> <li>• Detrimental impact – 0.5 points</li> <li>• <i>De jure/de facto</i> discrimination and application/non-application of the relevant tests – 1.5 points</li> </ul>	<b>8 %</b> (2.5 points)	
<b>7. TBT Agreement Article 2.1 – National Treatment</b> <ul style="list-style-type: none"> <li>• Likeness – 1 point</li> <li>• Detrimental impact – 1 point</li> <li>• Legitimate regulatory distinction – 2 points</li> </ul>	<b>13 %</b> (4 points)	
<b>8. TBT Agreement Article 2.4</b> <ul style="list-style-type: none"> <li>• Relevant international standard:               <ul style="list-style-type: none"> <li>○ Standard – 0.5 points</li> <li>○ Approval by international standardizing body:                   <ul style="list-style-type: none"> <li>▪ Body – 0.5 points</li> <li>▪ Recognized activities in standardization – 2 points</li> <li>▪ Openness – 0.5 points</li> </ul> </li> <li>○ Consensus – 1 point</li> <li>○ Relevance – 0.5 points</li> </ul> </li> <li>• As a basis – 0.5 points</li> <li>• Effectiveness and appropriateness – 0.5 points</li> </ul>	<b>20 %</b> (6 points)	
<b>9. TBT Agreement Articles 3.1 and 3.4/4.1</b> <ul style="list-style-type: none"> <li>• Non-governmental body – 0.5 points</li> <li>• Technical regulation/standard – 1 point</li> <li>• Non-compliance with Article 2.4/para. F of the Code of Good Practice – 0.5 points</li> <li>• Failure to ensure compliance – 0.5 points</li> <li>• Encouragement of non-compliance – 0.5 points</li> </ul>	<b>10 %</b> (3 points)	



## IV. CLAIMS

29. PLEASE NOTE: The following arguments should not be understood as indicating the *only* way that the case can be argued from either side. Rather, they simply illustrate the issues that the participants will have to address.

### **1. Article I:1 of the GATT 1994**

#### **a. Ruberia's legal claim**

30. Ruberia submits that the ARRA is inconsistent with Article I:1 of the GATT 1994 because it grants an advantage to countries with less than 0.15 hectares of arable land per capita that is not immediately and unconditionally granted to Ruberia.

[Note to Panellists: The reason why the longer transition periods for developing countries and the exemption for least-developed countries are not part of this claim is a strategic choice by Ruberia not to challenge these advantages granted to developing countries as violations of most-favoured nation treatment, where Viridium might invoke the Enabling Clause (though it is not entirely clear whether the longer transition periods and the exemption fall under the scope of para. 2(b) of the Enabling Clause), but rather to allege that these advantages are inconsistent with the requirements of the chapeau of Article XX of the GATT 1994, where the applicability of the Enabling Clause is less plausible (see paras. 68 ff below). Note further that the group of countries with less than 0.15 hectares of arable land per capita includes developed, as well as developing and least-developed countries. The text of the Enabling Clause is attached to this memorandum as Annex 1.]

#### **b. Legal Provision**

31. Article I:1 of the GATT 1994 provides:

##### *General Most-Favoured-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

#### **c. Relevant Jurisprudence**

32. The interpretation of Article I:1 of the GATT 1994 has been discussed in a number of cases. In *Canada – Autos*, the parties did not contest that an import duty

exemption is an “advantage, favour, privilege or immunity” within the meaning of Article I:1. The Appellate Body also noted the Panel’s interpretation (which was not appealed) that the term “unconditionally” refers to advantages conditioned on the “situation or conduct” of exporting countries (para. 76). The Appellate Body further clarified that the scope of Article I:1 is not restricted to cases in which the failure to accord an advantage to like products of all other Members “appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure” (para. 78). Rather, Article I:1 covers both *de jure* and *de facto* discrimination (ibid.).

33. The question of whether products are “like” has to be examined on a case-by-case basis; relevant factors are the products’ physical characteristics (i.e., the products’ properties, nature, and quality), the products’ end uses in a given market, consumers’ tastes and habits, and the products’ tariff classifications.

34. Article I:1 was most recently interpreted by the Appellate Body in *EC – Seal Products* (paras. 5.84-5.96). The Appellate Body summarized the elements that must be demonstrated to establish an inconsistency with Article I:1 as follows (para. 5.86):

- the measure at issue falls within the scope of application of Article I:1;
- the imported products at issue are “like” within the meaning of Article I:1;
- the measure at issue confers an “advantage, favour, privilege, or immunity” on a product originating in the territory of any country;
- that advantage is not accorded “immediately” and “unconditionally” to “like” products originating in the territory of all WTO Members.

35. The Appellate Body emphasized that Article I:1 protects expectations of equal competitive opportunities for like imported products from all WTO Members. It follows that Article I:1 does not prohibit Members from attaching *any* conditions to the receipt of an “advantage”; instead, it prohibits only conditions that have a detrimental impact on the competitive opportunities for products imported from a Member as compared to like products from another country (paras. 5.87-5.88).

#### **d. Arguments for Ruberia**

36. Ruberia could argue that the ARRA is inconsistent with Article I:1 of the GATT 1994 on the following basis:

- Measure covered by Article I:1: the ARRA is a “law” affecting the “offering for sale” of a product within the meaning of Article III:4 of the GATT 1994, because it bans the sale of non-ARRA-compliant animal products, and is therefore a measure covered by Article I:1 (recall that Article I:1 applies to “all matters referred to in paragraphs 2 and 4 of Article III”).

- Likeness: non-ARRA-compliant animal products of Ruberian origin are “like” non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita, since there is no evidence of differences in physical characteristics, end uses or consumer preferences between these products, and the ARRA distinguishes them solely on the basis of origin.
- Advantage: Article 4 of the ARRA grants an advantage to non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita – in the form of the exception from the sales ban – that is not accorded “immediately” and “unconditionally” to “like” products originating in Ruberia.

Potential additional argument:

- Detrimental impact on the competitive opportunities of imported products: Article 4 of the ARRA has a detrimental impact on the competitive opportunities of non-ARRA-compliant animal products of Ruberian origin as compared to like products from countries with less than 0.15 hectares of arable land per capita, since the sale of the former products is banned, while the sale of the latter products is allowed.

[Note to Panellists: this element of the test is not reflected in the text of Article I:1 or in the case law prior to *EC – Seal Products*. A complainant could establish a *prima facie* case of violation of Article I:1 without separately addressing this element.]

**e. Arguments for Viridium**

37. In response, Viridium could argue:

- Measure covered by Article I:1: it will be hard for Viridium to make an argument that the ARRA does not fall within the scope of application of Article I:1. Viridium may want to concede this element.
- Likeness: it will be hard for Viridium to argue that non-ARRA-compliant animal products of Ruberian origin are not “like” non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita. Viridium may want to concede this element.
- Advantage: it will be hard for Viridium to argue that Article 4 of the ARRA does not grant an advantage to non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita – in the form of the exception from the sales ban – that is not accorded “immediately” and “unconditionally” to “like” products originating in Ruberia. Viridium may want to concede this element.

Response to potential additional argument:

- Detrimental impact on the competitive opportunities of imported products: it will be hard for Viridium to argue that Article 4 of the ARRA does not have a detrimental impact on the competitive opportunities of non-ARRA-compliant animal products of Ruberian origin as compared to like products from countries with less than 0.15 hectares of arable land per capita. Viridium may want to concede this element.

38. It will be difficult for Viridium to rebut Ruberia's claims under Article I:1 of the GATT 1994. Given this difficulty, it might make sense for Viridium to concede this claim and rely exclusively on a defence under Article XX of the GATT.

## **2. Article III:4 of the GATT 1994**

### **a. Ruberia's legal claim**

39. Ruberia submits that the ARRA is inconsistent with Article III:4 of the GATT 1994 because it provides less favourable treatment to animal products imported from Ruberia than to like domestic products.

### **b. Legal Provisions**

40. Article III:4 of the GATT 1994 provides, in relevant part:

#### *National Treatment on Internal Taxation and Regulation*

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

...

### **c. Relevant Jurisprudence**

41. Article III:4 of the GATT 1994 has been interpreted by the Appellate Body in a number of cases, including *EC – Bananas III*, *Korea – Beef*, *EC – Asbestos*, *Thailand – Cigarettes (Philippines)*, and, most recently, *EC – Seal Products* (paras. 5.97-5.130). In the latter case, the Appellate Body summarized the elements that must be demonstrated to establish an inconsistency with Article III:4 as follows (para. 5.99):

- the measure at issue is a “law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use” of the products at issue;
- the imported and domestic products at issue are “like” products;
- the treatment accorded to imported products is “less favourable” than that accorded to like domestic products.

42. The Appellate Body further clarified that a measure accords less favourable treatment to imported products where it modifies the conditions of competition in the marketplace to the detriment of the group of imported products as compared to the group of like domestic products (para. 5.117). Finally, the Appellate Body noted that, for a measure to be found to modify the conditions of competition in the marketplace to the detriment of imported products, there must be a “genuine relationship” between the measure and the detrimental impact (ibid.).

#### **i. Detrimental Impact on Imports**

43. A key issue in the present dispute is the precise definition of the concept of a “detrimental impact on the conditions of competition for like imported products”. It

is well established that the analysis of whether a measure has a detrimental impact on imports “need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned.” (AB Report, *Thailand – Cigarettes (Philippines)*, para. 129) In other words, a complainant does not have to show that a measure has in fact led to a decrease of imports or a loss of market share for imported products.

44. What a complainant does have to show, however, is that the measure has some adverse effect on imported products as compared to like domestic products. Typically, panels and the Appellate Body have found this to be the case where the *proportion* of the group of like imported products that was adversely affected by the measure was higher than the *proportion* of the group of like domestic products that was adversely affected. In its analysis under Article 2.1 of the TBT Agreement in *US – Tuna II (Mexico)*, for example, the Appellate Body noted that “most tuna caught by Mexican vessels ... would not be eligible for inclusion in a dolphin-safe product”, while “most tuna caught by US vessels is potentially eligible for the label”, and concluded on this basis that the measure at issue had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market (paras. 234-235). Similarly, in *EC – Seal Products*, the panel found that “most of the European Union’s seal products are potentially eligible for placement on the EU market under the [MRM] exception, while virtually all Canadian seal products are not”, and hence found a detrimental impact on the competitive opportunities of Canadian imported products as compared to domestic products (paras. 7.168, 7.170). These quotes strongly suggest that the concept of a “detrimental impact on the conditions of competition for like imported products” requires an “asymmetric impact” on the group of like imported products (see also Ehring 2002).

45. The question raised by the facts of the present dispute (as they relate to beef) is whether a “detrimental impact on the conditions of competition for like imported products” could also be present where the *absolute quantity* of imported products that is adversely affected by the measure is higher than the absolute quantity of like domestic products, while the *proportion* of imported products that is adversely affected is lower than the proportion of like domestic products. In the present dispute, the quantity of beef from Ruberia that will be banned by the ARRA may be larger than the quantity of banned domestic beef (because Ruberia’s market share of the beef market of Viridium at the time of the adoption of the ARRA was 70 per cent), even though the proportion of Ruberian beef that will be banned (40 per cent) is lower than the proportion of domestic beef (50 per cent) [This is assuming that the mix of ARRA-compliant/non-compliant beef in Ruberia’s beef exports to Viridium corresponds to the mix of ARRA-compliant/non-compliant beef in Ruberia’s overall beef production (namely, 60 per cent/40 per cent). As noted above (Note accompanying para. 10), the participants could make different assumptions, and the participants’ arguments should be evaluated on the basis of whether they reflect an understanding of the implications of different assumptions for their respective positions]. Is there a detrimental impact on the conditions of competition for Ruberian beef in these circumstances? It would appear that this question has never been squarely considered in the jurisprudence or the literature. The most plausible answer is that there would be no detrimental impact: While Ruberian beef may be more heavily affected by the measure in absolute terms, the proportion of Ruberian beef that is adversely affected is lower than the proportion of domestic beef; in other

words, the measure actually improves the competitive opportunities for Ruberian beef. One might argue, however, that this interpretation could emasculate the non-discrimination in certain circumstances: Where there is a very large discrepancy between the amount of imports and the amount of domestic production, an analysis of detrimental impact that is couched exclusively in relative terms might permit a measure which has a strong adverse impact on imports, while only having a negligible effect on the domestic economy (given the small amount of domestic production).

ii. “Genuine Relationship”

46. The question of whether a “genuine relationship” exists between a measure and a change in the conditions of competition in the marketplace to the detriment of imports has arisen in a number of cases in which the change in competitive conditions involved some element of private choice. In *Korea – Beef*, for example, private retailers were given the choice to sell either domestic or imported beef. While the “dramatic reduction in number of retail outlets for imported beef” that followed was the consequence of private choice, the Appellate Body noted that the “legal necessity of making a choice was ... imposed by the measure” at issue (para. 146). Given the “restricted nature” of the choice – to sell either domestic or imported beef – the reduction in retail outlets for imported beef was “in legal contemplation, the effect of that measure” (ibid.) Similarly, in *US – Tuna II (Mexico)*, the United States argued that any detrimental impact on Mexican tuna products was the result of the decisions by US consumers to purchase dolphin-safe tuna products, rather than an effect of the measure. In rejecting this argument, the Appellate Body cited the panel’s finding that it was the measure at issue that controlled access to the label. Since consumers had a preference for dolphin-safe tuna, the measure afforded an advantage to products that it made eligible for the label (para. 238).

47. In *US – Tuna II (Mexico)*, the question of a genuine relationship between the measure and the detrimental impact also arose in a different sense, which is more relevant to the present case. In its analysis under Article 2.1 of the TBT Agreement, the panel in that case found that, at the time when the US dolphin-safe labelling requirements were first enacted (i.e., in 1990, 19 years before the establishment of the panel), the United States and Mexico had been “in a comparable position with regard to their fishing practices in the [Eastern Tropical Pacific], in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins. Both of these fleets had therefore to adapt their fishing methods in order to catch tuna eligible for the US dolphin-safe label.” (para. 7.324) Proceeding from these observations, the panel stated that it was “not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices” (para. 7.334). Citing *Korea – Beef*, the panel recalled that it had to consider “the treatment arising from the preparation, adoption and application” of the measure at issue, “rather than differences in the impact of the measure that are attributable to the behaviour of private actors on the market” (ibid.). The panel’s finding that Mexico’s tuna fleet chose not to adapt to the US labelling requirements figured prominently in its ultimate conclusion that these requirements did not violate Article 2.1 of the TBT Agreement (para. 7.378).

48. The Appellate Body overturned the panel's finding of consistency on the basis that the panel applied an "incorrect approach" to the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement (para. 227). As a result, the Appellate Body did not discuss the panel's findings regarding the choices made by Mexico's tuna fleet in any detail. Arguably, however, these findings would have been relevant to the question of whether there was a "genuine relationship" between the measure at issue and the detrimental impact on Mexican tuna products. The question of whether and to what extent an industry's ability to adapt to the requirements of a measure factors into the assessment of the "genuine relationship" element of the "treatment no less favourable" test can thus be regarded as unsettled.

#### **d. Arguments for Ruberia**

49. Ruberia could argue that the ARRA is inconsistent with Article III:4 of the GATT 1994 on the following basis:

- Measure covered by Article III:4: the ARRA is a "law" affecting the "offering for sale" of a product within the meaning of Article III:4 of the GATT 1994.
- Likeness: non-ARRA-compliant beef and non-ARRA-compliant eggs are "like" ARRA-compliant beef and ARRA-compliant eggs, because they have the same physical characteristics and end uses, are subject to the same consumer preferences, and are in a strong competitive relationship with each other. (Note that beef and eggs are the only animal products for which the record provides the market share information that is indispensable for a *de facto* discrimination claim.)
- Detrimental impact on competitive opportunities: with respect to eggs, Ruberia could argue that the proportion of the Ruberian production of eggs that will be banned under the measure (80 per cent) exceeds the proportion of domestic production that will be banned (70 per cent). The measure thus has a disproportionate impact on Ruberian eggs, as compared to domestic eggs.

#### Potential additional arguments:

- Quantity of affected imports: Ruberia could argue that the quantity of beef and eggs of Ruberian origin that will be banned by the measure exceeds the quantity of banned domestic beef and eggs, and that the measure hence has a detrimental impact on the competitive opportunities of beef and eggs that are imported from Ruberia as compared to domestic beef and eggs.
- Genuine relationship: there is a "genuine relationship" between the measure and the detrimental impact on imports, as it is the measure that bans the importation of non-ARRA-compliant beef and eggs.



### **e. Arguments for Viridium**

50. In response, Viridium could argue as follows:

- Measure covered by Article III:4: it will be hard for Viridium to make an argument that the ARRA does not fall within the scope of application of Article III:4. Viridium may want to concede this element.
- Likeness: non-ARRA-compliant beef and non-ARRA-compliant eggs are not “like” ARRA-compliant beef and ARRA-compliant eggs. Viridium could argue that there are differences in physical characteristics, as an animal’s ability to move affects the quality of the meat; Viridium could also point to differences in consumer preferences, which are evident in the Viridian people’s strong rejection of industrial agriculture that manifested itself in the election victory of the Green party.
- Detrimental impact on competitive opportunities: it will be hard for Viridium to argue that the measure does not have a disproportionate effect on Ruberian eggs. Viridium could argue, however, that there is no “genuine relationship” between the measure and a potential disproportionate effect on Ruberian eggs (see below).

#### Responses to potential additional arguments:

- Quantity of affected imports: there is no detrimental impact on the competitive opportunities of beef from Ruberia, as the proportion of the domestic production of beef that is detrimentally affected by the measure exceeds the proportion of beef of Ruberian origin that is detrimentally affected.
- Genuine relationship: there is no “genuine relationship” between the measure and the alleged detrimental impact on Ruberian beef and eggs, as any such detrimental impact is attributable to the private choice of Ruberian beef and egg producers not to adapt to the requirements of the ARRA. In both Ruberia and Viridium, a majority of egg producers (and a lower percentage of beef producers) will have to adapt to meet the ARRA’s requirements. They are thus, as the panel in *US – Tuna II (Mexico)* put it, in a “comparable position”, and any detrimental impact on Ruberian beef and egg producers will be attributable to their private choices, rather than the ARRA.

### **3. Article XX of the GATT 1994 - subparagraphs**

#### **a. Viridium's legal claim**

51. Viridium could argue that, even if the ARRA were found to be inconsistent with Articles I:1 or III:4 of the GATT 1994, it would still be justified under Article XX(a) as necessary to protect public morals and/or under Article XX(b) as necessary to protect human health, animal health and/or the environment.

#### **b. Legal Provisions**

52. Article XX of the GATT 1994 provides, in relevant part:

##### *Article XX: General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

...

#### **c. Relevant Jurisprudence**

53. Article XX of the GATT 1994 has been interpreted by the Appellate Body in a number of disputes, including *US – Gasoline*, *US – Shrimp*, *Korea – Beef*, *EC – Asbestos*, *Brazil – Tyres*, *Thailand – Cigarettes (Philippines)*, and most recently in *EC – Seal Products*. In the latter case, the Appellate Body recalled its finding in *US – Gasoline* that the assessment of a claim of justification under Article XX involves a two-step analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, and then analysed for consistency with the chapeau of Article XX (para. 5.169).

54. Provisional justification under one of the subparagraphs requires that the measure “address” the particular interest specified in that paragraph and that there be a “sufficient nexus” between the measure and the interest protected” (para. 5.169). In the context of subparagraphs (a) and (b), the measure must be “necessary” to protect the particular interest at stake. In *EC – Seal Products*, the Appellate Body reaffirmed its finding in *Korea – Beef* that the analysis of “necessity” involves a process of “weighing and balancing” a series of factors, including the importance of the objective, the contribution of the measure to the objective, and the measure’s trade restrictiveness. In most cases, a comparison between the challenged measure and reasonably available alternative measures must be undertaken (such a comparison might be unnecessary where the measure is not trade restrictive or

makes no contribution to the identified objective). While the burden of proving the necessity of a measure rests on the responding party who invokes the exception, a complaining party must identify reasonably available alternative measures that the responding party could have taken (para. 5.169).

55. There is a long-standing debate on the question of what must be justified as “necessary” under the subparagraphs of Article XX: is it the measure as a whole, or only the aspects of the measure that have been found to be inconsistent with a provision of the GATT 1994? Despite the controversy, the jurisprudence appears to be consistent: it is only the aspects of a measure that have been found to give rise to the inconsistency that have to be analysed under the subparagraphs of Article XX. Thus, in *US – Gasoline*, the Appellate Body found that “the ‘measures’ to be analyzed under Article XX are the same provisions infringing Article III:4” (p. 13). Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body stated that “what must be shown to be ‘necessary’ is the treatment giving rise to the finding of less favourable treatment” (para. 177). In *EC – Seal Products*, the Appellate Body again reaffirmed that “the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994” (*EC – Seal Products*, para. 5.186).

56. What are the implications of this jurisprudence in the context of a violation of a non-discrimination obligation? Importantly, where the discrimination arises from a prohibition that operates in conjunction with an exemption (as in the case of the transition periods and exemptions in the ARRA), the question is *not* whether the exemption is necessary (even though the discrimination would disappear if the exemption was eliminated). Rather, the question is whether the prohibitive and permissive elements of the measure, considered together, meet the requirements of the necessity test (AB report, *EC – Seal Products*, paras. 5.187-5.190). Typically, an exemption will reduce the contribution that a prohibition makes to the achievement of the measure’s objective.

#### **d. Arguments for Viridium**

57. Viridium could argue that the ARRA is “necessary to protect public morals” within the meaning of Article XX(a) on the following basis:

- Objective: one of the objectives of the ARRA is to ensure “the humane treatment of animals”, which the preamble to the ARRA characterizes as “a matter of ethical responsibility for human beings in general”; this objective falls within the scope of the protection of “public morals”.
- Contribution: the ARRA contributes to this objective by ensuring that animals have enough space to move (minimum space allowances and prohibition of battery cages) and that they do not experience unnecessary suffering in the course of transport and slaughter.
- Trade restrictiveness: the ARRA is no more trade restrictive than necessary to enforce compliance with its requirements.

58. Viridium could argue that the ARRA is “necessary to protect human, animal or plant life or health” within the meaning of Article XX(b) on the following basis:

- Objectives: one of the objectives of the ARRA is to promote the development of a sustainable agricultural sector and thereby to reduce the environmental impact of industrial farming; this objective also serves to protect animal health by ensuring that farm animals are less likely to contract diseases associated with industrial farming and, by extension, human health by reducing the dangers to human health that arise from the by-products of industrial farming (especially manure and wastewater) and from the overuse of antibiotics in industrial farming.
- Contribution: the ARRA contributes to these objectives through the generous minimum space allowances and the ban on battery cages, which prevent the re-emergence of highly concentrated farming operations in Viridium and the entry of animal products derived from industrial farming in other countries into Viridium.
- Trade restrictiveness: the ARRA is no more trade restrictive than necessary to enforce compliance with its requirements.

#### **e. Arguments for Ruberia**

59. Apart from rebutting Viridium’s claims, Ruberia will need to identify alternative measures that Viridium could have taken instead of adopting the challenged requirements of the ARRA. These alternative measures must...

- ... be less trade restrictive than the requirements of the ARRA, e.g., they could involve labelling requirements or subsidy schemes for organic and other small-scale farming. Both labelling requirements and subsidy schemes would be less restrictive of trade than the import prohibitions contemplated by the ARRA. Alternatively, Ruberia could propose measures to make large-scale farming more environmentally friendly and less risky to animal and human health.
- ... achieve at least the same level of contribution to the objectives pursued by Viridium as the challenged requirements of the ARRA. Whether it is plausible for Ruberia to argue that labelling requirements or subsidy schemes would achieve the same level of contribution as an import ban depends on how exactly Viridium formulates its objectives. If Viridium emphasizes the need to protect public morals, Ruberia could argue that labelling requirements would allow Viridium’s citizen to express their moral disapproval directly and would thereby protect public morals more effectively. If Viridium emphasizes the need to reform the agricultural sector, Ruberia could argue that subsidies can be more easily targeted than the blunt instrument of an import and sales ban and would therefore achieve the same level of contribution with less trade restrictiveness.

- ... be reasonably available to Viridium, i.e., they must be enforceable, technologically and administratively feasible, etc.. Given that Viridium is a developed country, introducing and administering labelling requirements or subsidy schemes should be feasible for Viridium.

#### **f. Rebuttal Arguments for Viridium**

60. In its rebuttal, Viridium could dispute that the alternative measures proposed by Ruberia fulfil the three criteria. For example, Viridium could argue that labelling requirements and subsidy schemes would not achieve the same level of contribution to the objectives of the ARRA.

#### **4. Article XX of the GATT 1994 – chapeau**

##### **a. Ruberia’s legal claim**

61. Ruberia submits that the ARRA does not meet the requirements of the chapeau of Article XX because the longer transition periods for developing countries and the exemptions for least-developed countries and countries with less than 0.15 hectares of arable land per capita are not rationally related to the objective of the ARRA.

[Note to Panellists: While the burden of proof under the chapeau is on Viridium, it is not uncommon for complainants to make submissions on the respects in which a respondent’s measure does not fulfil the requirements of the chapeau.]

##### **b. Legal Provisions**

62. Article XX of the GATT 1994 provides, in relevant part:

*Article XX: General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

...

##### **c. Relevant Jurisprudence**

63. The requirements of the chapeau of Article XX were most recently interpreted by the Appellate Body in *EC – Seal Products*. The Appellate Body noted that the chapeau of Article XX imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX (para. 5.296). The Appellate Body recalled its finding in *US – Gasoline* that the function of the chapeau is “to prevent the abuse or misuse of a Member’s right to invoke the exceptions contained in” Article XX (para. 5.297). With regard to the “discrimination” that is at issue under the chapeau, the Appellate Body noted that, while the legal standard under the non-discrimination obligations of the GATT 1994 differs from the legal standard under the chapeau, this does not mean that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of one of the non-discrimination obligations of the GATT 1994 (para. 5.298).

64. The Appellate Body further noted that the examination of whether a measure is applied in a manner that would constitute a means of “arbitrary or unjustifiable

discrimination between countries where the same conditions prevail” necessitates, as a first step, an assessment of whether the “conditions” prevailing in the countries between which the measure allegedly discriminates are “the same”. In this respect, the Appellate Body clarified that only “conditions” that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau (para. 5.299). More specifically, the Appellate Body observed that the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide context that is pertinent to determining which “conditions” prevailing in different countries are relevant in the context of the chapeau (para. 5.300). The burden of showing that the conditions prevailing in different countries are not “the same” in relevant respects rests on the respondent (para. 5.301).

65. Where countries in which the same conditions prevail are differently treated, the question arises whether the resulting discrimination is “arbitrary or unjustifiable”. Recalling previous jurisprudence, the Appellate Body noted that this analysis “should focus on the cause of the discrimination, or the rationale put forward to explain its existence” (para. 5.303). The Appellate Body further explained that the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under the subparagraphs of Article XX is “one of the most important factors in the assessment of arbitrary or unjustifiable discrimination” (para. 5.306). The Appellate Body underscored, however, that the relationship of the discrimination to the objective of a measure is “not the sole test”, and that “additional factors” may also be relevant to the assessment (para. 5.321).

i. Evolution of the test for “arbitrary or unjustifiable discrimination”

66. The Appellate Body’s formulation of the test for “arbitrary or unjustifiable discrimination” in *EC – Seal Products* could appear to be a weakening of the strict standard that the Appellate Body formulated in *Brazil – Tyres*, and a return to the more case-specific and multi-faceted inquiry that was the hallmark of the Appellate Body’s reasoning under the chapeau in the earlier case law, in particular *US – Gasoline* and *US – Shrimp*. In the earlier cases, the Appellate Body had considered a number of factors in its analysis under the chapeau, without treating any one of them as dispositive for a finding of “arbitrary or unjustifiable discrimination”. (In paras. 5.304-5.305 of its report in *EC – Seal Products*, the Appellate Body provides a succinct summary of its findings in *US – Gasoline* and *US – Shrimp*.) In *Brazil – Tyres*, by contrast, the Appellate Body appeared to elevate the question of whether the rationale for the discrimination at issue bears a “relationship to the objective of a measure” that falls within the purview of a subparagraph of Article XX to a litmus test for the question of whether the discrimination is “arbitrary or unjustifiable” (paras. 227, 228, 232). As the Appellate Body stated in that case, “discrimination can result from a rational decision or behaviour, and still be ‘arbitrary or unjustifiable’, because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.” (para. 232)

67. The Appellate Body's ruling in *EC – Seal Products* appears to weaken the bright-line test formulated in *Brazil – Tyres* by characterizing the question of the relationship between the discrimination and the objective of the measure as “one of the most important factors, but not the sole test” (para. 5.321). While the Appellate Body proceeded in that case to fault the measure at issue for defects that went *beyond* the unclear relationship between the discrimination and the measure's objective, it remains unclear whether other factors could ever *overcome or outweigh* the lack of a relationship between the discrimination and the measure's objective, so as to result in a finding that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination *even though* there is no relationship between the rationale for the discrimination and the measure's objective. Given that the Appellate Body continues to characterize the question of whether such relationship exists as “one of the most important factors”, it is doubtful that a measure could ever be found to meet the requirements of the chapeau if there is no relationship between the rationale of the discrimination and the measure's objective. If this reading is correct, the Appellate Body's ruling in *EC – Seal Products* has not weakened the *Brazil – Tyres* test in any meaningful way, but in effect made the requirements of the chapeau even harder to meet – by piling on additional factors which can only aggravate, but never cure, the lack of a relationship between the discrimination and the objective.

68. In the present case, these interpretative questions become relevant because the rationale for granting longer transition periods and exemptions to developing and least-developed countries, as well as to countries with less than 0.15 hectares of arable land per capita, is not related in any evident way to the objectives pursued by the ARRA. While the rationale for the longer transition periods and exemptions is not explicitly identified in the facts, it should be obvious that these features of the measure are designed to accommodate the capacity and resource constraints of countries that are either poor or have very little arable land. The interpretative dilemma that arises is this: While such accommodations reflect fundamental principles of WTO law, and in particular the principle of special and differential treatment, which is embodied in the Enabling Clause and in numerous WTO provisions, they appear to be inconsistent with the requirements of the chapeau, which demand a relationship between the rationale for any discrimination and an objective of the measure that falls within one of the subparagraphs of Article XX.

#### **d. Arguments for Ruberia**

69. Ruberia could argue that the ARRA does not meet the requirements of the chapeau of Article XX on the following basis:

- Conditions prevailing in different countries: the conditions prevailing in developed countries, on the one hand, and developing and least-developed countries, as well as countries with less than 0.15 hectares of arable land per capita, on the other hand, are “the same” in all relevant respects. The Appellate Body has clarified that, in determining which “conditions” prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. Given that Viridium has sought to justify the



ARRA under Article XX(a) and/or XX(b), it follows that conditions relating to the potential animal welfare impact and the risks to human or animal health and the environment associated with concentrated farming operations would be relevant in the circumstances of this case. However, there is no evidence that the animal welfare impact (and related public moral concerns) or the risks that Viridium alleges are associated with concentrated farming differ across the countries concerned.

- Rational relationship: the longer transition periods for developing countries and the exemption for least-developed countries and countries with less than 0.15 hectares of arable land per capita are not rationally related to the policy objectives of the ARRA. To the contrary, exempting certain countries from the requirements of the ARRA fundamentally undermines the achievement of the objectives of the ARRA. The same holds true for transition periods, although to a lesser extent. It follows that the ARRA is applied in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” within the meaning of the chapeau of Article XX of the GATT 1994.

#### **e. Arguments for Viridium**

70. In response, Viridium could argue as follows:

- Conditions prevailing in different countries: the conditions prevailing in developed countries, on the one hand, and developing and least-developed countries, as well as countries with less than 0.15 hectares of arable land per capita, on the other hand, are not “the same” in relevant respects. Thus, industrial farming is not as prevalent in developing and least-developed countries as it is in developed countries. Moreover, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*, the concept of “countries where the same conditions prevail” must be interpreted in its context and in light of the object and purpose of the WTO agreements. The principle of special and differential treatment of developing countries is a fundamental principle of WTO law and is embodied in the Enabling Clause and numerous provisions of WTO law; as such, it constitutes relevant context in deciding which “conditions” are relevant for the purposes of the chapeau of Article XX. In addition, “sustainable development” is mentioned in the preamble of the Marrakesh Agreement as one of the objectives of the WTO agreements. As the Appellate Body stated in *US – Shrimp*, this preambular language “must add colour, texture and shading” to the interpretation of the terms of the WTO agreements, including the GATT 1994 (para. 153). Finally, the limited supply of arable land in countries with less than 0.15 hectares of arable land per capita renders the conditions in these countries relevantly different, even when they are developed countries.

- Rational relationship: Even if the conditions prevailing in the respective countries were found to be the same, the different treatment of developed countries, on the one hand, and developing and least-developed countries, as well as countries with less than 0.15 hectares of arable land per capita, on the other hand, does not amount to “arbitrary or unjustifiable discrimination” within the meaning of the chapeau of Article XX of the GATT 1994, for two reasons:
  - i. The fact that the measure pursues its objectives in different ways when it comes to different countries does not mean that this differentiation bears no relationship to the objectives of the measure. To the contrary, the measure “calibrates” the manner in which it pursues its objectives to the capacity and resources constraints faced by different countries and thereby avoids imposing a “single, rigid and unbending requirement” on a diverse range of countries – something for which the Appellate Body faulted the United States in its finding of “arbitrary or unjustifiable discrimination” in *US – Shrimp* (para. 177).
  - ii. Discrimination in favour of developing countries is explicitly permitted by the Enabling Clause in relation to Article I of the GATT 1994. While the Enabling Clause does not explicitly extend to the chapeau of Article XX, the fact that discrimination in favour of developing countries is permitted and even “encouraged” (see AB Report, *EC – Tariff Preferences*, para. 111) in some contexts militates against a finding that such discrimination is “arbitrary or unjustifiable” in another, closely related, context.

## **5. Annex 1.1 to the TBT Agreement**

### **a. Ruberia's legal claim**

71. Ruberia submits that the ARRA is a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement as it is a document which lays down “processes and production methods” (PPMs) that are “related” to “product characteristics” and with which compliance is mandatory.

### **b. Legal Provisions**

72. Annex 1 to the TBT Agreement provides, in relevant part:

#### *1. Technical regulation*

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

### **c. Relevant Jurisprudence**

73. The Appellate Body has interpreted Annex 1.1 to the TBT Agreement in four disputes: *EC – Asbestos*, *EC – Sardines*, *US – Tuna II (Mexico)*, and *EC – Seal Products*. *EC – Sardines* and *US – Tuna II (Mexico)* concerned labelling requirements, which are not at issue in this dispute. In both *EC – Asbestos* and *EC – Seal Products*, the complainant(s) argued that the measure at issue laid down “product characteristics”. In *EC – Seal Products*, the complainants also argued, in the alternative, that the measure at issue laid down PPMs. However, neither the panel nor the Appellate Body in that case ruled on the alternative claim.

74. In *EC – Seal Products*, the Appellate Body provided some interpretation of the concept of “related PPMs” (para. 5.12). The Appellate Body defined a “process” as referring to “a course of action, a procedure, a series of actions or operations directed to some end, as in manufacturing”. The Appellate Body further noted the definition of “production” as “[t]he process of being manufactured commercially, esp. in large quantities”. The Appellate Body cited a definition of “method” as “a (defined or systematic) way of doing things” (id.).

75. The Appellate Body stated that “a ‘related’ PPM is one that is ‘connected’ or ‘has a relation’ to the characteristics of a product” (para. 5.12). The Appellate Body further noted that, in order to determine whether a measure lays down related PPMs, a panel “will have to examine whether the processes and production methods prescribed by the measure have *a sufficient nexus* to the characteristics of a product in order to be considered related to those characteristics” (id., emphasis added).

76. The Appellate Body further highlighted that the determination of whether a measure constitutes a technical regulation must be made in respect of, and having considered, the measure as a whole. At the same time, the analysis should give particular weight to the “integral and essential” aspects of the measure (para. 5.19).

77. Finally, the Appellate Body suggested that, in delimiting the scope of the term “technical regulation”, it may be helpful to seek contextual guidance in other provisions of the TBT Agreement, such as those pertaining to standards, international standards, and conformity assessment procedures (para. 5.60). The Appellate Body also encouraged panels to have recourse to supplementary means of interpretation, such as the negotiating history of the TBT Agreement (ibid.).

78. A key jurisprudential question that is as yet unresolved is the issue of how the concept of PPMs that are “related” to product characteristics within the meaning of Annex 1.1 to the TBT Agreement fits into the distinction between product-related and non-product related PPMs that has long been debated in the context of the “likeness” of products. There are a number of reasons why arguments about PPMs from the likeness context are not easily applicable to the context of Annex 1.1 to the TBT Agreement:

- In the likeness context, the question of whether a PPM is product-related or not arises in the context of a comparison: the question is whether one PPM affects the product in a way that renders the product unlike a product produced with another PPM. In the context of Annex 1.1, the question is simply whether a PPM is related to the characteristics of a product; there is no obvious comparator or benchmark. *Prima facie*, any PPM that was employed in the production of a product effects some kind of transformation of the product and hence affects the characteristics of the product.
- In the likeness context, the question of whether the use of a certain PPM renders the product unlike a product produced with a different PPM is part of an examination of whether a substantive provision of WTO law has been violated. In the context of Annex 1.1, the question of whether a PPM is related to the characteristics of a product is part of the threshold determination of whether the TBT Agreement applies. Arguably, the standard of proof required in these two types of inquiries should be different, with the standard of proof in the second inquiry being lower. It appears implausible, for example, that a complainant would have to provide scientific evidence of the impact of a PPM on the final product merely to show that a measure is subject to the disciplines of the TBT Agreement, while such evidence might well be required to show that different PPMs render products unlike for purposes of a discrimination analysis.

79. The negotiating history of Annex 1.1 to the TBT Agreement can shed some light on the question of what it means for a PPM to be “related” to the characteristics of a product. (The negotiating history on PPMs is summarized in WTO Document WT/CTE/W/10-G/TBT/W/11 of 29 August 1995, an excerpt of which is attached to this memorandum as Annex 2.) The negotiating history shows that the Uruguay

Round negotiations on what would become the TBT Agreement started out with a proposal by the United States to extend the coverage of the Tokyo Round Standards Code to PPMs. Under the US proposal, a document would have been subject to the agreement if it “include[d], or deal[t] exclusively with ... processes, ... and production methods” (para. 120). The United States argued that the “[l]ack of full coverage of PPMs seriously weakened the effectiveness of the Agreement by excluding a growing body of regulations from its disciplines” (para. 121).

80. A subsequent proposal by New Zealand would have limited the coverage of the agreement to “processes and production methods insofar as they are necessary to achieve the required characteristics of a product” (para. 127). The intent of this proposal was to “not ... include all kinds of PPMs”, as the US proposal would have done,

but only those that were necessary to ensure certain legitimate objectives of quality in a final product such as its strength, purity or safety. A PPM that was required for religious purposes, for example, did not have any direct effect on the quality or the final characteristics of a product and would therefore not be covered. (para. 131)

81. The language that was ultimately included in the final version of Annex 1.1 to the TBT Agreement can be traced to a proposal by Mexico, which suggested the insertion of the term “related” between “products” and “processes and production methods”. Mexico explained that the intent was “to exclude PPMs unrelated to the characteristics of a product from the coverage of the Agreement” (para. 146). Mexico later further refined its proposal with the insertion of “their” before “related” (“product characteristics or their related processes and production methods”), again with the intention “to ensure that the Agreement will only address a narrow selection of processes and production methods” (para. 147).

#### **d. Arguments for Ruberia**

82. Ruberia could argue that the ARRA is a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement on the following basis:

- Document: the ARRA is a “document”.
- Related PPMs: the ARRA lays down PPMs that are “related” to the characteristics of products; more specifically:
  - i. the ARRA’s requirements regarding minimum space allowances, as well as transport and slaughter, are PPMs within the meaning of Annex 1.1, as defined by the Appellate Body;
  - ii. all these PPMs have the potential, and are indeed likely, to affect the final products’ characteristics, and there is hence a sufficient “nexus” between the PPMs and the characteristics of the final product;
  - iii. indeed, one of the objectives of the ARRA is to affect the quality of the final products, as reflected in the fourth recital of the

preamble; this indicates that the related PPMs are an “integral and essential” aspect of the ARRA;

- iv. the context provided by other provisions of the TBT Agreement supports the view that the measure falls within the scope of the TBT Agreement; thus, the subject matter of the measure is the subject of an international standard, and the measure will require conformity assessment procedures to be enforced, which indicates that the ARRA is the type of measure that the TBT Agreement was designed to discipline.
- Mandatory compliance: compliance with the ARRA is mandatory; while the implementing regulations for the ARRA are still being drafted, it is clear from the language of the law that producers and distributors will not have the option not to comply with the requirements of the ARRA if they want to sell animal products in Viridium.

#### **e. Arguments for Viridium**

83. In response, Viridium could argue that the ARRA is not a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement on the following basis:

- Document: Viridium may want to concede that the ARRA is a “document”.
- Related PPMs: the ARRA does not lay down PPMs that are “related” to the characteristics of products; more specifically:
  - i. the ARRA’s requirements regarding minimum space allowances, as well as transport and slaughter, do not qualify as PPMs within the meaning of Annex 1.1, as defined by the Appellate Body;
  - ii. even if the ARRA’s requirements were PPMs, they do not affect the final products’ characteristics, and there is hence not a sufficient “nexus” between the PPMs and the characteristics of the final product for them to be “related” to product characteristics.
  - iii. the context provided by other provisions of the TBT Agreement supports the view that the measure falls outside the scope of the TBT Agreement; thus, the ARRA has been adopted partly for moral reasons, and the protection of public morals is not included among the list of legitimate objectives in Article 2.2 of the TBT Agreement.
- Mandatory compliance: Viridium may want to concede that compliance with the ARRA is mandatory.

## **6. Article 2.1 of the TBT Agreement – MFN treatment**

### **a. Ruberia’s legal claim**

84. Ruberia submits that the ARRA is inconsistent with Article 2.1 of the TBT Agreement because it accords treatment to animal products imported from Ruberia that is less favourable than the treatment accorded to like products imported from countries with less than 0.15 hectares of arable land per capita.

[Note to Panellists: The reason why the longer transition periods for developing countries and the exemption for least-developed countries are not part of this claim is a strategic choice by Ruberia not to challenge these advantages granted to developing countries as violations of most-favoured nation treatment, where Viridium might invoke the Enabling Clause (though it is not entirely clear whether the longer transition periods and the exemption fall under the scope of para. 2(b) of the Enabling Clause), but rather to allege that these advantages are inconsistent with the requirements of the chapeau of Article XX of the GATT 1994 (see paras. 68 ff above). Note that the group of countries with less than 0.15 hectares of arable land per capita includes developed, as well as developing and least-developed countries. The text of the Enabling Clause is attached to this memorandum as Annex 1.]

### **b. Legal Provisions**

85. Article 2.1 of the TBT Agreement provides:

*Preparation, Adoption and Application of Technical  
Regulations by Central Government Bodies*

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

### **c. Relevant Jurisprudence**

86. The Appellate Body has interpreted Article 2.1 of the TBT Agreement in its reports in *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*. The Appellate Body has noted that, for a violation of Article 2.1 to be established, three elements must be satisfied: the measure must be a technical regulation, the imported products must be like the domestic product and the products of other origins, and the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other origins (*US – Tuna II (Mexico)*, para. 202).

87. The Appellate Body has clarified that the interpretation of the concept of “likeness” in Article 2.1 of the TBT Agreement focuses on the “nature and extent of a competitive relationship between and among products” (*US – Clove Cigarettes*, para.

120) and that the analysis of likeness should be undertaken on the basis of the traditional likeness criteria (physical characteristics, end uses, consumer tastes and habits).

88. While the scope of “likeness” in Article 2.1 would appear to be co-extensive with the scope of that concept in Article III:4 of the GATT 1994, the Appellate Body has interpreted the concept of “treatment no less favourable” in Article 2.1 of the TBT Agreement in a manner that is different from the interpretation of the same concept in Article III:4 of the GATT 1994. Whereas a showing that a measure has a detrimental impact on the competitive opportunities of imported products, as compared to like domestic products, is sufficient to find a violation of Article III:4 of the GATT 1994, such a showing is not dispositive for the purposes of Article 2.1 of the TBT Agreement. Instead, a measure that does not *de jure* discriminate against imports will only violate Article 2.1 of the TBT Agreement if the complainant can show that (1) the measure has a detrimental impact on the competitive opportunities of imported products and (2) that detrimental impact does not stem exclusively from a legitimate regulatory distinction (para. 182).

89. In *EC – Seal Products*, the Appellate Body noted that there are “important parallels” between the analysis of whether a detrimental impact stems exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement and the analysis of whether discrimination is “arbitrary or unjustifiable” under the chapeau of Article XX (para. 5.310). Thus, the Appellate Body highlighted that both Article 2.1 and the chapeau do not “operate to prohibit *a priori* any obstacle to international trade”, but rather provide that such obstacles are justified when they meet the respective legal standard. However, the Appellate Body also noted “significant differences” between the legal standards applicable under the two provisions. Most importantly, in the context of Article 2.1, it is only the regulatory distinction that accounts for the detrimental impact on imported products that is to be examined for its legitimacy. Under the chapeau, by contrast, a measure can be found to be applied in a manner that is arbitrarily or unjustifiably discriminatory on a number of grounds, including grounds which differ in their “nature and quality” from the discrimination that was found to be inconsistent with the non-discrimination obligations of the GATT 1994 (para. 5.312).

#### **d. Arguments for Ruberia**

90. Ruberia could argue that the ARRA is inconsistent with the MFN obligation in Article 2.1 of the TBT Agreement on the following basis:

- Likeness: non-ARRA-compliant animal products of Ruberian origin are “like” non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita, since there is no evidence of differences in physical characteristics, end uses or consumer preferences between these products, and the ARRA distinguishes them solely on the basis of origin.
- Detrimental impact on the competitive opportunities of imported products: Article 4 of the ARRA has a detrimental impact on the competitive opportunities of non-ARRA-compliant animal products of



Ruberian origin as compared to like products from countries with less than 0.15 hectares of arable land per capita, since the sale of the former products is banned, while the sale of the latter products is allowed.

- De jure discrimination: since the exception from the sales ban of non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita is *de jure* discriminatory, no additional inquiry into whether the detrimental impact stems exclusively from a legitimate regulatory distinction is required.

#### **e. Arguments for Viridium**

91. In response, Viridium could argue as follows:

- Likeness: it will be hard for Viridium to argue that non-ARRA-compliant animal products of Ruberian origin are not “like” non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita. Viridium may want to concede this element.
- De jure discrimination: the exception for animal products from countries with less than 0.15 hectares of arable land per capita is not *de jure* discriminatory, since there would only be discrimination if such countries in fact produced animal products that are “like” animal products produced by Ruberia and with respect to which the measure would hence modify the conditions of competition to the detriment of Ruberian products; and whether this is so is a factual question. [Note that this argument is very weak; however, Viridium will have to argue somehow that this aspect of the measure is not *de jure* discriminatory if it wants to have any chance of saving this aspect of the measure from a finding of inconsistency under the TBT Agreement.]
- De facto discrimination calls for additional inquiry: as a result, an additional inquiry is required to establish whether the regulatory distinction between non-ARRA-compliant animal products from countries with less than 0.15 hectares of arable land per capita, on the one hand, and like products from countries with equal to or more than 0.15 hectares of arable land per capita, on the other hand, is legitimate.
- Legitimate regulatory distinction: the regulatory distinction is legitimate, because requiring countries with less than 0.15 hectares of arable land per capita to observe the minimum space allowances mandated by the ARRA would impose undue hardship on such countries, given the limited arable land that they have available.

## **7. Article 2.1 of the TBT Agreement – national treatment**

### **a. Ruberia’s legal claim**

92. Ruberia submits that the ARRA is inconsistent with Article 2.1 of the TBT Agreement because it accords treatment to animal products imported from Ruberia that is less favourable than the treatment accorded to like domestic products.

### **b. Legal Provisions**

93. Article 2.1 of the TBT Agreement provides:

*Preparation, Adoption and Application of Technical  
Regulations by Central Government Bodies*

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

### **c. Relevant Jurisprudence**

94. The Appellate Body has interpreted Article 2.1 of the TBT Agreement in its reports in *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*. The Appellate Body has noted that, for a violation of Article 2.1 to be established, three elements must be satisfied: the measure must be a technical regulation, the imported products must be like the domestic product and the products of other origins, and the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other origins (*US – Tuna II (Mexico)*, para. 202).

95. The Appellate Body has clarified that the interpretation of the concept of “likeness” in Article 2.1 of the TBT Agreement focuses on the “nature and extent of a competitive relationship between and among products” (*US – Clove Cigarettes*, para. 120) and that the analysis of likeness should be undertaken on the basis of the traditional likeness criteria (physical characteristics, end uses, consumer tastes and habits).

96. While the scope of “likeness” in Article 2.1 would appear to be co-extensive with the scope of that concept in Article III:4 of the GATT 1994, the Appellate Body has interpreted the concept of “treatment no less favourable” in Article 2.1 of the TBT Agreement in a manner that is different from the interpretation of the same concept in Article III:4 of the GATT 1994. Whereas a showing that a measure has a detrimental impact on the competitive opportunities of imported products, as compared to like domestic products, is sufficient to find a violation of Article III:4 of the GATT 1994, such a showing is not dispositive for the purposes of Article 2.1 of the TBT Agreement. Instead, a measure that does not *de jure* discriminate against imports will only violate Article 2.1 of the TBT Agreement if the complainant can

show that (1) the measure has a detrimental impact on the competitive opportunities of imported products and (2) that detrimental impact does not stem exclusively from a legitimate regulatory distinction (para. 182).

#### **d. Arguments for Ruberia**

97. Ruberia could argue that the ARRA is inconsistent with the national treatment obligation in Article 2.1 of the TBT Agreement because

- Likeness: non-ARRA-compliant beef and non-ARRA-compliant eggs are “like” ARRA-compliant beef and ARRA-compliant eggs, as they have the same physical characteristics and end uses, are subject to the same consumer preferences, and are in a strong competitive relationship with each other. [Note that beef and eggs are the only animal products for which the record provides the market share information that is indispensable for a *de facto* discrimination claim.]
- Detrimental impact on competitive opportunities: with respect to eggs, Ruberia could argue that the proportion of the Ruberian production of eggs that will be banned under the measure exceeds the proportion of domestic production that will be banned. The measure thus has a disproportionate impact on Ruberian eggs, as compared to domestic eggs.
- Legitimate regulatory distinction: the detrimental impact on Ruberian eggs (and beef, if the additional argument mentioned below is made) does not stem exclusively from a legitimate regulatory distinction. There are no valid animal welfare or animal health reasons that justify the minimum space allowances imposed by the ARRA. A regulatory distinction between products that comply with the minimum space allowances of the ARRA, on the one hand, and like products that do not comply with those allowances, on the other hand, is therefore not legitimate.

[Note to Panellists: it is important to remember that only the regulatory distinction between products that comply with the minimum space allowances of the ARRA, on the one hand, and like products that do not comply with those allowances, on the other hand, is relevant to Ruberia’s national treatment claim under Article 2.1 of the TBT Agreement, because this is the regulatory distinction that accounts for the detrimental impact on Ruberian beef and eggs. The Appellate Body has made it clear that it is *only* the regulatory distinction that accounts for the detrimental impact on the imports at issue that has to be examined for its legitimacy under Article 2.1 of the TBT Agreement (*US – Tuna II (Mexico)*, paras. 284, 286). The other regulatory distinctions embodied in the ARRA (i.e., those not related to minimum space allowances) are not relevant here: they do not have a detrimental impact on the competitive opportunities of Ruberian products, since Ruberia’s regulations regarding transport and slaughter of farm animals are substantially equivalent to the requirements of the ARRA.]

Potential additional arguments:

- Quantity of affected imports: Ruberia could argue that the quantity of beef and eggs of Ruberian origin that will be banned by the measure exceeds the quantity of banned domestic beef and eggs, and that the measure hence has a detrimental impact on the competitive opportunities of beef and eggs that are imported from Ruberia as compared to domestic beef and eggs.
- Genuine relationship: there is a “genuine relationship” between the measure and the detrimental impact on imports, as it is the measure that bans the importation of non-ARRA-compliant beef and eggs.

**e. Arguments for Viridium**

98. In response, Viridium could argue:

- Likeness: non-ARRA-compliant beef and non-ARRA-compliant eggs are not “like” ARRA-compliant beef and ARRA-compliant eggs. Viridium could argue that there are differences in physical characteristics, as an animal’s ability to move affects the quality of the meat; Viridium could also point to differences in consumer preferences, which are evident in the Viridian people’s strong rejection of industrial agriculture that manifested itself in the election victory of the Green party.
- Detrimental impact on competitive opportunities: it will be hard for Viridium to argue that the measure does not have a disproportionate effect on Ruberian eggs. Viridium could argue, however, that there is no “genuine relationship” between the measure and a potential disproportionate effect on Ruberian eggs (see below).
- Legitimate regulatory distinction: even if the measure has a detrimental impact on Ruberian beef and eggs, that detrimental impact stems exclusively from a legitimate regulatory distinction; more specifically, the regulatory distinction between ARRA-compliant and non-ARRA-compliant beef and eggs is legitimate for animal welfare and animal health reasons.

Responses to potential additional arguments:

- Quantity of affected imports: there is no detrimental impact on the competitive opportunities of beef from Ruberia, as the proportion of the domestic production of beef that is detrimentally affected by the measure exceeds the proportion of beef of Ruberian origin that is detrimentally affected.
- Genuine relationship: there is no “genuine relationship” between the measure and the alleged detrimental impact on Ruberian beef and eggs, as any such detrimental impact is attributable to the private choice of

Ruberian beef and egg producers not to adapt to the requirements of the ARRA. In both Ruberia and Viridium, a majority of egg producers (and a lower percentage of beef producers) will have to adapt to meet the ARRA's requirements. They are thus, as the panel in *US – Tuna II (Mexico)* put it, in a “comparable position” and any detrimental impact on Ruberian beef and egg producers will be attributable to their private choices, rather than the ARRA.

## **8. Article 2.4 of the TBT Agreement**

### **a. Ruberia's legal claim**

99. Ruberia submits that the ARRA is inconsistent with Article 2.4 of the TBT Agreement because it is not based on the relevant international standard, namely, the "WAWC guidelines".

### **b. Legal Provisions**

100. Article 2.4 of the TBT Agreement provides:

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

101. Annex 1.2 to the TBT Agreement defines a "standard" as follows:

#### *2. Standard*

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

#### *Explanatory note*

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

102. Annex 1.4 to the TBT Agreement defines an “international body or system” as follows:

4. *International body or system*

Body or system whose membership is open to the relevant bodies of at least all Members.

**c. Relevant Jurisprudence**

103. The Appellate Body interpreted the requirements of Article 2.4 and related provisions in *EC – Sardines* and *US – Tuna II (Mexico)*. A threshold question for Article 2.4 is whether the document in question constitutes an “international standard” for purposes of the TBT Agreement, and whether it is “relevant” to the subject matter of the technical regulation at issue. To constitute an “international standard” for purposes of the TBT Agreement, a document must fulfil the following requirements: (1) The document must be a “standard” within the meaning of Annex 1.2 to the TBT Agreement; (2) The document must have been approved by an “international standardizing body”, that is, a “body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members” (*US – Tuna II (Mexico)*, para. 359).

i. “International Standardizing Body”

104. The Appellate Body provided further guidance on the components of the definition of an “international standardizing body”. Thus, a “body” is a “legal or administrative entity that has specific tasks and composition” (para. 360). A body has “activities in standardization” if it is “active” in standardization; the Appellate Body clarified that this does not require that the body is, or has been, involved in the development of more than one standard (*ibid.*). “Standardization” is defined as the “activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context”.

105. With regard to the requirement that a body’s activities in standardization be “recognized”, the Appellate Body clarified that, while a standardizing body does not need to have standardization as its principal function, or even as one of its principal functions, the requirement of recognition means, at a minimum, that WTO Members are aware, or have reason to expect, that the body in question is engaged in standardization activities (para. 362).

106. With regard to the requirement that a body must be “open to the relevant bodies of at least all Members” in order to be considered an “international” body for the purposes of the TBT Agreement, the Appellate Body noted that a body will be “open” if membership to the body is not restricted (para. 364). For example, where a WTO Member can only accede to a standardizing body pursuant to an invitation, the invitation must be issued automatically once a Member has expressed interest in joining the body for membership in the body to be considered “open” (para. 386).

107. The Appellate Body further found that the TBT Committee’s *Decision on Principles for the Development of International Standards, Guides and*

*Recommendations with Relation to Article 2, 5, and Annex 3 to the Agreement* (the “TBT Committee Decision”; see Annex 3) can qualify as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” within the meaning of Article 31.3(a) of the *Vienna Convention on the Law of Treaties*. The Appellate Body found that the TBT Committee Decision bears specifically on the interpretation of the term “open” in Annex 1.4 to the TBT Agreement, as well as on the interpretation and application of the concept of “recognized activities in standardization” (para. 372).

ii. Requirement of Consensus

108. There are some questions as to whether an international standardizing body has to approve a document by consensus for it to be considered an “international standard” for the purposes of the TBT Agreement. The uncertainty arises because the composite term “international standard” is not defined in Annex 1 of the TBT Agreement. At the same time, the introductory clause of Annex 1 provides that terms used in the TBT Agreement that are also “presented” in the ISO/IEC Guide 2: 1991, *General Terms and Their Definitions Concerning Standardization and Related Activities* “shall have the same meaning as given in the definitions in the said Guide”. The term “international standard” is defined in the ISO/IEC Guide 2: 1991 as a “standard that is adopted by an international standardizing/standards organization and made available to the public”, while the term “standard” as defined in the Guide requires that the document is “established by consensus”. While the consensus requirement has not been incorporated into the definition of the term “standard” in Annex 1.2 to the TBT Agreement, the Explanatory Note to Annex 1.2 states that “[s]tandards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.”

109. There are two possible interpretations of the Explanatory Note. The first one, which was endorsed by the Appellate Body in *EC – Sardines*, is that adoption by consensus is not a requirement for a document to qualify as an “international standard” for the purposes of the TBT Agreement (para. 222). The second interpretation of the Explanatory Note is that the requirement of consensus was omitted from the definition of a “standard” in Annex 1.2 because the TBT Agreement also covers standards adopted by regional, local and non-governmental standardizing bodies which may not operate on the basis of consensus, and that the omission is not intended to affect the requirement of consensus established by the ISO/IEC Guide 2: 1991 as it relates to “international standards”.

110. The Appellate Body’s interpretation of Annex 1.2 and the Explanatory Note in *EC – Sardines* has been subject to strong criticism, and was not reaffirmed by the Appellate Body in the more recent *US – Tuna II (Mexico)* case (para. 353: “we do not need to address in this appeal the question of whether, in order to constitute an ‘international standard’, a standard must also be ‘based on consensus’”). The question of which interpretation is correct could thus be regarded as open, especially in light of the Appellate Body’s finding that the TBT Committee Decision can qualify as a “subsequent agreement” within the meaning of Article 31.3(a) of the *Vienna Convention on the Law of Treaties*. The TBT Committee Decision provides, under the heading “Impartiality and Consensus”: “Consensus procedures should be



established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.”

#### **d. Arguments for Ruberia**

111. Ruberia could argue that the ARRA is inconsistent with Article 2.4 of the TBT Agreement on the following basis:

- Relevant international standard: the WAWC guidelines are a “relevant international standard” for the purposes of Article 2.4, because:
  - i. Standard: the WAWC guidelines are a “standard” as defined in Annex 1.2 to the TBT Agreement; more specifically, they are embodied in a document that provides guidelines for common and repeated use concerning PPMs that are related to products, compliance with which is not mandatory.
  - ii. Approval by an international standardizing body: the WAWC guidelines were adopted by the WAWC, which qualifies as an “international standardizing body” for the purposes of Article 2.4; more specifically:
    - 1. Body: the WAWC is a body, because it is a “legal or administrative entity that has specific tasks and composition”; the WAWC has a secretariat and has a specific mission (the promotion of animal welfare) and composition (its membership).
    - 2. Recognized activities in standardization: the WAWC has “recognized activities in standardization”, because, even though it has only been involved in the development of a single standard, its activities in standardization were widely publicized (non-member states and the public were given the opportunity to comment on the draft guidelines), so all WTO Members would have been aware of these activities; moreover, the WAWC has followed the principles for the development of international standards laid down in the TBT Committee Decision.
    - 3. Openness: the WAWC is open to the relevant bodies of at least all WTO Members, as any WTO Member can accede by expressing its interest to join to the WAWC secretariat.
  - iii. Consensus: while the WAWC guidelines were not adopted by consensus, this is not a requirement to meet the definition of an “international standard” for the purposes of the TBT Agreement, as the Appellate Body clarified in *EC – Sardines*.
  - iv. Relevance: the WAWC guidelines are “relevant” to the ARRA, because the guidelines cover the same subject matter as the ARRA, namely, minimum space allowances.

- As a basis: the ARRA is not based on the WAWC guidelines, because the minimum space allowances in the ARRA are significantly higher than those recommended in the WAWC.
- Effectiveness and appropriateness: the WAWC guidelines would not be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by Viridium; in fact, Viridium voted for the adoption of the guidelines (when the previous government was in power).

### **e. Arguments for Viridium**

112. In response, Viridium could argue that the ARRA is not inconsistent with Article 2.4 of the TBT Agreement on the following basis:

- Relevant international standard: the WAWC guidelines are not a “relevant international standard” for the purposes of Article 2.4, because:
  - i. the WAWC guidelines do not meet the definition of a “standard” as defined in Annex 1.2 to the TBT Agreement, because they have not been approved by a “recognized body”;
  - ii. the WAWC guidelines were adopted by the WAWC, which is not an “international standardizing body” for the purposes of Article 2.4; in particular, the WAWC does not have “recognized activities in standardization”; rather, the WAWC’s mission is the provision of technical assistance to developing countries. Before developing the guidelines regarding minimum space allowances, the WAWC had never engaged in any activities resembling standardization. WTO Members would thus not be aware of any standardizing activities taking place in the WAWC, and those activities could thus not be said to be “recognized” by WTO Members. Moreover, the WAWC is not equipped to live up to the principles of transparency and inclusiveness outlined in the TBT Committee Decision.
  - iii. the WAWC guidelines were not adopted by consensus, which, on the proper interpretation of the Explanatory Note to Annex 2.1 to the TBT Agreement, is a requirement to meet the definition of an “international standard” for the purposes of the TBT Agreement (see the discussion in “Relevant Jurisprudence” above). This view is also reinforced by the TBT Committee Decision, which the Appellate Body has found can qualify as a “subsequent agreement” within the meaning of Article 31.3(a) of the *Vienna Convention on the Law of Treaties*.
- As a basis: if the WAWC guidelines were found to be a relevant international standard, *quod non*, the ARRA could be said to be based

on the WAWC guidelines, since the minimum space allowances in the ARRA are merely a variation on those recommended in the WAWC.

- Effectiveness and appropriateness: the WAWC guidelines would be an ineffective and inappropriate means to fulfil the legitimate objectives pursued by Viridium, as the minimum space allowances prescribed in the guidelines are not strict enough to effectively prevent concentrated farming and the associated risks to human and animal health and the environment.

## **9. Articles 3.1 and 3.4/4.1 of the TBT Agreement**

### **a. Ruberia's legal claim**

113. Ruberia submits that the ARRA is inconsistent with Articles 3.1 and 3.4 or, in the alternative, 4.1 of the TBT Agreement as it does not take reasonable measures to prevent, and in fact encourages, private entities to act inconsistently with Article 2.4 of the TBT Agreement or with paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 to the TBT Agreement.

[Note to Panellists: Ruberia's (indirect) challenge to the private standards adopted by the association of Viridium's largest retailers might appear difficult to reconcile with Ruberia's MFN claim, which targets the discrimination arising from the exemption for countries with less than 0.15 hectares of arable land per capita. This impression might arise because the private standards, which do not include such an exemption, eliminate the discriminatory effects of the ARRA's exemption in the 80 per cent of the market that is controlled by the members of the retailers' association. Why would Ruberia still want to bring both claims? There are at least two reasons:

- First, assuming that Ruberia prevails in its challenge against the ARRA and, as a result, Viridium has to modify the minimum space allowances in the ARRA, Ruberia will only be able to take full advantage of the restored market access if the private standards are modified as well.
- Second, the fact that Ruberia frames its challenge to the ARRA as a discrimination claim arguably does not mean that it is concerned about the discrimination *per se*. Arguably, states frequently bring discrimination claims not because they are concerned about the discrimination *per se*, but rather because they hope to get rid of the challenged measure, and are hoping to use the discrimination claim as a vehicle to achieve that. This scenario is especially common where the discrimination arises from a prohibition of the complainant's products coupled with a permission of other countries' products. In this scenario, the respondent could eliminate the discrimination by prohibiting the other countries' products as well, but the complainant would gain very little from that – what it wants is to do away with the prohibition *of its own* products. (The *EC – Seal Products* case provides a parallel: arguably, Canada and Norway did not care whether Greenlandic seal products have access to the EU market or not and whether their own seal products are hence discriminated against – indeed, it is hard to see what Canada and Norway would gain from a prohibition of Greenlandic seal products as long as their own seal products remain prohibited as well. What Canada and Norway cared about was that their own seal products gain access to the EU market, and they used the discrimination claims as a vehicle to achieve that).]

## **b. Legal Provisions**

114. Article 3 of the TBT Agreement provides, in relevant part:

*Article 3: Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies*

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

...

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

115. Article 4.1 of the TBT Agreement provides:

*Article 4: Preparation, Adoption and Application of Standards back to top*

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the “Code of Good Practice”). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good

Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

116. Annex 3.F to the TBT Agreement provides:

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

117. Annex 1.8 to the TBT Agreement defines a “non-governmental body” as follows:

8. *Non-governmental body*

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

### **c. Relevant Jurisprudence**

118. There is currently no jurisprudence by panels or the Appellate Body on the interpretation of Articles 3.1, 3.4 or 4.1 of the TBT Agreement.

### **d. Arguments for Ruberia**

119. Ruberia could argue that the ARRA is inconsistent with Articles 3.1 and 3.4 of the TBT Agreement on the following basis:

- Non-governmental body: the association of Viridium’s largest food retailers is a “non-governmental body” within the meaning of Annex 1.8 to the TBT Agreement.
- Technical regulation: the requirements adopted by the association constitute a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement, since their content corresponds with the requirements of the ARRA (minus the transitional periods and exemptions), which (as argued above) constitutes a technical regulation. While compliance with the ARRA is *de jure* mandatory, compliance with the requirements adopted by the association is *de facto* mandatory, given that the association represents retailers that together control 80 per cent of the market for the products in question.
- Non-compliance with Article 2.4: the requirements adopted by the association are inconsistent with the requirements of Article 2.4, because they are not based on the relevant international standard, namely, the WAWC guidelines (see arguments above).

- Failure to ensure compliance by non-governmental bodies: Article 5 of the ARRA, which provides that private retailers that sell animal products may implement more stringent standards than those provided for in the ARRA, constitutes a violation of Viridium’s obligation under Article 3.1 of the TBT Agreement to take reasonable measures to ensure compliance by non-governmental bodies with the provisions of Article 2 of the TBT Agreement.
- Encouragement of non-compliance by non-governmental bodies: Article 5 of the ARRA, which provides that private retailers that sell animal products may implement more stringent standards than those provided for in the ARRA, constitutes a violation of Viridium’s obligation under Article 3.4 of the TBT Agreement not to take measures which encourage non-governmental bodies to act in a manner that is inconsistent with the provisions of Article 2 of the TBT Agreement.

120. In the alternative, Ruberia could argue that the ARRA is inconsistent with Article 4.1 of the TBT Agreement on the following basis:

- Non-governmental body: the association of Viridium’s largest food retailers is a “non-governmental body” within the meaning of Annex 1.8 to the TBT Agreement.
- Standard: the requirements adopted by the association constitute a “standard” within the meaning of Annex 1.2 to the TBT Agreement, since their content corresponds with the requirements of the ARRA (minus the transitional periods and exemptions), except that compliance with them is not mandatory.
- Non-compliance with paragraph F of the Code of Good Practice: the requirements adopted by the association are inconsistent with paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 to the TBT Agreement, because they are not based on the relevant international standard, namely, the WAWC guidelines (see arguments on Article 2.4 of the TBT Agreement above).
- Failure to ensure compliance by non-governmental bodies: Article 5 of the ARRA, which provides that private retailers that sell animal products may implement more stringent standards than those provided for in the ARRA, constitutes a violation of Viridium’s obligation under Article 4.1 of the TBT Agreement to take reasonable measures to ensure compliance by non-governmental bodies with the Code of Good Practice.
- Encouragement of non-compliance by non-governmental bodies: Article 5 of the ARRA, which provides that private retailers that sell animal products may implement more stringent standards than those provided for in the ARRA, constitutes a violation of Viridium’s obligation under Article 4.1 of the TBT Agreement not to take measures

which have the effect of, directly or indirectly, encouraging non-governmental bodies to act in a manner that is inconsistent with the Code of Good Practice.

**e. Arguments for Viridium**

121. In response, Viridium could argue as follows:

- Technical regulation: the requirements adopted by the association do not constitute a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement, because compliance with them is not mandatory. The mere fact that the association represents retailers that together control 80 per cent of the market for the products in question does not render compliance with the requirements “mandatory” for the purposes of Annex 1.1 of the TBT Agreement.
- Non-compliance with Article 2.4 and paragraph F of the Code of Good Practice: the requirements adopted by the association are not inconsistent with Article 2.4 or paragraph F of the Code of Good Practice. As argued above, the WAWC guidelines do not qualify as an “international standard”. In any event, the requirements adopted by the association are based on the WAWC guidelines, since the minimum space allowances required by the association are merely a variation on those recommended in the WAWC.



## **Indicative List of Relevant Case Law**

Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS400/AB/R, 22 May 2014.

Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R – WT/DS386/AB/R, 29 June 2012.

Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012.

Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012.

Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007.

Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002.

Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001.

Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998.

## **Indicative List of Background Readings**

Michael Trebilcock, Robert Howse, and Antonia Eliason (2013): *The Regulation of International Trade* (Oxford/New York: Routledge)

Peter Van den Bossche and Werner Zdouc (2013): *The Law and Policy of the World Trade Organization. Text, Cases and Materials* (Cambridge: Cambridge University Press)

Tracy Epps and Michael J. Trebilcock (eds.) (2013): *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham/Northampton: Edward Elgar Publishing)

Gabrielle Marceau and Joel P. Trachtman (2014): 'A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade', in: *Journal of World Trade* 48 (2), 351-432.

Lothar Ehring (2002): 'De Facto Discrimination in World Trade Law. National and Most-Favoured-Nation Treatment – or Equal Treatment?', in: *Journal of World Trade* 36 (5), 921-977.

Howse, Robert (2011): 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards"', in: Christian Joerges and Ernst-Ulrich Petersmann (eds.): *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford/Portland: Hart Publishing), 383-395.