



Team: 034

**ELSA MOOT COURT COMPETITION ON WTO LAW
2014-2015**

**Viridium – Measures Affecting the
Agricultural Sector**

Ruberia
(Complainant)

VS

Viridium
(Respondent)

SUBMISSION OF THE COMPLAINANT

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TBT	Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10.
VCLT	Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
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<i>China – Audiovisual</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> (21 December 2009) WT/DS363/AB/R.

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<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> (26 September 2002) WT/DS231/AB/R.
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<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> (4 April 2012) WT/DS406/AB/R.
<i>US – COOL</i>	Appellate Body Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> (29 June 2012) WT/DS384/AB/R.
<i>US – Gambling</i>	Appellate Body Report, <i>Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> (20 April 2005) WT/DS285/AB/R.
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> (20 May 1996) WT/DS2/AB/R.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> (12 October 1998) WT/DS58/AB/R.
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> (16 May 2012) WT/DS381/AB/R.

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<i>Colombia – Ports of Entry</i>	Panel Report, <i>Indicative Prices and Restrictions on Ports of Entry</i> (27 April 2009) WT/DS366/R.
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LIST OF ABBREVIATIONS

Abbreviation	Description
0.15 Countries	Countries with less than 0.15 hectares of arable land per capita
0.15 Hectare condition	Less than 0.15 hectares of arable land per capita
AB	Appellate Body
AFO	Animal Feeding Operation
ARRA	Agricultural Reconstruction and Reform Act
Art./Arts.	Article/Articles
CAFO	Concentrated Animal Feeding Operation
EC	European Communities
GATT	<i>General Agreement on Tariffs and Trade 1994</i>
ISO/IEC	International Organization for Standardization/ International Electrotechnical Commission
LDC	Least-Developed Country
MFN	Most Favoured Nation
Para./Paras.	Paragraph/Paragraphs
PPM	Process and Production Method
SDT	Special and Differential Treatment
TBT	<i>Agreement on Technical Barriers to Trade 1994</i>
VCLT	<i>Vienna Convention on the Law of the Treaties</i>
WAWC	World Animal Welfare Council
WTO	World Trade Organization

SUMMARY OF ARGUMENTS

I. The ARRA violates the MFN obligations under Art. I:1 GATT 1994 by exempting countries with less than 0.15 hectares of arable land per capita.

- Viridium’s exemption to the ARRA Art. 2 requirements to countries with less than 0.15 hectares of arable land per capita while like products from Ruberia are banned from import and sale in Viridium. Consequently, the exemption is an advantage for countries that meet the hectare condition as it modifies the conditions of competition between like products—meat and animal products—originating in Ruberia and the exempted countries.
- By not immediately and unconditionally granting Ruberia the exemption granted to countries that meet the arable land condition, Viridium violates its Art. I:1 MFN obligation.

II. The ARRA violates Art. III:4 GATT 1994 by providing *de facto* less favourable treatment to like imported products from Ruberia than domestic products.

- Ruberian meat and animal products are ‘like’ Viridium’s meat and animal products. Viridium cannot distinguish the products based on “consumers’ tastes and habits” given Ruberia’s command of the market share prior to ARRA’s adoption, nor can it claim that the quality of products is different based on a “belief”.
- The ARRA accords *de facto* less favourable treatment because it has a direct detrimental impact on competitive opportunities for Ruberian beef and eggs, violating the national treatment obligation under Art. III:4 of GATT 1994.

III. The ARRA cannot be provisionally justified under one of GATT 1994 Art. XX subparagraphs, nor does it meet Art. XX chapeau requirements.

- The ARRA is an import ban that does not fit within GATT Art. XX's subparagraphs and cannot meet GATT Art. XX chapeau requirements.
- The ARRA cannot be provisionally justified under GATT 1994 Art. XX subparagraphs (a) or (b). XX(a) is unavailable because less trade-restrictive alternatives exists. XX(b) is unavailable because the ARRA does not protect animal life and the ARRA is unnecessary to accomplishing this goal.
- The ARRA cannot meet the Chapeau requirements because it is applied arbitrarily or unjustifiably. The ARRA includes exceptions for developing and least-developed countries, and those with less than 0.15 hectares of arable land per capita which defeat the measure's objective. These exceptions are unrelated to the ARRA's measures to treat animals humanely.

IV. The ARRA is a Technical Regulation that lays down processes and production methods (PPMs) related to product characteristics.

- Viridium’s ARRA meets all criteria under Para 1 of TBT Annex 1.1: The ARRA applies to meat and products derived from animals, specifies the product characteristics “tastier” and “of better quality” as well as related PPMs concerning the humane treatment of animals and requires mandatory compliance.

V. The ARRA violates TBT. 2.1 by causing a detrimental impact to like products imported from Ruberia

- The ARRA violates both MFN and National Treatment obligations of TBT Art. 2.1 by causing *de facto* detrimental impact on the competitive opportunities between like Ruberian products vis-à-vis like domestic and imported products.
- The detrimental impact cannot be justified under the legitimate regulatory distinction test because the distinction is arbitrary and the measure lacks even-handedness.

VI. The ARRA violates TBT Art. 2.4 because the ARRA is not based on the Relevant International Standard, the WAWC Guidelines

- The WAWC Guidelines are a relevant international standard because they have been adopted by an international standardizing organization, the WAWC, to promote animal health.
- The ARRA is not based on the Guidelines because the ARRA's restrictions are significantly higher, defeating the standard's purpose. The WAWC Guidelines effectively promote animal health.

VII. The ARRA violates TBT Arts. 3.1, 3.4 and 4.1 by Failing to Ensure that Local Non-Governmental Bodies Comply with TBT Art. 2.4

- The association of Viridium's largest agricultural retailers is a non-governmental body that has the legal power to enforce a technical regulation. Viridium must ensure that this association acts consistently with TBT Art. 2.4 by basing its standards on the relevant international standard, the WAWC Guidelines.
- Viridium has violated TBT Arts. 3.1 and 3.4 by failing to ensure that its largest association of agricultural retailers complies with TBT 2.4 and the WAWC Guidelines. In the alternative, Viridium has violated TBT Art. 4.1 because the agricultural retailers association, as a non-governmental body, has acted inconsistently with TBT Annex 3F.

STATEMENT OF FACTS

1. Ruberia and Viridium are developed countries and WTO Members. Following a natural disaster that destroyed most of its farm animals and agricultural infrastructure, Viridium adopted the Agricultural Reconstruction and Reform Act (ARRA) to rebuild its agricultural sector in a sustainable manner. Complying with the ARRA is mandatory when importing and selling meat and any other products derived from animals. There is currently no regime in place to ensure that products exported to Viridium can meet the ARRA's standard. Before adopting the ARRA, Ruberia dominated Viridium's beef and eggs market, supplying it with 70 percent and 80 percent respectively.
2. The ARRA comes into force after a 1-year transitional period for developed countries and 3 years for developing countries. Least-developed nations and those with less than 0.15 hectares of arable land are exempted from ARRA Art. 2, which increases the minimum space allowance for livestock and bans using battery cages for hens. Art. 3 mandates compliance with Annex 2, which stipulates transportation and slaughter conditions, requiring non-slip flooring, limiting cattle prod usage to less than 5 percent and restricts filling pens beyond 75 percent capacity. Art. 4 prohibits importing and selling any meat or animal products raised or processed under dissimilar conditions that Arts. 2 and 3 require.
3. Ruberia and Viridium are members of the World Animal Welfare Council (WAWC), an international organization devoted to promoting animal welfare, with 30 developed country member states. The WAWC Guidelines on minimum space allowances for AFOs were developed by member states to promote humane animal treatment, and were adopted by majority vote following an open consultation period. Ruberia and Viridium both voted for the Guidelines. The ARRA stipulates stricter requirements and was not developed in consultation with other nations. Although Ruberia abides by the WAWC Guidelines, 40 percent of its cattle and 80 percent of its eggs do not meet the ARRA's requirements.
4. Viridium's largest association of retailers, controlling 80 percent of Viridium's market, has already established its own standards for animal products requiring compliance with ARRA Arts. 2 and 3. This association represents the interests of food retailers during the legislative and policy process and serves a coordinating and standardizing function. Before the disaster, 50 percent of Viridium's production of beef and 70 percent of its eggs would not have met the ARRA requirements. Viridium is now rebuilding its agricultural sector according to the ARRA.

IDENTIFICATION OF THE MEASURES AT ISSUE

1. The Agricultural Reconstruction and Reform Act (ARRA) of Viridium

LEGAL PLEADINGS

I. The ARRA violates the most favoured nation obligation of Art. I:1 of the GATT 1994 by exempting products from countries with less than 0.15 hectares of arable land per capita.

1. The ARRA violates the MFN obligation under GATT I:1 because it does not confer an “advantage”, in the form of an exemption, “immediately and unconditionally” to Ruberia that it accords to other countries. In effect, the ARRA bars Ruberian products from Viridium’s market while allowing like products from other countries.

2. A violation under Art. I:1 occurs when a) the offending measure confers an advantage of the type covered; b) the products concerned are like products; c) the advantage in question is not granted “immediately and unconditionally” to all like products.¹

a) The exemption for countries with less than 0.15 hectares of arable land per capita is an advantage.

3. An “advantage” within the meaning of Art. I:1 occurs when there are favourable import opportunities affecting the commercial relationship between products of different origin. Less onerous procedural and administrative requirements constitute an advantage.² The exemption under the ARRA allows countries with less than 0.15 hectares of arable land per capita to bypass the space allowance requirements set out in Art. 2 and qualifies as an “advantage” because it places less onerous requirements on 0.15 countries. Under Art. 4 of the ARRA, Ruberian products that do not meet Art. 2 requirements are banned from import and sale in Viridium.

4. The purpose of I:1 is to protect “expectations of equal competitive opportunities for like imported products from all Members.”³ The ARRA allows products from 0.15 countries market access to Viridium, while placing additional conditions of entry, such as space allowance requirements for livestock, for like Ruberian products. Although the measure is origin neutral, it is *de facto* inconsistent with Art. I:1 since Ruberian products cannot qualify for the exemption.⁴ The Art. I:1 analysis must consider how a measure impacts competitive opportunities and not

¹ PR, Indonesia—Autos, [14.138]; ABR, EC—Bananas III, [206].

² Trebilcock, Howse, and Eliason (2013), 62; ABR—EC Bananas III, [206].

³ ABR, EC—Seals, [5.88].

⁴ ABR, EC—Seals, [5.95].

simply on its actual effects.⁵ Exempted countries enjoy an advantage over non-exempted ones when importing to Viridium because they avoid costs associated with the ARRA's Art. 2 space allowance requirements. Meanwhile, 40 percent of Ruberian cattle and 80 percent of its eggs are unable to meet ARRA Art. 2's costly and onerous requirements and are banned from Viridium.⁶ The exemption under the ARRA fundamentally alters competition by banning many like products originating in Ruberia and is an advantage within the meaning of Art. I:1.

b) The products in question are “like” products, distinguished only on the basis of origin.

5. The products in question are “meat and any other products derived from animals,”⁷ with the only difference in treatment resulting from country origin. Generally, the like products analysis under Art. I:1 considers the competitive relationship between products by evaluating four key factors.⁸ However, a full ‘like’ products analysis is unnecessary where a measure explicitly discriminates based on origin.⁹ The ARRA explicitly discriminates against meat and animal products on the basis of 0.15 hectares of arable land per capita, a condition tied to the product's origin.

c) The exemption has not been granted “immediately and unconditionally” to all like products concerned.

6. Any advantage under Art. I:1 must “immediately” be granted to all like products “originating in or destined for ‘all other’ members”¹⁰ and without “discrimination as to origin” or “subject to conditions with respect to the situation or conduct of those countries.”¹¹ Additionally, members are prohibited from attaching a condition on imports that has a “detrimental impact on the competitive opportunities for like imported products from any member.”¹² The 0.15 hectare condition, which is the basis of the ARRA exemption, violates Art. I:1. Since WTO members must “unconditionally” accord to third-country Members of the WTO an advantage that has been granted to another country, Viridium violates Art. I:1 by not granting Ruberia the same exemption immediately and without any conditions.

5 ABR, EC—Seals, [5.87].

6 Problem, [7].

7 Problem, [5].

8 Van den Bossche, Werner Zdouc (2013), 353.

9 PR, Colombia—Ports of Entry, [7.355]; PR, Canada—Wheat, [6.164].

10 ABR, Canada—Autos, [79].

11 PR, Canada—Autos, [10.22-10.25].

12 ABR, EC—Seals, [5.88].

II. The ARRA violates Art. III:4 of the GATT 1994 by providing less favourable treatment to animals and animal products imported from Ruberia than to like domestic products.

7. The ARRA violates the national treatment obligations under Art. III:4. The elements necessary to prove a violation of Art. III:4 are that: 1) the imported and domestic products at issue are ‘like products’; 2) the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and; 3) that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.¹³

a) The domestic and imported products at issue are “like” products.

8. The products at issue are animals and animal products. The test for establishing “like” products considers the same four factors as under Art. I:1, originally applied for Art. III:4. These factors are 1) the properties, nature and quality of the products; 2) the end-uses of the products; 3) consumers’ tastes and habits; and 4) tariff classification.¹⁴

9. The end-uses of the products in question are the same, and there is no distinction made in tariff classifications.

10. Viridium's "belief" that ARRA-abiding animal products are "tastier and of better quality"¹⁵ does not indicate a consumer preference or taste. There is no scientific evidence that the products’ properties, nature and quality are different. Nor is the “belief” analogous to religious beliefs concerning “halal” or “kosher” foods,¹⁶ as there is no established practice.

11. Regarding factor 3, “consumer tastes or preferences,” nothing distinguishes products that follow the ARRA’s stipulations from those that do not. If consumer taste, preference or habit were aligned with the ARRA’s requirements, then Ruberia’s products would not have commanded 80 percent of the market share for beef, or 70 percent of the market share in eggs sold in Viridium before the adoption of ARRA. Therefore the products at issue are like products.

b) The ARRA is “a law, regulation, or requirement” affecting internal sale, transportation, distribution, or use of imported products.

12. ARRA Art. 4 bans “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

13 ABR, Korea—Beef, [133]; ABR, EC—Seals, [5.99]; ABR, EC—Asbestos, [87-101].

14 ABR, EC—Asbestos, [101]; Border Tax Adjustments, [18]; Marceau & Trachtman (2014), 360.

15 Problem, [3].

16 Nielsen (2007), 272.

Arts. 2 and 3 of the ARRA” after a transitional period.¹⁷ The measure at issue is a law passed by Viridium’s Parliament. The result is a ban on like products from Ruberia.

c) The ARRA accords *de facto* less favourable treatment to like products originating in Ruberia compared to like domestic products.

13. Art. III:4 requires “according conditions of competition no less favourable to the imported product than to the like domestic.”¹⁸ A violation therefore hinges on “governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.”¹⁹

14. For a finding of less favourable treatment under III:4, the measure must 1) create “a detrimental impact on the conditions of competition for like imported products,” and 2) “there must be a “genuine relationship” between the measure at issue and the adverse impact on competitive opportunities for imported products”.²⁰

15. The ARRA alters the conditions of competition by banning like Ruberian imports that do not meet the ARRA’s requirements. Producers are subjected to additional costs to meet the ARRA’s requirements. The Panel’s approach in *US – COOL* under the TBT analysis applies here. In that case, costs incurred only by imported products were understood to qualify as a “competitive disadvantage”²¹. Additional costs should likewise be understood as a detrimental impact on the conditions of competition between like imported and domestic products under III:4. On its face, the ARRA treats national products and imported products the same but it alters the competitive market conditions for products from Ruberia based on Art. 2 cost consequences. However, the disaster has allowed Viridium to reconstruct its agricultural sector to whatever specifications it desires. Imposing those same specifications on Ruberia adds costs to Ruberian producers. The added costs, and therefore the detrimental impact on the conditions of competition, come from implementing the ARRA to gain market access to Viridium.

III. The ARRA cannot be saved under GATT Art. XX

16. The ARRA does not meet any of the Art. XX exceptions. Even if the ARRA did meet one of the exceptions, the ARRA was not applied within Art. XX's chapeau. Examining a

17 Problem, [5].

18 ABR, Korea—Beef, [135].

19 ABR, Korea—Beef, [149].

20 ABR, EC—Seals, [5.101]; ABR, US—Clove Cigarettes, [179]; ABR, US—COOL, [270].

21 PR, US—COOL (2014), [7.75]; PR, US—COOL, [7.313].

measure under Art. XX “involves a two-tiered analysis in which a measure must first be provisionally justified under one of the sub-paragraphs of Art. XX, before it is subsequently appraised under the chapeau of Art. XX.”²²

a) The ARRA fails the provisional justification under GATT Art. XX(a) because less trade-restrictive alternatives exist.

17. To meet Art. XX(a), “[a] challenged measure [must] ‘address the particular interest specified in the paragraph and that there be a sufficient nexus between the measure and the interest protected.’”²³ The ARRA cannot be justified under paragraph (a) of Art. XX because the measure is not connected to protecting public morals, these measures are unnecessary for the stated objective of protecting public morals, and the proposed measure is more trade-restrictive than a labelling policy.

18. Public morals are standards set by a nation determining what is right and wrong, depending on that nation's prevailing values.²⁴ The measures in the ARRA are unrelated to public morals. The necessity test for public morals involves a process of weighing and balancing a series of factors, including the objective’s importance, the contribution made to the realization of the objective, and the measure’s trade-restrictiveness.²⁵ Following this analysis, a panel compares the measure with possible alternatives.²⁶

19. Treating animals humanely is an important objective for the purposes of Art. XX(a).²⁷ Under the second element of the test, the Measure does not contribute to protecting public morals since (a) Viridium has signed on to the WAWC Guidelines and (b) the other measures in the ARRA are not related to treating animals humanely, only slaughtering them. The WAWC, a body whose purpose is “to improve animal welfare,”²⁸ administers the WAWC’s multilaterally adopted Guidelines. The Guidelines govern animal enclosures based on multilateral discussions concerning treating animals humanely. The ARRA, therefore, does not require additional measures in this area to protect public morals, since the WAWC Guidelines fulfill this purpose.

22 ABR, US—Gasoline, [22]; PR, US—Shrimp, [7.28]; ABR, Brazil—Retreaded Tyres, [139].

23 ABR, US—Gasoline, [22]; ABR, US—Shrimp, [119]; ABR, EC—Seals, [5.169]

24 PR, US—Gambling, [6.465]; ABR, US—Gambling, [299]; PR, China—Audiovisual, [7.759]

25 ABR, US—Gambling, [306]; ABR, EC—Asbestos, [172]; ABR, EC—Seals, [5.169].

26 ABR, US—Gambling, [307]; ABR, Korea—Beef, [166].

27 PR, EC—Seals, [7.631]

28 Problem, [10].

20. Furthermore, the measure is too trade-restrictive for the marginal improvements in treating animals humanely, especially since less-trade restrictive means could accomplish this goal. The measure bans products that fail to meet its specifications after a short period for compliance and exceptions for developing and least-developed nations. Banning imports is highly restrictive and will be given greater weight against the measure's importance or contribution to the objective.²⁹

21. Viridium could institute a labelling regime classifying products derived from cattle, pigs, and poultry based on raising and handling practices. A labelling system will protect Viridium's morals by allowing Viridians to distinguish between products, allowing the market to determine how humanely to treat animals without banning imports.

b) The ARRA cannot be justified under GATT Art. XX(b) because it is not related to protecting or improving animal health and is unnecessary to achieve that objective.

22. The test for GATT XX(b) is: 1) That the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; 2) that the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective.³⁰

23. The ARRA does not seek to protect animal life; it only seeks to make it less painful. The ARRA's preamble states that its purpose is to create a sustainable agricultural sector and that treating animals humanely is an ethical issue. The ARRA relates to reducing pain to livestock bred for slaughter. For example, the measures include limits on using cattle prods, size requirements for holding pens, and a ban on battery cages.

24. Even if treating animals humanely is a policy that protects animal or human health under GATT XX(b), the ARRA's ban is not necessary to fulfill this goal. The level of necessity of a measure must be "linked to its effectiveness in achieving its objectives."³¹ Thus, "the more restrictive the impact of the measure at issue is on international trade, the more difficult it is to consider that measure necessary."³² Legislating how animals are slaughtered and transported is not adequately related to preserving animal lives. Failing to implement a monitoring mechanism to assess a measure's effectiveness makes "it difficult to assume that the level of necessity is

29 PR, China—Audiovisual, [7.862]; ABR, China—Audiovisual, [310]; ABR, Brazil—Retreaded Tyres, [150].

30 ABR, US—Gasoline, [6.20]; PR, Brazil—Retreaded Tyres, [7.40-7.41]; PR, EC—Tariff Preferences, [7.197].

31 PR, EC—Tariff Preferences, [7.214].

32 ABR, Brazil—Retreaded Tyres, [150]; Van den Bossche and Zdouc (2013), 557.

closer to the pole of “indispensable” than to the pole of “contributing to.”³³ The ARRA cannot achieve its purpose without a complimentary monitoring mechanism, since compliance may or may not occur.

IV. The ARRA fails on the GATT Art. XX Chapeau because it is applied arbitrarily and unjustifiably.

25. Viridium has not satisfied the Art. XX chapeau requirements. The GATT XX chapeau requirements are two-fold. First, a measure must be provisionally justified under one of the paragraphs of Art. XX, and second, it must not be applied in a manner that would constitute “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail.³⁴

a) The Discrimination is arbitrary or unjustifiable because the measure’s exceptions defeat the measure's objective.

26. The test for arbitrary or unjustifiable discrimination is: “(1) the application of the measure at issue must result in discrimination; (2) this discrimination must be *arbitrary* or *unjustifiable* in character; and (3) this discrimination must occur *between countries where the same conditions prevail*.”³⁵ Arbitrary discrimination also occurs when a measure has been applied rigidly and “without any regard for the difference in conditions between countries.”³⁶ Each issue is analyzed in turn.

27. The ARRA *de facto* discriminates between Viridium and Ruberia. Although both are developed nations³⁷ and have a one-year transition period, the recent natural disaster in Viridium creates a “difference in conditions” between them, resulting in discrimination. Since Viridium must rebuild its agricultural sector, it may do so more cheaply than Ruberia and to the ARRA’s specifications. The ARRA explicitly discriminates between Ruberia and developing countries as the latter qualifies for the three-year transition period. Finally, LDCs and countries with less than 0.15 hectares of arable land per capita are exempt from ARRA Art. 2 requirements.

33 PR, EC—Tariff Preferences, [7.214].

34 ABR, US—Gasoline, [25]; ABR, Brazil—Retreaded Tyres, [227-228].

35 ABR, US—Shrimp, [150]; PR, Brazil—Retreaded Tyres, [7.226-7.251]; Van den Bossche and Zdouc (2013), 575.

36 ABR, US—Shrimp, [177]; Van den Bossche and Zdouc (2013), 575.

37 Problem. [8].

28. Discrimination also occurs when exporting nations have no access to question the regulatory regime.³⁸ The ARRA's specifications have been applied to all nations without consultation. The ARRA is too rigid as it does not allow for other countries to meet that measure's requirements with a regime that is comparable in effectiveness.³⁹

29. Arbitrary discrimination arises when the measure is unrelated to its objective or works against its objective.⁴⁰ The ARRA is arbitrary given that the transition periods are not rationally related to ARRA's stated objective. The ARRA applies differently to countries in different stages of development. However, the ARRA's exceptions for developing or least-developed nations cannot be justified under the SDT principle of the WTO, as the chapeau "does not explicitly provide for special treatment of developing countries."⁴¹ The 0.15 hectares exemption is unrelated to the measure's goals and consequently arbitrary and unjustified. There is no connection between treating animals humanely and a nation's amount of arable land. The exception defeats the measure's purpose by allowing countries with less than 0.15 hectares of arable land to export to Viridium meat and products derived from animals without any guarantee that these animals have been treated humanely.

V. The ARRA is a Technical Regulation as set out in TBT Annex 1.1

30. The test for determining whether a measure is a technical regulation is three-tiered: 1) the document must apply to an identifiable product or group of products, 2) the document must lay down one or more characteristics of the product, prescribed or imposed in either a positive or a negative form,⁴² or their related PPMs and 3) compliance with the product characteristics or related PPMs is mandatory.⁴³ The ARRA is a technical regulation because it lays down process and production methods related to the "tastiness" and "quality" of products derived from animals.⁴⁴ The ARRA thus bans goods produced under certain conditions and stipulates product characteristic-related PPMs.

38 ABR, US—Shrimp, [164-165]; Van den Bossche and Zdouc (2013), 575.

39 ABR, US—Shrimp, [144].

40 ABR, Brazil—Retreaded Tyres, [232].

41 Conrad (2011), 356.

42 ABR, EC—Asbestos, [66-70]; ABR, EC—Sardines, [176]; Koebele (2007), 187.

43 ABR, EC—Seals, [5.10]; ABR, EC—Asbestos [66-70]; ABR, EC—Sardines, [176].

44 Problem, [3-4].

a) The ARRA applies to an identifiable group of products.

31. The ARRA meets the first tier because it applies to an identifiable group of products that are not specifically named in the document.⁴⁵ The ARRA applies to a broad category of products including meat and any other products derived from the animals named in the ARRA.⁴⁶

b) The ARRA lays down process and production methods of products derived from animals.

32. Para 1, Annex 1.1 applies to process and production methods. The ARRA lays down product characteristics related to the process and production methods of products derived from animals to produce meat that is “tastier and of better quality” and that the animals are raised ethically.⁴⁷ Specifications regarding enclosures, non-slip flooring, cattle-prod usage, prohibiting battery cages, requiring access to water and single-file chutes⁶ are all related to products derived from livestock. Based on the plain language of the TBT Agreement, specifying that animal products conform to processes that make their production “humane” is a product characteristic. The AB also determined in *EC-Asbestos* that a prohibition on products containing certain materials “effectively prescribes or imposes certain objective features, qualities, or ‘characteristics’ on all products.”⁴⁸ By banning all animal products not processed in accordance with ARRA, the measure makes the PPMs a characteristic of all animal products.

c) Compliance with the ARRA is mandatory.

33. Compliance with the ARRA is mandatory to access Viridium's market.⁴⁹ According to Art. 4 of the ARRA, “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 Arts. 2 and 3 of the ARRA will be prohibited after a transitional period.”⁷ Compliance, therefore, is mandatory.

VI. The ARRA violates the National Treatment and MFN obligations of TBT 2.1 because it causes detrimental impact on like products from Ruberia.

34. The ARRA violates TBT Art. 2.1 by treating products from Ruberia less favourably than that accorded to other like domestic and imported products. To prove an Art. 2.1 violation, 1) the

45 ABR, EC—Asbestos, [70].

46 Problem, [5].

47 ABR, EC—Asbestos, [67]; ABR, EC—Sardines, [189].

48 McDonald (2005), 253; ABR, EC—Asbestos, [72].

49 PR, EC—Sardines, [7.30]; ABR, EC—Sardines, [194].

measure at issue must be a technical regulation; 2) the imported domestic products at issue must be like products; and 3) the treatment accorded to imported products must be less favourable than that accorded to like domestic products or like products from other WTO members.⁵⁰ The GATT I:1 and III:4 submissions in paras. 3-4 and 7-10 apply respectively for the likeness analysis under MFN and national treatment under TBT 2.1.⁵¹

35. Two elements are needed to establish less favourable treatment: a) the measure causes a detrimental impact on competitive opportunities for the group of products imported from the complainant vis-à-vis the group of like imported products from any other country and domestic products, and b) the detrimental impact must not stem from a legitimate regulatory distinction.⁵²

a) The ARRA causes a detrimental impact on competitive opportunities for like Ruberian products vis-à-vis like domestic and imported products.

36. Detrimental impact arises where like products are accorded “less favourable treatment”⁵³ by adversely modifying the conditions of competition between the like products.⁵⁴

37. Under the MFN analysis, Viridium establishes a condition for exemption from ARRA Art. 2 requirements for 0.15 countries. This import condition is directly linked to origin and discriminatory as it would be impossible for Ruberia to qualify for the exemption.⁵⁵

38. Although the ARRA treats both national products and Ruberia’s products the same on its face, the detrimental impact arises from the change in the competitive relationship between Ruberia’s and Viridium’s livestock. As explained in the GATT III:4 submission above, the ARRA causes *de facto* discrimination against Ruberia’s livestock by increasing the costs of exporting to Viridium. Under pre-disaster market conditions, Ruberia supplied Viridium’s market with 70 percent of its beef and 80 percent of its eggs.⁵⁶ Following the ARRA’s adoption, 40 percent of Ruberia’s cattle and 80 percent of its eggs will be prohibited from Viridium’s market at the end of the transition period.

39. Ruberia’s pre-disaster exports represented 70 percent of beef and 80 percent of the eggs sold in Viridium. Ruberia’s majority market share demonstrates that the ARRA does not respond

50 ABR, US—Clove Cigarettes, [87]; Guzman & Pauwelyn (2012), 576.

51 ABR, US—Tuna II, [7.223-7.225].

52 ABR, US—Clove Cigarettes, [169-174].

53 ABR, US—Clove Cigarettes, [87].

54 ABR, US—Clove Cigarettes, [80]; PR, EC—Seals, [7.130].

55 ABR, US—Tuna II, [207].

56 Problem, [8].

to consumer preferences, but instead is designed to modify consumer preferences. Modifying consumer behaviour and patterns of consumption is more controversial than catering to consumer preferences or providing information.⁵⁷

b) The detrimental impact must not stem from a legitimate regulatory distinction.

40. Where a *prima facie de facto* discrimination exists, a respondent must justify that the detrimental impact stems from a legitimate regulatory objective.⁵⁸ Even-handedness in applying a measure is a determining factor in whether a legitimate regulatory distinction exists.⁵⁹ Where a regulatory distinction is not designed and applied in an even-handed manner “because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, that distinction is not ‘legitimate,’ and thus the detrimental impact will reflect discrimination prohibited under Art. 2.1.”⁶⁰ Furthermore, TBT 2.1 is correctly read in conjunction with the sixth recital of the TBT Preamble, as was done by the AB in *US—Clove*⁶¹ and by the AB in *US—Tuna II* in regards to TBT 2.2.⁶² The six recital states that technical regulations must not be a disguised restriction on international trade.⁶³

41. The ARRA’s design is discriminatory. As the GATT 1994 analysis under Art. I:1 and Art. XX Chapeau has demonstrated: the regulatory distinction to exempt 0.15 countries is arbitrary and unjustified. The 0.15 hectare condition is directly linked to origin. Legitimate regulatory distinctions under the TBT are not granted to regulations that constitute *de jure* discrimination, as is the case here.⁶⁴ There is no legitimate regulatory distinction for the differential treatment under the MFN obligation of TBT Art. 2.1.

42. The ARRA is not applied even-handedly. Even-handedness in applying a measure that might, on its face, seem origin neutral is a determining factor in whether a legitimate regulatory distinction exists.⁶⁵ Under the National Treatment analysis, the ARRA imposes arbitrary guidelines that are not applied even-handedly when considering that 50 percent of Viridium’s pre-disaster production of beef and 70 percent of eggs would not have met ARRA’s

⁵⁷ Epps and Trebilcock (2013), 456.

⁵⁸ ABR, *US—Clove Cigarettes*, [173-174]; Marceau and Trachtmann (2014), 366.

⁵⁹ De Schutter (2014), 98.

⁶⁰ ABR, *US—COOL*, [271]; ABR, *US—Tuna II (Mexico)*, [216]; ABR, *US—Clove Cigarettes*, [182].

⁶¹ Lester, Mercurio and Davies (2012), 603-612; ABR, *US—Clove*, [173].

⁶² ABR, *US—Tuna II*, [339].

⁶³ *Ibid.*

⁶⁴ ABR, *US—Clove Cigarettes*, [173-174]; Van den Bossche and Zdouc (2013), 869.

⁶⁵ ABR, *US—Tuna II*, [205-207].

requirements. Both Ruberia and Viridium have a one-year transition period before the ARRA comes into effect. Due to the disaster, Viridium has the opportunity to structure its entire market to ARRA's requirements thereby ensuring that domestic producers comply with the ARRA. The cost consequences on Ruberian producers are much higher by comparison. Furthermore, as under the GATT XX analysis in paras. 17-29 above, reasonable, less discriminatory alternatives exist.⁶⁶ The design and impact of the ARRA therefore fails the even-handed test under TBT Art. 2.1.

43. Finally, as the analysis under GATT XX in above paras 17-21 demonstrated, the ARRA's level of restriction on international trade is not justified in relation to its legitimate objectives. Thus, ARRA's detrimental impact on Ruberian products cannot be considered to stem from a legitimate regulatory distinction.

VII. The ARRA violates Art. 2.4 of the TBT Agreement because it is not based on the relevant international standard.

52. The ARRA violates TBT Art. 2.4 because it is not based on the relevant international standard, the WAWC Guidelines. For a measure to violate Art. 2.4, the international standard at issue must a) be a relevant international standard; b) have been used as a basis for the measure in question; and c) not be ineffective or inappropriate to the measure's purpose.⁶⁷

53. As applied to the facts of the case a) the WAWC Guidelines are a relevant international standard, b) they have not been used as a basis for the ARRA, and c) they are an effective and appropriate means for fulfilling the goal of the ARRA taking into account climatic or geographical factors or fundamental technological problems.

a) The WAWC Guidelines are a relevant international standard.

54. The WAWC guidelines are a relevant international standard. An international standard, per the ISO/IEC Guide 2, is composed of three parts: "(i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public."⁶⁸

55. Under TBT 2.4, an international standardizing body must approve an international standard. To qualify as an international standardizing body: a) the body must be active in standardization; b) the standardization activities must be recognized, but need not be the body's principle function; c) the body must be open to the relevant bodies of at least all WTO members,

⁶⁶ Zhou (2012), 1120; Irish (2014), 231.

⁶⁷ PR, US—Tuna II, [7.627]; PR, EC—Sardines, [7.74]; ABR, EC—Sardines, [204].

⁶⁸ PR, US—Tuna II, [7.664]; ISO/IEC Guide 2.

and open on a non-discriminatory basis.⁶⁹ In respect to criterion (b), a body's standards need not be "widely used" in order to be "recognized,"⁷⁰ and a body that has only developed a single standard (as is the case with the WAWC) can have "recognized activities in standardization."⁷¹ By adopting a standard, the WAWC is now active in standardization. The WAWC is open to ascension on a non-discriminatory basis.⁷² Therefore, the WAWC is an international standardizing body within the meaning of TBT Art. 2.4.

56. As the WAWC is an international standardizing body, and its members approved the Guidelines, it follows that the Guidelines are an international standard. The fact that the WAWC Guidelines were not adopted by consensus is irrelevant since international standards need not be approved by consensus.⁷³

57. The WAWC Guidelines are available to the public and refer to minimum space allowances for livestock.⁷⁴ Since ARRA Art. 2 also refers to minimum space allowances, the WAWC Guidelines constitute a relevant international standard.

b) The ARRA is not based on the WAWC Guidelines.

58. The ARRA violates TBT Art. 2.4 because it is not based on the WAWC guidelines. "As a basis for" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge."⁷⁵ The preamble to the ARRA states that "*Recognizing* that only a radical break with past farming practices will permit the development of a sustainable agricultural sector."⁷⁶ The law's purpose is to form an agricultural sector that is radically different from existing practices. As such, the space enclosure regulations in the ARRA are at a much higher standard than the WAWC guidelines. Where a measure is contradictory to a standard, it cannot claim it as its basis.⁷⁷ The ARRA's specifications are so much higher and overbroad in comparison to the WAWC Guidelines as to be contradictory.

59. The WAWC guidelines were developed through consultation with member nations and specialists, and one of their goals is to promote animal welfare amongst developing nations. The

69 ABR, US—Tuna II, [360-365].

70 Ibid, [392].

71 Ibid, [394].

72 Problem, [9].

73 Howse (2011), 389; ABR, EC—Sardines, [223, 227].

74 Problem, [10-12].

75 ABR, EC—Sardines, [240].

76 Problem, [3].

77 ABR, EC—Sardines, [248].

ARRA is not based on the WAWC even though they deal with a similar area because the restrictions are so much higher in the ARRA that they do not respect nor reflect the WAWC's spirit or purpose by raising standards such that developing nations cannot meet them.

c) The WAWC Guidelines are an appropriate and effective means for the legitimate objective pursued.

60. The WAWC guidelines are an effective and appropriate standard, notwithstanding Viridium's recent catastrophe. The Appellate Body upheld the interpretation of ineffective and inappropriate as, respectively: “The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.”⁷⁸ For promoting animal welfare, there is no question that regulations concerning size enclosures are related to the results and nature of the means. The WAWC guidelines have lower standards for size enclosures than the ARRA, but were developed in consultation with multiple nations for the goal of promoting animal welfare. Therefore, the standard by the WAWC is appropriate and effective for the goal of promoting animal welfare.

VIII. The ARRA violates TBT Art. 3.1 by failing to ensure private entities comply with TBT Art. 2.4.

61. The ARRA does not contain measures to ensure compliance by local governmental or non-governmental bodies with TBT Art. 2.4. TBT Art. 3.1 provides that: “members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Art. 2.”⁷⁹ The ARRA does not outline any monitoring mechanism for ensuring compliance by local bodies, even though it allows local bodies to operate even more restrictively than the law. It is a positive obligation to create measures and mechanisms to ensure that non-governmental bodies do not violate TBT Art. 2.4.⁸⁰

62. As defined by the TBT Agreement, a non-governmental body is a 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.”⁸¹ The association of Viridium's largest food retailers meets this definition because of their market share (80 percent) and practice of setting standards in Viridium. Although a body appears to create a voluntary standard, it can still

78 ABR, EC—Sardines, [261].

79 TBT, Art. 3.1.

80 Arcuri (2013), 499.

81 TBT, Annex 1.8.

function as a technical regulation if the adoption of that standard is, for all intents and purposes, mandatory.⁸² Technical regulations are mandatory by nature; therefore any technical regulation coming from non-governmental bodies “involves acts delegated by public powers.”⁸³ By setting their own standards and announcing their compliance with the ARRA, this association enforces the ARRA's measures.

63. The ARRA includes specifications that are extremely difficult to monitor, such as cattle prod usage. For example, it is extremely difficult to accurately determine how often a farmhand uses a cattle prod. The danger is that such specifications are impossible to enforce, and, rather, serve as a way to ban imports. The ARRA does not set out any method to inspect or certify compliance.

IX. The ARRA violates TBT Art. 3.4 as it encourages local bodies to act inconsistently with TBT Art. 2.4.

64. The ARRA violates TBT Art. 3.4 by failing to provide measures for discouraging local bodies from acting inconsistently with TBT Art. 2.4. TBT 3.4 reads as follows: “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 Art. 2.”⁸⁴ Art. 3.4 of the TBT has not been interpreted by the WTO. Therefore, this provision will be analyzed according to the *Vienna Convention on the Law of Treaties*. First, the provision's text must be interpreted according to the “ordinary meaning to be given to the terms of the treaty in their context.”⁸⁵ Second, the provision's terms must be interpreted “in their context and in light of its object and purpose.”⁸⁶

65. For step 1, The Oxford English Dictionary defines “require” as “to make a request or demand of a person.”⁸⁷ “Encourage” is “to incite, induce, instigate; in a weaker sense, to recommend, advise.”⁸⁸ TBT 3.4, then, concerns measures that force or provide incentives for local governmental and non-governmental bodies from acting against TBT Art. 2.4.

82 Arcuri, (2013), 500-501.

83 Ibid, 499.

84 TBT, Art. 3.4.

85 VCLT, Art. 31.1.

86 Ibid.

87 Oxford English Dictionary (2014).

88 Ibid.

66. For analyzing the textual context in step 2, the TBT's purpose is to promote free trade by restricting technical regulations. TBT Art. 3.4, then, exists to stop governments circumventing the TBT by disallowing local bodies with government-like control from behaving inconsistently with the TBT where the government has agreed not to.

67. The ARRA allows local bodies to set even more restrictive specifications than those set down in the law, which can be inconsistent with TBT Art. 2.4 by being arbitrarily discriminatory. By including Art. 5 in the ARRA, which allows private retailers to implement more stringent standards than those listed in the ARRA, Viridium encourages the association of food retailers, a non-governmental body, to impose stricter measures for animal welfare.

X. In the alternative, the ARRA violates TBT Art. 4.1 and Annex 3F.

68. If the ARRA is a standard and not a technical regulation, it still violates TBT Art. 4.1 by not ensuring local bodies' compliance with relevant international standards. The Viridian association of local food retailers has not adopted the WAWC Guidelines, contrary to TBT Annex 3F. According to TBT Art. 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]"⁸⁹ TBT Art. 4.1 applies to both "local government and non-governmental standardizing bodies."⁹⁰ Viridium's association of its largest food retailers, which dominates 80 percent of the market, seeks to apply even more restrictive standards than the ARRA. As stated above, this association qualifies as a non-governmental body.

69. TBT Annex 3F requires that local standardizing bodies adopt international standards where applicable, similarly to how governments must develop standards according to TBT Art. 2.4. The local association of food retailers has not based their standards on the WAWC guidelines. The local association of food retailers cannot implement stricter standards in areas governed by the WAWC, since, as above, even greater restrictions on space enclosures do not promote animal welfare. Additionally, stricter standards cannot be justified based on Viridium's geography, climate, or technological capacity. Therefore, if the ARRA is a standard, it violates TBT 4.1 as it does not ensure that private entities like the association comply with TBT 2.4.

⁸⁹ TBT, Art. 4.1.

⁹⁰ Ibid.

REQUEST FOR FINDINGS

For the above stated reasons, Ruberia requests that the Panel finds:

- (I) That the ARRA is inconsistent with Viridium's obligations under Arts. I:1 and Art. III:4 of the GATT 1994.
- (II) That the ARRA is not provisionally justified under the subparagraphs of Art. XX of GATT 1994 and that it is inconsistent with the requirements of the Chapeau of Art. XX of GATT 1994.
- (III) That the ARRA is a technical regulation within the meaning of Para 1, Annex 1.1 of the TBT Agreement.
- (IV) That the ARRA is in violation of Art. 2.1 of the TBT Agreement.
- (V) That the ARRA is inconsistent with Viridium's obligations under Art. 2.4, and Arts 3.1 and 3.4 or in the alternative Art. 4.1 of the TBT Agreement.