

ELSA Moot Court Competition (EMC2)
on WTO Law

Case 2014-2015

Viridium – Measures Affecting the Agricultural Sector

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1. Viridium is a small developed country WTO Member. It 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 disaster has also 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.

2. Unable to cope with the aftermath of the disaster, the Viridian government has resigned in disgrace. In the ensuing elections, 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).

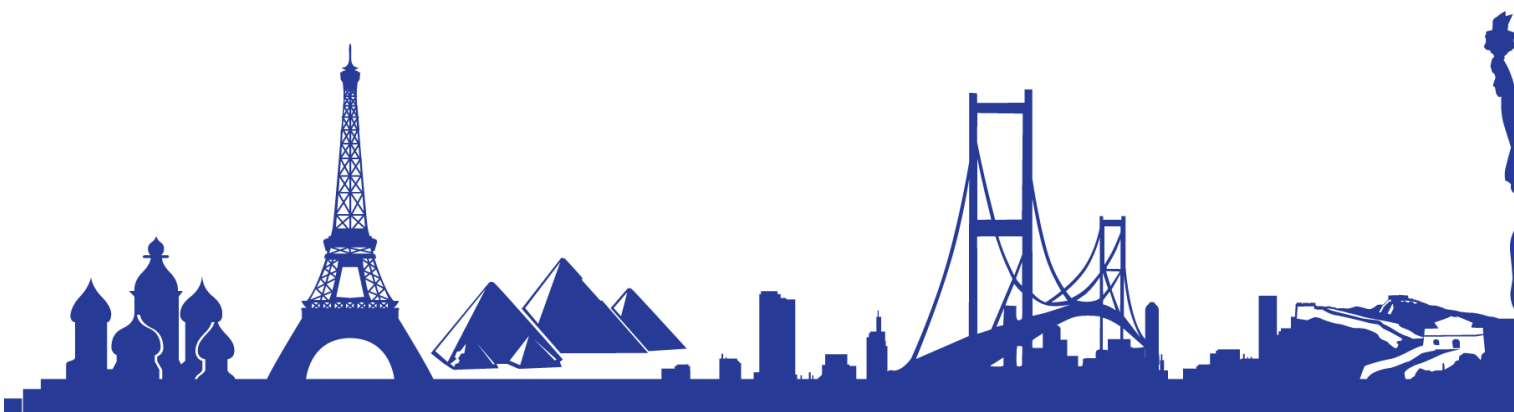
3. Recitals 1-4 of the Preamble of the ARRA explain the objectives of the Act as follows:

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; ...



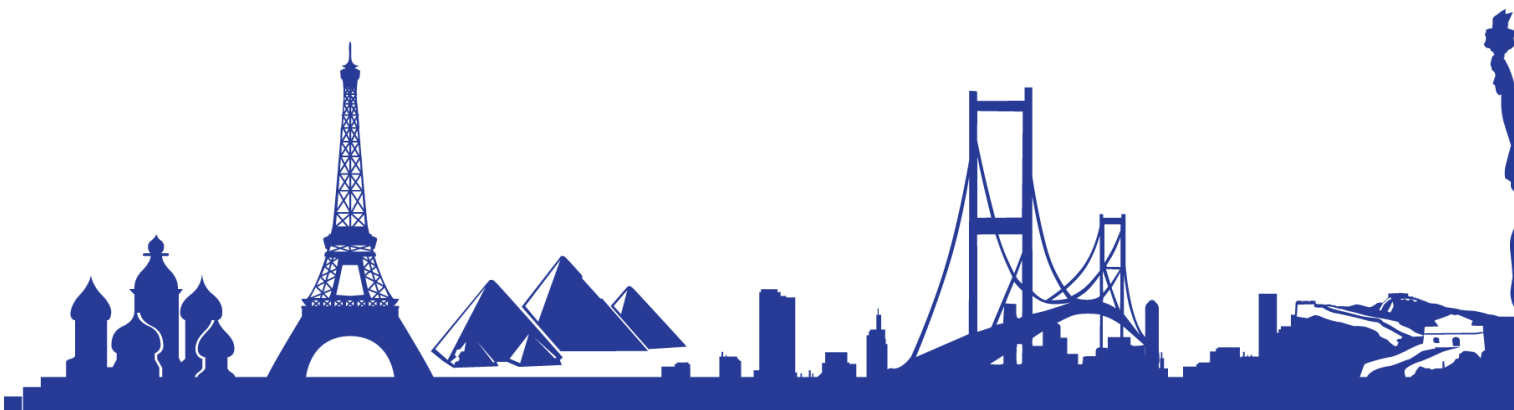
4. Article 2 of the ARRA prescribes minimum space allowances for cattle, hogs, and poultry, and prohibits the use of battery cages for hens. Article 3 provides that cattle, hogs, and poultry must be transported and slaughtered in accordance with the regulations stipulated in Annex 2 to the ARRA. Among 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.

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

6. 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. Already, 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.

7. Ruberia is a large developed country WTO Member in which 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. Moreover, 80 per cent of the eggs produced in Ruberia come from hens that are held in battery cages. At the same time, 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.

8. 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.

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

10. 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 than the requirements of the ARRA.

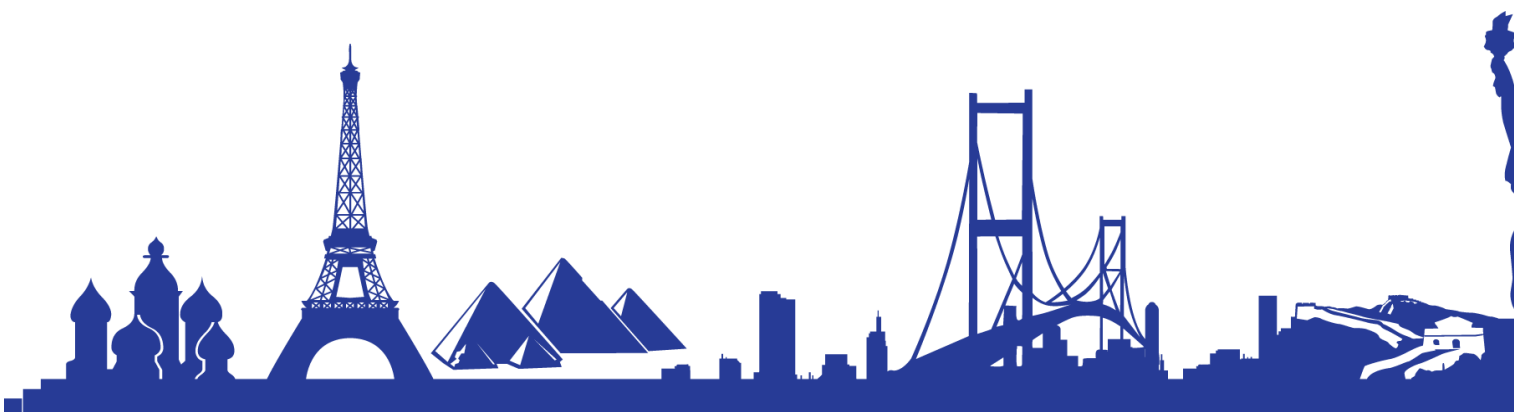
11. The guidelines are the result of a long process of discussion and consultation about good regulatory practice among experts from WAWC member states. Initially, these discussions were held informally on the side lines of the WAWC's annual general meetings. As the idea of developing the guidelines 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.

12. 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.

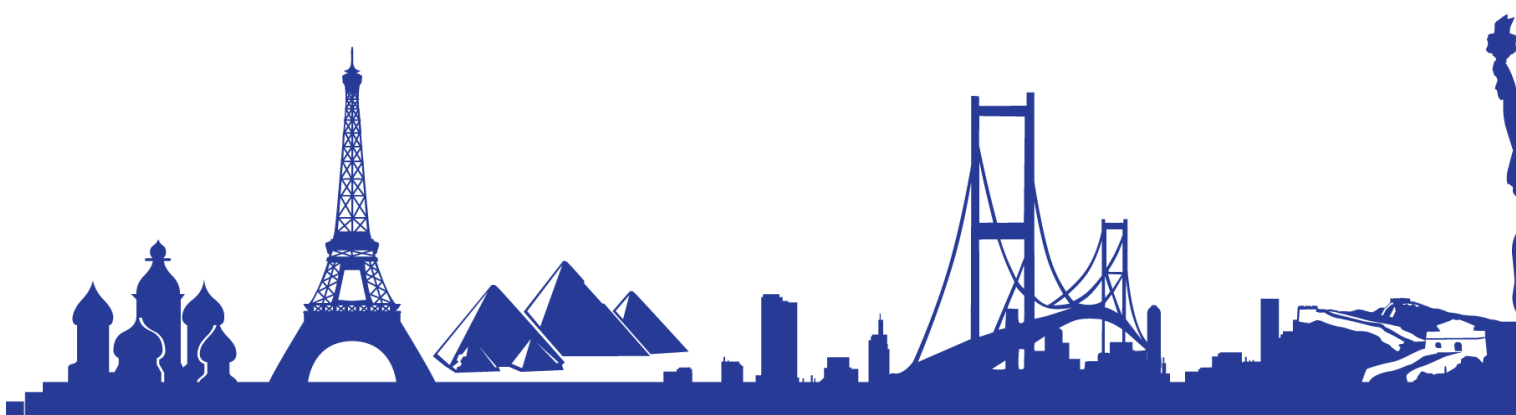
13. The WAWC guidelines were adopted while Viridium's previous government was in power. Both Viridium and Ruberia voted in favour of the guidelines.

Legal Claims

14. After unsuccessful consultations with Viridium, Ruberia brings a case to the DSB asserting that the ARRA is inconsistent with Viridium's WTO obligations under the GATT 1994 and the TBT Agreement.



15. With respect to the GATT 1994, 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;
 - 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.
16. Moreover, Ruberia submits that even if the ARRA could be provisionally justified under one of the subparagraphs of Article XX of the GATT 1994, the ARRA does not meet the requirements of the chapeau of Article XX because the longer transition periods for developing countries and the exemptions are not rationally related to the objective of the ARRA.
17. With respect to the TBT Agreement, Ruberia submits:
- that the ARRA is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement as it lays down "processes and production methods" that are "related" to "product characteristics";
 - 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 and to like products imported from countries with less than 0.15 hectares of arable land per capita;
 - 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";
 - 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 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.



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.

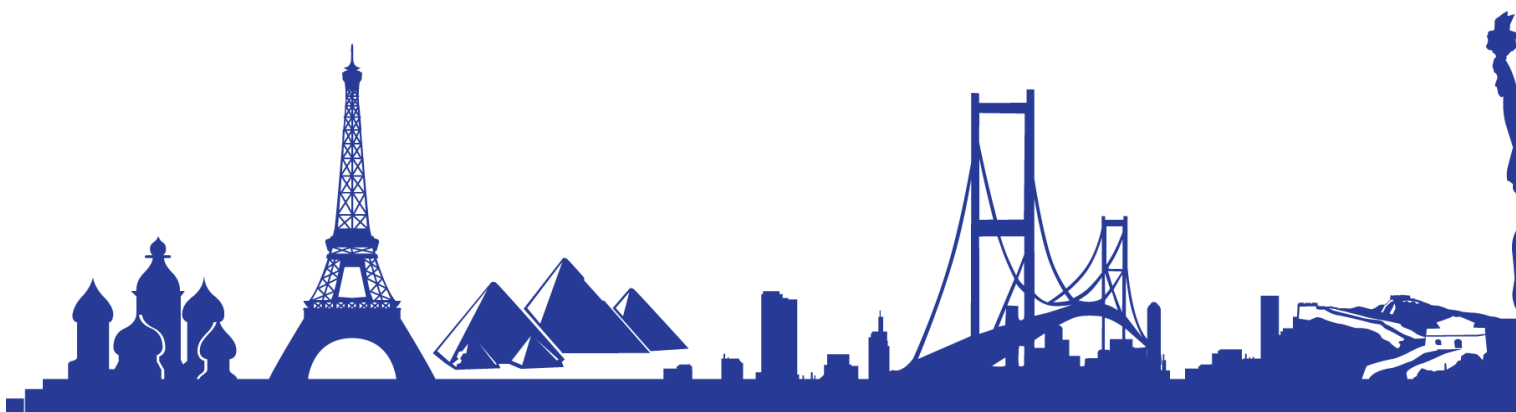
Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001.

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.

