



Team: 062

ELSA MOOT COURT COMPETITION ON WTO LAW

2014 – 2015

Viridium – Measures Affecting the Agricultural Sector

RUBERIA

(Complainant)

VS

VIRIDIUM

(Respondent)

SUBMISSION OF THE RESPONDENT

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List of Abbreviations

0.15 ha exemption	Exemption from Article 2 of the ARRA for countries with less than 0.15 ha arable land per capita
AB	Appellate Body
ABR	Appellate Body Report
ARRA	Agricultural Reconstruction and Reform Act
CAFOs	Concentrated Animal Feeding Operations
CGP	Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the <i>TBT</i>
Conforming animal products	Animal products that conform to the requirements of the ARRA
Ed./eds.	Editor / editors
GATT	General Agreement on Tariffs and Trade 1994
ha	Hectares
MFN treatment	Most-favoured nation treatment
Non-conforming animal products	Animal products that do not conform to the requirements of the ARRA
NPR PPM	Non-product related process and products method
PPM	Process and production method
PR	Panel Report
PR PPM	Product related process and production method
<i>TBT</i>	Agreement on Technical Barriers to Trade
TBT Committee	Committee on Technical Barriers to Trade
VCLT	Vienna Convention on the Law of Treaties
WAWC	World Animal Welfare Council
WAWC guidelines	WAWC guidelines on minimum space allowance
WTO	World Trade Organization

B. SUBSTANTIVE**Summary of Arguments**

I. Claims related to the GATT

- The ARRA and its enforcement are consistent with Article I:1 or Article III:4 of the GATT.
 - The ARRA and its enforcement are consistent with Article I:1 of the GATT because the exemption for countries with less than 0.15 ha arable land per capita does not have a discriminatory effect.
- The ARRA and its enforcement are consistent with Article III:4 of the GATT.
 - Animal products that do not conform to the requirements of the ARRA are not like products that conform to the requirements of the ARRA;
 - In any event, there is no less favourable treatment granted to imported animal products as compared to domestic animal products.
- Should the Panel find the ARRA to be inconsistent with the GATT, it is in any case justified under Article XX of the GATT.
 - The ARRA is necessary to protect public morals and is therefore provisionally justified under Article XX (a) of the GATT;
 - The ARRA is necessary to protect animal health and is therefore provisionally justified under Article XX (b) of the GATT;
 - The ARRA relates to the conservation of natural resources and is made effective in conjunction with restrictions on domestic production and consumption. It is therefore provisionally justified under Article XX (g) of the GATT;
 - There are no reasonably available alternative measures to the ARRA that would reach the same level of protection.
 - The ARRA does not discriminate arbitrarily or unjustifiably. It is not a disguised restriction on trade. Therefore, the ARRA meets the requirements of the chapeau of Article XX of the GATT.

I. Claims related to the *TBT*

- The ARRA does not fall within the scope of the *TBT* because it is not a technical regulation within the meaning of Annex 1.1 of the *TBT*. The ARRA is not a technical regulation because it does not lay down Process and Production Methods that are related to product characteristics.

- Even if it would be considered a technical regulation, the ARRA and its enforcement are consistent with Article 2.1 of the *TBT*.
 - Concerning the Most-Favoured Nation treatment obligation: The ARRA and its enforcement do not treat imported products from Ruberia less favourably than imports from other countries.
 - Concerning the national treatment obligation:
 - Products that do not conform to the ARRA and products that conform to the ARRA are not like within the meaning of Article 2.1 of the *TBT*;
 - In any case, the treatment provided to imports is no less favourable than that given to domestic products;
 - In any event, any detrimental impact that arises from the ARRA and its enforcement stems exclusively from a legitimate regulatory distinction.
- The ARRA and its enforcement are consistent with Article 2.4 of the *TBT*.
 - The WAWC guidelines are not a relevant international standard;
 - The WAWC guidelines are neither appropriate nor effective to ensure animal health and protection of the environment at the level of protection Viridium desires.
- The ARRA and its enforcement are consistent with Articles 3.1, 3.4 and Article 4.1 of the *TBT*.
 - The retailer's regulatory scheme proclaimed by Viridium's association of largest food retailers is neither a technical regulation within the meaning of Annex 1.1 of the *TBT*, nor a standard within the meaning of Annex 1.2 of the *TBT*;
 - The regulatory scheme is consistent with Article 2.4 of the *TBT* or Paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the *TBT*;
 - Even if the regulatory scheme is inconsistent with the *TBT*, Viridium neither encouraged nor required this activity nor are there any reasonable measures to be taken to prevent such activity.

Statement of facts

Viridium is a small, developed country with significant trading ties to Ruberia. Viridium recently suffered a devastating natural disaster. This led to the destruction of the majority of Viridium's agricultural infrastructure as well as to the death of most of its farm animals. Additionally, the disaster resulted in spills of manure and wastewater from several Concentrated Animal Feeding Operations (CAFOs). This currently threatens to pollute several of Viridian's rivers and lakes. The pre-disaster government of Viridium resigned shortly after the catastrophe. In the ensuing elections, the Green Party won the majority of the seats in parliament. The Green Party campaigned on a promise to transform the agricultural sector in a sustainable manner.

The newly formed government of Viridium is strongly committed to fulfil this promise. Through the adoption of the Agricultural Reconstruction and Reform Act (ARRA), Viridium aims to prevent the re-emergence of industrial farming practices in Viridium, support animal health and welfare and thus lead Viridium into a more sustainable future. The natural disaster raised the public's concern about the safety of the environment and the animals as a part of it. The requirements of the ARRA regarding space allowance, transport and slaughter, will lead to major transformations in the agricultural sectors of Viridium and its trading partners, including Ruberia. Currently, 70% of eggs and 50% of beef generated in Viridium do not conform to the requirements of the ARRA. As in Viridium, Ruberian producers will also have to undergo changes as 80% of eggs and 40% of beef produced in Ruberia do not conform to the requirements of the ARRA.

The World Animal Welfare Council (WAWC) is an international organization with 35 members, including Ruberia and Viridium. Only five members of the WAWC are developing countries. The WAWC recently adopted new guidelines. These set less stringent requirements on minimum space allowances than the ARRA. The main objective of the WAWC is to provide technical assistance to developing countries. The recent guidelines were adopted only by a narrow majority, since many members heavily contested their sufficiency to address animal health and welfare.

The association of Viridium's largest private food retailers that holds 80% of the market has announced that it will apply the requirements of the ARRA immediately. They will not grant the transitional period in order to encourage faster and more uniform transition for all of the market actors.

Identification of the measure at issue

Article 4 of the ARRA prohibits the sale and importation of any products derived from animals not raised or processed according to its requirements (non-conforming products). Article 2 of the ARRA sets minimum space allowances for cattle, hogs and poultry, and bans the use of battery cages for hens. Article 3 and Annex 2 set requirements for animal transfer and slaughter. Developed countries are granted a transitional period of one year, while developing countries receive three years to comply with the new requirements. An exemption from the space allowance requirements of Article 2 is given to least-developed countries and countries with less than 0.15 hectares of arable land per capita (0.15 ha exemption). Article 5 of the ARRA allows private retailers to implement more stringent requirements.

Legal Pleadings

I. The ARRA and its enforcement are consistent with Article I:1 and Article III:4 of the GATT.

A. The ARRA and its enforcement are consistent with Article I:1 of the GATT.

1. The ARRA does not grant an advantage to animal products that fall under the 0.15 ha exemption because this exemption from the requirements of Article 2 of the ARRA does not have a discriminatory effect. The prohibition of advantageous treatment under Article I:1, a cornerstone of the GATT¹, contains the principle of non-discrimination.² In *US – Gasoline*, the AB emphasised, with reference to the general rule of interpretation in Article 31(1) of the VCLT that “the words of a treaty ... are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose”.³ The most favoured nation (MFN) treatment seeks to “prohibit discrimination among like products originating in different countries.”⁴ It is thus only to the extent that measures discriminate among like products that they are not allowed under Article I:1 of the GATT.⁵

2. Countries with less than 0.15 ha of arable land per capita face major difficulties when implementing the generous space allowance requirements of the ARRA because they do not have enough arable land available. The ARRA addresses these difficulties by creating

¹ ABR, *Canada – Autos*, [69].

² *Ibid.*, [82].

³ ABR, *US – Gasoline*, 17.

⁴ *Ibid.*, [84]; cf. Lester et.al. (2008), 330.

⁵ ABR, *EC – Bananas III*, [206].

exemptions from the requirements of its Article 2. In doing so, the ARRA balances the differential impact of Article 2 that stems from the different amount of arable land available to them. The 0.15 ha exemption thus creates equal market access conditions among the products. In light of the object and purpose of the GATT, which is to eliminate discriminatory treatment in international commerce,⁶ Viridium thus submits that such even-handed balance does not amount to a discriminatory advantage towards particular countries. Accordingly, the ARRA is consistent with Article I:1 of the GATT.

B. The ARRA and its enforcement are consistent with Article III:4 of the GATT.

3. Article III:4 of the GATT seeks “to avoid protectionism”.⁷ It obliges Members to treat imported products no less favourably than like domestic products.⁸ Viridium considers that the ARRA does not protect domestic products and is thus consistent with Article III:4. *First*, non-conforming products imported from Ruberia are not *like* products that conform to the requirements of the ARRA (conforming products). *Secondly*, even if these products are considered like, Ruberian products are treated no less favourably than domestic products.

1. Non-conforming animal products are not like products that conform to the requirements of the ARRA.

4. According to *EC – Asbestos*, likeness is to be determined by the competitive relationship of products.⁹ The general criteria in analysing likeness are “(i) the properties and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits ... and (iv) the tariff classification of the products.”¹⁰ Both non-conforming and conforming products have the same properties, end-uses and tariff category, yet regarding consumers' tastes and habits they are no longer competitive for the purpose of the Viridian market. Viridium believes that conforming products “are tastier and of better quality”.¹¹ However, food quality is a highly subjective concept, which essentially reflects consumer's acceptance of a product.¹² Consumers overwhelmingly believe that sound animal welfare improves the taste of meat.¹³ In Viridium, current threats from manure and wastewater to rivers and lakes,

⁶ Cf. Preamble of the GATT.

⁷ ABR, *Japan – Taxes on Alcoholic Beverages*, [109].

⁸ Van den Bossche and Zdouc (2013), 352.

⁹ ABR, *EC – Asbestos*, [99].

¹⁰ ABR, *EC – Asbestos*, [101].

¹¹ Fourth recital of the Preamble of the ARRA in *the Case* at [3].

¹² Moskowitz (1995), 157.

¹³ Mayfield et.al. (2007), 63.

stress the dangers associated with industrial farming. The Viridian consumers' new awareness of these issues is reflected in the election of the hitherto obscure Green Party. The Viridian consumers therefore distinguish between products derived from humanely raised animals, and products from animals treated differently. Viridium thus considers that, in the Viridian market these products are no longer competitive and thus not like within the meaning of Article III:4 of the GATT.

2. In any case, the ARRA does not provide less favourable treatment.

5. In *EC – Asbestos*, the AB found that “a Member may draw distinctions between [like] products ..., without, for this reason alone, according ... ‘less favourable treatment’”.¹⁴ Thus, even if the Panel considers non-conforming and conforming products like, it may still conclude that the ARRA is consistent with Article III:4 of the GATT.

6. According to the AB, “the existence of [an] additional requirement may provide a significant indication that imported products are treated less favourably.”¹⁵ Therefore, *a contrario*, formally equal treatment must strongly suggest that the treatment accorded to imports is no less favourable than to domestic products. Viridian products must comply with the same requirements as other developed countries that do not fall under the 0.15 ha exemption. The same transitional period applies to all developed countries, including Viridium. Thus, the ARRA accords formally identical treatment to imports and domestic products, which indicates that there is no less favourable treatment given to the latter.

7. The AB further emphasised that less favourable treatment relates to the treatment accorded “to the *group* of ‘like’ imported products [in comparison to treatment] accorded to the *group* of ‘like’ domestic products.”¹⁶ The question is thus whether the burden arising from the measure is heavier on imports than it is on domestic products.¹⁷

8. Considering that 60% of beef products in Ruberia comply with the requirements of Article 2 of the ARRA, whereas only 50% of the beef products in Viridium conform to the ARRA, relatively more domestic products must be adapted to the new space allowance requirements to be granted market access in the future. Thus, the measure does not place a heavier burden on imported beef but in fact affects domestic products more heavily.

¹⁴ ABR, *EC – Asbestos*, [100].

¹⁵ ABR, *Thailand – Cigarettes*, [130].

¹⁶ ABR, *EC – Asbestos*, [100] (emphasis added).

¹⁷ Ehring (2002), 925.

B. Substantive

Viridium

BEEF	Ruberia	Viridium
non-conforming to the ARRA	40%	50%
conforming to the ARRA	60%	50%

9. With regard to egg products, a similar pattern is displayed:

EGGS	Ruberia	Viridium
non-conforming to the ARRA	80%	70%
conforming to the ARRA	20%	30%

10. Whereas in the case of egg products, the ARRA is slightly asymmetrical in favour of domestic products, the decisive factor for the determination of less favourable treatment is the treatment of the *entire group* of imported animal products. Even if the ARRA affects different subgroups of animal products differently, it is overall applied in an even-handed manner and does not place a heavier burden on imported products.

11. Viridium further submits that Ruberia does not carry a heavier burden due to its higher market share. The AB recognised that a detrimental effect, which is explained by factors unrelated to the foreign origin of a product, such as the market share, does not amount to less favourable treatment.¹⁸ Such a finding would in fact favour economies that can supply domestic demand from domestic production. They would be consistent with Article III:4 of the GATT when regulating market access, while Viridium and other small economies would have to rely on the general exceptions to justify such measures.

12. Therefore, Viridium submits that there is no less favourable treatment accorded to animal products imported from Ruberia than to domestic products.

II. The ARRA is in any event justified under Article XX of the GATT.

13. Should the Panel find the ARRA to be inconsistent with the GATT, Viridium submits that the ARRA is justified by Article XX (a), (b) and (g) of the GATT. Article XX applies if a measure, *firstly*, falls under one of the exceptions in paragraphs (a) to (j) and, *secondly*, fulfils the requirements of the introductory clause (“the chapeau”).¹⁹

A. *The ARRA falls within the scope of Article XX (a), (b) and (g) of the GATT.*

14. Viridium submits that the ARRA is provisionally justified under Article XX (a), (b) and (g) of the GATT because it is necessary (1.) to protect public morals and (2.) animal health. It (3.) relates to the conservation of exhaustible natural resources, which is made

¹⁸ ABR, *Dominican Republic – Cigarettes*, [96].

¹⁹ ABR, *US – Gasoline*, 22; Van den Bossche and Zdouc, 552.

effective in conjunction with restrictions on domestic production and consumption. Additionally, there are (4.) no reasonably available alternatives to the ARRA. The necessity test, as outlined by the AB, is a “process of weighing and balancing”²⁰ of “all the relevant factors, particularly the extent of the contribution to the achievement of the measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake.”²¹ In *Brazil – Retreaded Tyres*, the AB held that a measure must be apt to make a material contribution to the achievement of its objective to be considered necessary.²² This jurisprudence seems to have merged the necessity test and the test under Article XX (g),²³ which requires a close and genuine relationship of ends and means between a measure and the conservation of exhaustible resources.²⁴ The weighing and balancing process finally includes an analysis of whether a WTO consistent alternative measure is reasonably available.²⁵

15. The following sections evaluate the weighing and balancing process as it relates to the ARRA and its objectives.

1. The ARRA is necessary to protect public morals.

16. The Panel in *US – Gambling* defined public morals as “standards of right and wrong conduct”.²⁶ It further determined that Members have some scope to apply this concept for themselves.²⁷ Public morals are an important issue pursued by public policy.²⁸ An increasing amount of consumers in developed countries shares ethical concerns for animal welfare.²⁹ Due to the devastating natural disaster, the Viridian people are particularly sensitive to the issues of animal welfare and sustainable agriculture. The importance of this belief is shown in the election of the hitherto obscure Green Party, which promised to transform the agricultural sector in a sustainable manner.

17. The ARRA effectively addresses these concerns by prohibiting the sale and importation of products derived from animals that were treated inhumanely. Because

²⁰ ABR, *Korea – Beef*, [164].

²¹ ABR, *Brazil – Retreaded Tyres*, [143]; cf. ABR, *US – Gambling*, [306]; ABR, *EC – Asbestos*, [172]; ABR, *Korea – Beef*, [164].

²² ABR, *Brazil – Retreaded Tyres*, [150].

²³ Marceau and Wyatt (2013), 297-298.

²⁴ Cf. ABR, *US – Shrimp*, [136]; ABR, *China – Rare Earths*, [5.94].

²⁵ ABR, *Korea – Beef*, [166]; ABR, *Brazil – Retreaded Tyres*, [143].

²⁶ PR, *US – Gambling*, [6.465].

²⁷ *Ibid.* [6.461]; cf. ABR, *EC – Seal Products*, [5.200].

²⁸ PR, *China – Audiovisuals*, [7.817].

²⁹ Mayfield et.al. (2007), 59.

inhumane treatment is an abstract concept, the ARRA lays down concrete requirements. The ARRA thus makes a substantial contribution to the protection of public morals.

18. The ARRA covers three types of animals: poultry, beef and hogs. Producers from Viridium and Ruberia are the major market holder of the animal products in Viridium. Both are developed countries and should have the resources to adapt to the requirement of the ARRA. Viridium thus considers that the ARRA has a minimal impact on international trade. It therefore is within the scope of Article XX (a) of the GATT.

2. The ARRA is necessary to protect animal health.

19. The recent natural disaster amplified the issue further for Viridium, as a majority of its farm animals died. The ARRA protects animal health through minimum space allowance, transport and slaughter requirements. Absence of space may lead to behavioural restrictions, which in turn may cause physical problems and abnormal behaviour that can lead to injury or death.³⁰ One of the most behaviourally restrictive environments are conventional cages for hens.³¹ By granting more suitable space allowances to animals and prohibiting the use of battery cages, the ARRA thus protects animals from serious injury. Additionally, animals are less likely to be injured when the limited use of electric prods reduces stress and non-slip flooring reduces fall rates.³² Since the ARRA applies to the sale of all animal products in Viridium, it protects animal health in all countries that engage in trade with Viridium. As laid out above, the restrictions on international trade are minor. The ARRA thus falls within the scope of Article XX (b) of the GATT.

3. The ARRA relates to the conservation of exhaustible resources and is made effective in conjunction with domestic restrictions.

20. *Firstly*, the AB emphasised that the definition of exhaustible natural resources must be based on an evolutionary interpretation.³³ The human right to water, recognised by the United Nations General Assembly,³⁴ underlines the importance of the protection of clean water. Since the amount of clean, fresh water is shrinking quickly,³⁵ Viridium submits that water must be regarded an exhaustible natural resource. *Secondly*, the measure's restrictions on international trade need to be complemented with restrictions on domestic production or

³⁰ Mirle (2012), [5.1].

³¹ *Ibid.*

³² European Commission Directorate General for Health and Consumer Protection (2004), 30.

³³ ABR, *US – Shrimp*, [130].

³⁴ United Nations General Assembly, 2.

³⁵ World Trade Report (2010), 49.

consumption.³⁶ The ARRA applies to the importation as well as sale of animal products. The ARRA is thus made effective in conjunction with restrictions on domestic production and consumption. It falls within the scope of Article XX(g) of the GATT.

4. There are no alternative measures reasonably available.

21. It is upon the Claimant to suggest any concrete alternatives.³⁷ However, Viridium would like to emphasise the AB's affirmation in *EC – Asbestos* that “WTO Members have the right to determine the level of protection of health that they consider appropriate”.³⁸ In view of the aftermath of the natural disaster, Viridium chose a high level of protection. A mere labelling requirement, for example, would not achieve such a level of protection.

22. In consideration of the importance of the values protected by the ARRA and its substantial contribution to these objectives, as well as the lack of reasonably available alternatives, Viridium submits that the ARRA is provisionally justified under Article XX (a), (b) and (g) of the GATT.

B. The ARRA respects the requirements of the introductory clause to Article XX of the GATT (“the chapeau”).

23. The chapeau of Article XX of the GATT seeks to prevent “an abuse or misuse of the provisional justification made available by Article XX”.³⁹ A measure must “not be applied in a manner that would constitute ‘arbitrary or unjustifiable discrimination’ between countries where the same conditions prevail [or] in a manner that would constitute ‘a disguised restriction on international trade’”.⁴⁰

24. The ARRA does not discriminate because its requirements apply to both Viridian and Ruberian products. Additionally, Viridium considers that the conditions prevailing in any of the concerned countries are not the same. Due to the disaster, Viridium currently has a largely destroyed agricultural sector and its environment is greatly endangered. Viridium observes that least-developed and developing countries face more difficult conditions in the world economy and thus created an exemption from Article 2 of the ARRA for the first and granted a longer transitional period to the latter. The 0.15 ha exemption is based on the conviction

³⁶ ABR, *China – Rare Earths*, [5.132].

³⁷ ABR, *US – Gambling*, [309].

³⁸ ABR, *EC – Asbestos*, [168].

³⁹ ABR, *US – Shrimp*, [160].

⁴⁰ ABR, *Brazil – Retreaded Tyres*, [215].

that the lack of arable land already disfavors these countries, when it comes to minimum space allowance requirements. Ruberia, on the other hand, is a large, developed country.

25. The AB defined a disguised restriction on international trade as a “concealed or unannounced restriction”.⁴¹ The ARRA transparently sets out the requirements for importation and sale of animal products. Viridium submits thus that the ARRA does not discriminate arbitrarily and unjustifiably between countries where the same conditions prevail and is not a disguised restriction on international trade. It satisfies the conditions of the chapeau of Article XX of the GATT and is consistent with the provisions of the GATT.

III. The ARRA does not fall within the scope of the TBT.

26. A measure falls within the scope of the *TBT* if it is a technical regulation within the meaning of Annex 1.1 of the *TBT*.⁴² A measure is a technical regulation if it, *first*, concerns an identifiable product, *secondly*, lays down product characteristics or related processes and production methods and, *thirdly*, is mandatory.⁴³ Viridium submits that the ARRA is not a technical regulation because it does not lay down processes and production methods that are related to product characteristics.

27. Processes and production methods (PPMs) have traditionally been classified into product-related (PR) and non-product-related (NPR).⁴⁴ In *EC – Seal Products*, the AB confirmed that PR PPMs are within the scope of the *TBT*.⁴⁵ The negotiating history and the language of the *TBT* also indicate that NPR PPMs do not fall within the scope of the *TBT*.⁴⁶ PR PPMs are those that “affect the physical characteristics of the product itself”.⁴⁷

28. Viridium considers that the ARRA does not lay down any PR PPMs because the requirements proscribed do not leave any physical trace on the products. The ARRA deals with spacing, transfer and slaughter, not directly with the animal products as such. Since quality is a subjective matter,⁴⁸ the physical characteristics are not changed by the fact that Viridian consumers might consider conforming products of a better quality. Accordingly,

⁴¹ ABR, *US – Gasoline* [25].

⁴² Cf. *EC – Asbestos*, [59]; Kudryavtsev (2013), 26; Marceau (2013), 5.

⁴³ ABR, *EC – Asbestos*, [66-70]; ABR, *EC – Sardines*, [176].

⁴⁴ Conrad (2011), 28.

⁴⁵ ABR, *EC – Seal Products* [5.12].

⁴⁶ Conrad (2011), 378; Kudryavtsev (2013), 45.

⁴⁷ Hudec (2000), 191.

⁴⁸ Moskowitz (1995), 157.

Viridium submits that the ARRA is not a technical regulation within the meaning of Annex 1.1 of the *TBT* and does not fall within the scope of the *TBT*.

IV. Even if the ARRA falls within the scope of the *TBT*, it is consistent with Article 2.1 of the *TBT*.

29. Article 2.1 of the *TBT* prohibits Members to accord less favourable treatment to imported products from any Member as compared to the treatment accorded to like products of national origin as well as to like imports from any other country. Article 2.1 of the *TBT* thus establishes a national as well as MFN treatment obligation under the *TBT*.⁴⁹ The AB has observed that less favourable treatment under Article 2.1 is accorded when a measure, *firstly*, causes a detrimental impact, which, *secondly*, does not stem exclusively from a legitimate regulatory distinction.⁵⁰ Viridium considers that it complies with Article 2.1 because the ARRA does (A.) not have a detrimental impact on Ruberian imported products as compared to like domestic products and like imported products from countries that fall under the 0.15 ha exemption. In the event the Panel determines there is less favourable treatment, such treatment (B.) stems exclusively from a legitimate regulatory distinction.

A. The ARRA and its enforcement are consistent with Viridium's national and MFN treatment obligation under Article 2.1 of the *TBT*.

30. With regard to the national treatment and MFN obligation under the *TBT*, the AB observed that the *TBT* and the GATT “overlap in scope and have similar objectives.”⁵¹ It therefore considered that the interpretation of the two treaties must be coherent.⁵² Viridium submits that, since the criteria for the determination of a detrimental impact on like products under the *TBT* are based on the same grounds as developed under the GATT,⁵³ the arguments set out above in relation to Articles I:1 and III:4 of the GATT apply.⁵⁴ Thus, there is no detrimental impact under Article 2.1 of the *TBT*.

B. Even if the Panel finds a detrimental impact, it stems exclusively from a legitimate regulatory distinction.

31. If the Panel finds a detrimental impact on imported products, Viridium submits that it stems exclusively from a legitimate regulatory distinction. The AB has observed that Article

⁴⁹ ABR, *US – Clove Cigarettes*, [87]; ABR, *US – COOL*, [267].

⁵⁰ ABR, *US – Clove Cigarettes*, [182].

⁵¹ *Ibid.* [91].

⁵² *Ibid.*

⁵³ Cf. ABR, *US – Clove Cigarettes*, [156]; ABR, *US – COOL*, [269].

⁵⁴ Cf. above [1-12].

2.1 of the *TBT* does not prohibit *a priori* any obstacle to trade.⁵⁵ In light of the object and purpose of the *TBT*, the decisive aspect is whether the detrimental impact stems exclusively from a “legitimate regulatory distinction”.⁵⁶ A technical regulation is a legitimate regulatory distinction if it establishes a balance between the impact of the measure and the objective pursued and accordingly is “even-handed”⁵⁷

32. The interpretation of treatment no less favourable is shaped by the sixth recital of the Preamble of the *TBT*, which recognizes the right of Members to take measures for the protection of, *inter alia*, animal health and the environment.⁵⁸ Insofar, the *TBT* strikes a “balance between ... the objective of trade liberalization and ... Members' right to regulate”.⁵⁹ This is similar to the GATT, where obligations are balanced by the general exceptions of Article XX of the GATT.⁶⁰ Viridium accordingly submits that, for the reasons set out with regard to the justification of the measure under Article XX of the GATT, the ARRA pursues legitimate objectives, including protection of animal health and the environment.⁶¹ It does not amount to arbitrary and unjustifiable discrimination and is applied in an even-handed manner.⁶² Thus, Viridium submits that the ARRA is consistent with Article 2.1 of the *TBT*.

V. The ARRA and its enforcement are consistent with Article 2.4 of the *TBT*.

33. Article 2.4 of the *TBT* stipulates that Members “shall use [relevant international standards] as a basis for their technical regulations except when such international standards ... would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors”.⁶³ Viridium submits that the ARRA is consistent with Article 2.4 of the *TBT* because (A.) the WAWC guidelines are not a relevant international standard, and (B.) even if the Panel finds otherwise, the WAWC guidelines are inappropriate and ineffective for the fulfilment of the legitimate objectives pursued by the ARRA.

⁵⁵ ABR, *US – Clove Cigarettes*, [171].

⁵⁶ *Ibid.* [182].

⁵⁷ *Ibid.*

⁵⁸ Sixth recital of the Preamble of the *TBT*; cf. ABR, *US – Clove Cigarettes*, [173].

⁵⁹ ABR, *US – Clove Cigarettes*, [174].

⁶⁰ ABR, *US – Clove Cigarettes*, [96]; ABR, *EC – Seal Products*, [5.127].

⁶¹ Cf. above [19-20]

⁶² Cf. above [23-25].

⁶³ Article 2.4 of the *TBT*; cf. ABR, *EC – Sardines*, [274]; Van den Bossche and Zdouc (2013), 879.

A. The WAWC guidelines are not a relevant international standard.

34. The AB has stated that an international standard must have been approved by an international standardizing body.⁶⁴ It clarified that membership within such a body must be open to all WTO Members on a non-discriminatory basis at every stage of standards development.⁶⁵ In other words, Members must be aware, or must have reason to expect, that the international body in question is engaged in standardization activities.⁶⁶

35. The WAWC's main focus is the provision of technical assistance for developing countries. With only 35 member states, the WAWC is a small organization. Viridium considers that WTO Members cannot be expected to be aware that such a small body with a different core mission than standardization would produce an international standard. Therefore, the WAWC cannot be considered an international body with recognized activities in standardization.

36. The TBT Committee has clarified that "[a]ll relevant bodies of the WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard"⁶⁷ and the process should not favour interests of any particular supplier, country or region.⁶⁸ Decisions of the TBT Committee are subsequent agreements within the meaning of Article 31(3)(a) of the VCLT and are accordingly relevant for the interpretation of the *TBT*.⁶⁹ Regarding the WAWC guidelines, only experts from WAWC member states participated during the early stages of standardization. Since the WAWC has only a limited membership of 35 States and the WAWC guidelines were only adopted by a narrow majority and have been heavily contested, Viridium considers that they do not represent a global compromise on space allowance but rather the opinion of very few countries. Additionally, the fact that 30 out of the 35 WAWC member states are developed countries underlines in Viridium's view that the WAWC is closer to a club than to an open standardizing body. Consequently, the WAWC guidelines cannot be considered a relevant international standard within the meaning of Article 2.4 of the *TBT*. As no relevant international standard applies, the ARRA is consistent with Article 2.4 of the *TBT*.

⁶⁴ ABR, *US – Tuna II*, [359].

⁶⁵ ABR, *US – Tuna II*, [374-5].

⁶⁶ ABR, *US – Tuna II*, [362].

⁶⁷ Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, 47.

⁶⁸ *Ibid.*

⁶⁹ ABR, *US – Tuna II*, [372].

B. The WAWC guidelines are ineffective and inappropriate for the fulfilment of the objectives pursued by the ARRA.

37. Even if the Panel considers the WAWC guidelines a relevant international standard, Viridium submits that the ARRA is consistent with Article 2.4 of the *TBT* because the WAWC guidelines are ineffective and inappropriate for the fulfilment of the objectives it pursues. The AB has noted that the term *ineffective* refers to means that do not have the function of accomplishing the legitimate objective, whereas an *inappropriate* means is a means, which is not particularly suitable for the fulfilment of the legitimate objective.⁷⁰ The ARRA pursues the legitimate objectives of animal health and environmental protection.

38. Article 2.4 states that a “fundamental climatic ... factor”⁷¹ may render previously adopted standards ineffective and inappropriate. The recent disaster and the ensuing spills of manure and wastewater from CAFOs changed conditions in Viridium drastically. The disaster exemplified the dangers of industrial farming and provided Viridium with a unique opportunity to sustainably transform its agricultural sector. Viridium therefore considers that this catastrophe renders the previously adopted WAWC guidelines ineffective and inappropriate to address animal health and sustainable agricultural development in Viridium.

39. Additionally, Viridium submits that according to the Preamble of the *TBT*, it may take any measure to ensure the protection of animal health and of the environment at the level it considers appropriate.⁷² The AB has recognized that “a Member may decide to set for itself a level of protection different from that implicit in the international standard”.⁷³ That right is equally applicable to the *TBT*.⁷⁴ Accordingly, Viridium considers that it may and did determine a level of protection that exceeds the level set by the WAWC.

40. Therefore, Viridium submits that the ARRA is consistent with Article 2.4 of the *TBT*.

VI. The ARRA is consistent with Articles 3.1, 3.4 and 4.1 of the TBT.

A. The Requirements of Articles 3.1 and 3.4 of the TBT

41. Articles 3.1 and 3.4 of the *TBT* set out Members’ obligations “[w]ith respect to ... non-governmental bodies within their territories.”⁷⁵ Article 3.1 requires Members to “take such reasonable measures as may be available to them to ensure compliance by such bodies

⁷⁰ ABR, *EC – Sardines*, [285], quoting the PR, [7.116].

⁷¹ Article 2.4 of the *TBT*.

⁷² Sixth recital of the Preamble of the *TBT*.

⁷³ ABR, *EC – Hormones*, [172].

⁷⁴ Cf. Marceau and Trachtman (2014), 385.

⁷⁵ Article 3 of the *TBT*.

with the provisions of Article 2”⁷⁶ (the positive obligation). Article 3.4 obliges Members “not [to] take measures which require or encourage [such bodies] to act in a manner inconsistent with the provisions of Article 2”⁷⁷ (the negative obligation). Thus, the obligations under Articles 3.1 and 3.4 bring actions by non-governmental bodies within the scope of Article 2 of the *TBT*.

42. Article 2 of the *TBT* concerns the “Preparation, Adoption and Application of Technical Regulations.”⁷⁸ Ruberia alleges Viridium to be inconsistent with Article 3.1 and 3.4 in particular with regard to Article 2.4 of the *TBT*. An inconsistency with Article 2.4 is only possible if an action is considered a technical regulation within the meaning of Annex 1.1 of the *TBT*.⁷⁹ A measure is thus inconsistent with Article 3.1 and 3.4 when (i) a technical regulation set by a body within the scope of Article 3 (ii) does not conform to the requirements of Article 2 of the *TBT* and (iii) the concerned Member did not fulfil its positive and negative obligations to prevent such non-conformity.

B. The Requirements of Article 4.1 of the TBT

43. Article 4.1 deals in relevant parts with Members’ obligations regarding “non-governmental ... standardizing bodies”⁸⁰. Similarly as Article 3 of the *TBT*, it contains a positive obligation “to take such reasonable measures as may be available”⁸¹ and a negative obligation “not [to] take measures which have the effect of ... requiring or encouraging.”⁸² These obligations apply in Article 4.1 with regard to the standardizing bodies’ acceptance and compliance “with the Code of Good Practice for the Preparation, Adoption and Application of Standards [CGP] in Annex 3 to [the *TBT*].”⁸³

44. The CGP sets similar requirements with regard to standardization as Article 2 of the *TBT* does for the creation of technical regulations by Member states.⁸⁴ Paragraph F, which Ruberia alleges Viridium to be inconsistent with, stipulates in relevant parts that “[w]here international standards exist ... the standardizing body shall use them ... *as a basis* for the standards it develops, except where such international standards ... would be ineffective or

⁷⁶ Article 3.1 of the *TBT*.

⁷⁷ Article 3.4 of the *TBT*.

⁷⁸ Heading of Article 2 of the *TBT*.

⁷⁹ ABR, *EC – Asbestos*, [59].

⁸⁰ Article 4.1 2nd sentence of the *TBT*.

⁸¹ *Ibid.*

⁸² Article 4.1 3rd sentence of the *TBT*.

⁸³ Article 4.1 1st sentence of the *TBT*.

⁸⁴ Arcuri (2013), 499.

inappropriate.”⁸⁵ It is therefore comparable to the obligations to Article 2.4 of the *TBT*. Since the CGP only applies to the process of standardization, the concerned action must be considered such a standard within the meaning of Annex 1.2 of the *TBT*.

45. To be inconsistent with Article 4.1 there must therefore be (i) a standard within the meaning of Annex 1.2 of the *TBT* set up by a standardizing body that falls within the scope of Article 4.1, (ii) the standard must be inconsistent with the CGP and (iii) the concerned Member must not have fulfilled its positive and negative obligations.

C. The Structure of the Response

46. Since the obligations for non-governmental bodies under Article 2.4 and Paragraph F are similar, these will be addressed together. Similarly, Viridium’s positive and negative obligations to ensure compliance are almost identical in Article 3.1, 3.4 and 4.1. Therefore, they will also be treated simultaneously. Viridium thus submits that *firstly*, the association of large food retailers’ regulatory scheme is not within the scope of Article 3 because it is not a technical regulation; *secondly* the scheme is not a standard within the meaning of Annex 1.2 and therefore falls outside the scope of Article 4.1. *Thirdly*, the retailers’ scheme is in any case consistent with Article 2.4 and Paragraph F of the CGP. *Finally*, Viridium did in any event fulfil its positive and negative obligations to ensure compliance.

D. The retailers’ regulatory scheme is not within the scope of Article 3.

47. Annex 1.1 defines a technical regulation as a “[d]ocument ... with which compliance is *mandatory*”⁸⁶. It is considered that only a private entity with delegated governmental power is able to legally oblige third parties to adhere to their regulatory scheme, and thus make such a scheme mandatory.⁸⁷ Viridium did not delegate any power to the association of retailers. The retailers therefore lack the necessary means to enforce their regulatory scheme legally and their scheme can thus not be considered mandatory.

48. Furthermore, even if the Panel should consider the regulatory scheme *de facto* mandatory, it would not fall within the scope of Article 3. Firstly, the wording of Annex 1.8 of the *TBT* (“which has the *legal power* to enforce a technical regulation”)⁸⁸ suggests that a body needs legal, not merely market power to enforce a technical regulation. Secondly,

⁸⁵ Paragraph F of the CGP (emphasis added).

⁸⁶ Annex 1.1 of the *TBT* (emphasis added).

⁸⁷ Cf. Arcuri, (2013), 499; Tamiotti (2007) [8].

⁸⁸ Annex 1.8 of the *TBT Agreement* (emphasis added).

Article 4.1 addresses “*de facto* market access barriers”⁸⁹. To include such measures in Article 3 would leave little to no effect to Article 4.1, which disregards the AB’s ruling that “interpretation must give meaning and effect to *all* terms of a treaty.”⁹⁰

E. The retailers’ regulatory scheme is not within the scope of Article 4.1.

49. The concerned regulatory scheme falls outside the scope of Article 4.1 because it is not a standard. A standard is defined in Annex 1.1 of the *TBT Agreement* as a “[d]ocument ... that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods”⁹¹. Presently, the provisions for “common and repeated use” are those set by the ARRA. The retailers’ scheme does not in itself provide for any rules, guidelines or product characteristics. Instead, it simply implements the ARRA earlier and without exceptions.

F. The retailers’ regulatory scheme is in any case consistent with Article 2.4 of the TBT and Paragraph F of the CGP.

50. There is no appropriate and effective international standard that the retailers should or could have based their regulatory scheme on. In particular, the WAWC guidelines are not a relevant international standard and, and in any case, ineffective and inappropriate to address the objectives of animal health and sustainable agriculture.⁹²

G. Viridium fulfils in any event its negative and positive obligations under Articles 3.1, 3.4 and 4.1 of the TBT agreement.

1. No encouragement given

51. Viridium submits that it fulfils its negative obligation under Articles 3.4 and 4.1 not to require or encourage inconsistency with Article 2 or the CGP respectively. The ARRA does neither force nor oblige bodies to disregard international standards as a basis for their regulatory schemes. A starting point to determine the ordinary meaning of encourage, as required by Article 31(1) of the VCLT, are dictionary definitions.⁹³ The dictionary defines encourage as “[g]ive courage, confidence, or hope to”, “[m]ake sufficiently confident or bold to do a specified action” and “[u]rge, incite; recommend, advise”.⁹⁴ Viridium observes that this suggest that encouragement is far from just allowing for a different solution. There has to

⁸⁹ Koebele and Lafortune (2007), [1].

⁹⁰ ABR, *US – Gasoline*, 23 (emphasis added).

⁹¹ Annex 1.2 of the *TBT Agreement*.

⁹² Cf. above [33-40].

⁹³ ABR, *US – Gambling*, [164].

⁹⁴ Shorter Oxford English Dictionary, 827.

be some element of support, even pressure. Article 5 of the ARRA does not provide incentives for the adoption of private standards. It merely explains that the ARRA establishes minimal requirements, which may be surpassed. The ARRA does not suggest that private standardizing bodies should disregard available international standards. Therefore, Viridium does not consider that it encourages private entities not to base their regulatory schemes on international standards.

2. No obligation to take reasonable measures

52. Articles 3.1 and 4.1 stipulate that Members “shall take such *reasonable* measures as may be *available* to them to ensure”⁹⁵ compliance with Article 2 and the CGP respectively. It is a general principle in customary international law that a State is rarely responsible for the conduct of private actors.⁹⁶ The qualifying terms *reasonable* and *as may be available* indicate that the Members obligation to ensure compliance with the *TBT* by non-governmental bodies is far from absolute. It seems that only under certain circumstances is a Member obliged to ensure compliance through mandatory regulations.

53. Concerning the interpretation of the term reasonable in a different context the AB held that “the notions of flexibility and balance ... are inherent in the concept of ‘reasonableness’.”⁹⁷ Thus, a Member’s obligations under Articles 3.1 and 4.1 of the *TBT* must be balanced with their regulatory autonomy and the freedom of private entities in regimes driven by a market economy. From this, in Viridium’s view, it follows that a measure to require private entities to adhere to Article 2 and the CGP is only reasonable in situations where danger arising from regulations by private entities is particularly high. This might be the case where particularly powerful private bodies are able to single-handedly impose barriers on international trade or where a close relationship between a Member’s government and the non-governmental body exists. However, such a particular situation does not currently exist in Viridium. Even if the association of retailers enacts certain standards, there are still other retailers that do not impose these standards. Thus, the Viridian market is still accessible to products that do not conform to this regulatory scheme.

54. Viridium therefore considers that the ARRA is in conformity with Articles 3.1, 3.4 and 4.1 of the *TBT*.

⁹⁵ Article 3.1 and Article 4.1 2nd sentence of the *TBT* (emphasis added).

⁹⁶ Wolfrum (2005), 424.

⁹⁷ ABR, *US – Steel*, [85].

Request for Findings

Viridium requests that the Panel advise the Dispute Settlement Body to find the ARRA and its enforcement in full compliance with Articles I:1 and III:4 of the GATT or, in the alternative, justified under Article XX of the GATT. Furthermore, it requests the finding that the ARRA does not fall within the scope of the *TBT*. Should the Panel consider the ARRA within the scope of the *TBT*, Viridium requests the Panel to advise the Dispute Settlement Body to find the ARRA and its enforcement in compliance with Articles 2.1, 2.4, 3.1, 3.4 and 4.1 of the *TBT*.