



Sidley Austin Brown & Wood LLP
Institute of International Economic Law

WTO Moot Court Competition 2003

April 14-15, 2003, Washington, DC

Bench Memorandum

CONFIDENTIAL

This Bench Memorandum is being distributed to the panelists for purposes of briefing them on the legal issues addressed in the Competition Problem. The content of the Bench Memorandum is strictly confidential to all but panelists and the Steering Committee (*Official Rule 4.5*). Any team found making use of this Bench Memorandum shall be eliminated from the Competition. Teams discovering a copy of the Bench Memorandum should immediately return it, without examining the contents, to the Competition Office. (*Official Rule 2.5*)

Table of Contents

	<u>Page</u>
GENERAL ISSUES.....	1
I. Relationship between GATT, TBT, and SPS	1
A. Issue. In what order should a Panel examine a measure that appears <i>a priori</i> covered by both GATT 1994 and by another Agreement in Annex 1A to the Agreement Establishing the WTO?	1
B. Issue. What is the relationship between the SPS and TBT Agreements?.....	2
ISSUES UNDER THE GATT	3
II. Relationship between GATT Article XI:1 and Article III:4.....	3
A. Issue. Should the import ban on eggs be examined under Article XI:1 (relating to import restrictions) or Article III:4 (related to the national treatment requirement for internal regulations), or both?.....	3
III. GATT Article III:4.....	5
A. Issue. Does the ban on certain eggs accord less favorable treatment to imports than that accorded to domestic like products in violation of Article III:4?.....	5
B. Issue. Does the requirement to develop labeling rules, along with the proposed labeling regulations, accord less favorable treatment to imported products than that accorded to domestic like products?	8
IV. GATT Article XI:1	10
A. Issue. Does the import ban violate GATT Article XI:1?	10
V. GATT Article XX(b)	12
A. Issue. Can the import ban be justified under GATT Article XX(b)?.....	12
B. Issue. Can the requirement for a labeling scheme and the proposed labeling regulations be justified under GATT Article XX(b)?.....	15
ISSUES UNDER THE SPS AGREEMENT	18
VI. Applicability of SPS Agreement.....	18
A. Issue: Does the temporary import ban constitute an SPS measure?	18

Table of Contents
(continued)

	<u>Page</u>
B. Issue. Can the SPS Agreement apply to the proposed labeling scheme that has not yet entered into force?	20
C. Issue: Is the mandatory labeling concerning the production method an SPS measure?	21
D. Issue. Is the Mandatory reference to the nutritional disadvantages on the product label an SPS measure?	22
E. Issue. Is the mandatory warning on the product label concerning the danger of serious food poisoning an SPS measure? See issue.....	23
VII. Does the temporary import ban conform to the general SPS Principles as established by Article 2.2 of the SPS Agreement?	23
A. Issue: SPS measures may only be applied to the extent necessary to protect human or animal health (Article 2.2).....	23
B. Issue. Is the SPS measures based on scientific principles?.....	24
C. Issue. Is the SPS measure maintained without sufficient scientific evidence (Article 2.2)?	25
VIII. An SPS measure may not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail (Article 2.3 first sentence).....	26
A. Issue: Does the SPS measure arbitrarily or unjustifiably discriminate between Members?	26
B. Issue. Is the SPS measure applied in a manner that constitutes a disguised restriction on international trade (Article 2.3 second sentence)?.....	27
IX. SPS Agreement Article 3.3	27
A. Issue. Is the Animal Welfare Convention an international standard, guideline or recommendation?.....	27
X. SPS Agreement Articles 5.1 and 5.2.....	28
A. Introductory remarks. Risk Determination - Risk Assessment – Risk Management.....	28
B. Issue. Is SPS measure based on a risk assessment as defined by Annex A, paragraph 4?.....	28

Table of Contents
(continued)

	<u>Page</u>
C. Issue. Did the risk assessment take into account the factors set out in SPS Agreement Articles 5.2 and 5.3.	30
D. Issue. Is the SPS measure based on a risk assessment?	32
XI. Article 5.5 of the SPS Agreement.....	33
A. Issue. Is Anterra consistent in applying its appropriate levels of protection?	33
XII. SPS Agreement Article 5.6.....	36
A. Issue: Are the measures in question more trade restrictive than required?.....	36
ISSUES UNDER THE TBT AGREEMENT	38
XIII. Applicability of TBT Agreement under TBT Agreement Annex 1.1.....	38
A. Issue. Should the entire Global Hen Protection Act be examined – as a <i>whole</i> – to determine if it is a “technical regulation” under Annex 1.1 to the TBT Agreement?.....	38
B. Issue. Is the import ban a “technical regulation”?	39
C. Issue: Is the labeling requirement a “technical regulation”?	40
XIV. TBT Agreement Article 2.1	40
A. Issue: Does the import ban violate the Most-Favored Nation (MFN) guarantee under TBT Agreement Article 2.1?.....	40
B. Issue. Does the import ban violate the NT guarantee under TBT Agreement Article 2.1?.....	43
XV. TBT Agreement Article 2.2	45
A. Issue. Does either the import ban or the labeling requirement violate TBT Agreement Article 2.2?.....	45
XVI. TBT Agreement Article 2.4	47
A. Issue. Is either the import ban or the labeling requirement a “relevant international standard” under TBT Agreement Article 2.4?.....	47
ISSUES UNDER THE AGREEMENT ESTABLISHING THE WTO	50

Table of Contents
(continued)

	<u>Page</u>
XVII. WTO Agreement Article XVI:4	50
A. Issue. Do any of the provisions of the Global Hen Protection Act violate Article XVI:4 of the WTO Agreement?	50

GENERAL ISSUES

I. Relationship between GATT, TBT, and SPS

- A. Issue. In what order should a Panel examine a measure that appears *a priori* covered by both GATT 1994 and by another Agreement in Annex 1A to the Agreement Establishing the WTO?
1. Lex specialis doctrine. When GATT 1994 and another Agreement in Annex 1A appear *a priori* to apply to a measure, the measure shall be examined first with respect to the Agreement that addresses the measure specifically. Only if the measure is found to be consistent with the specific agreement should it then be examined under GATT.¹
 - a. TBT/GATT relationship. If a measure appears *a priori* to be covered by both the TBT and GATT Agreements, a Panel initially must determine whether the measure is a “technical regulation” subject to the TBT Agreement. Two Panels have held that, if both Agreements apply, then the measure should be examined first under the TBT Agreement, which addresses technical regulations “specifically, and in detail.”² GATT claims will be examined only if the measure is found to be consistent with the TBT Agreement.³
 - b. SPS/GATT relationship. If a measure appears *a priori* covered by both the SPS and GATT Agreements, a Panel initially must determine whether the measure is a “sanitary or phytosanitary measure” subject to the SPS Agreement. The *lex specialis* doctrine discussed above applies identically here. In addition, the SPS analysis should be conducted first because measures found to be SPS-consistent are presumed to be GATT-consistent under SPS Agreement Article 2.4.⁴ [Note that no such presumption of GATT consistency exists under the TBT Agreement].
 2. Implication. Student submissions should structure their arguments in light of this rule.
 - a. The complainant submission (Bellona) should address: (1) whether the contested measures are (a) “technical regulations” subject to the TBT Agreement or (b) “sanitary or phytosanitary measures” subject to the SPS Agreement; (2) whether the measures are consistent with the relevant Agreement (i.e. TBT or SPS); and (3) in the *alternative*, whether the measures comply with the GATT.

¹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 204.

² See Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, paras. 8.15-8.17; Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, paras. 7.14-7.19.

³ See Panel Report, *EC – Asbestos*, para. 8.17.

⁴ See also Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699, para. 8.42.

- b. The respondent (Anterra), is likely to argue either that: (1) the measures fall within the scope of either the TBT or SPS Agreement; (2) the measures are consistent with the relevant Agreement; and (3) that the measures cannot be examined under the GATT; or, in the alternative, the measures, if examined under the GATT, are consistent with GATT Articles III:4 and XI.

B. Issue. What is the relationship between the SPS and TBT Agreements?

1. Provisions.

- a. SPS Agreement Article 1.1. “This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.”
- b. SPS Agreement Article 1.4. “Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.”
- c. TBT Agreement Article 1.5. “The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.”

2. Discussion. The SPS and TBT Agreements are mutually exclusive. SPS Agreement Article 1.1 defines the scope of the SPS Agreement. SPS Agreement Article 1.4 provides that the SPS Agreement shall not affect the Members’ rights with respect to the TBT Agreement regarding measures outside the scope of the SPS Agreement. TBT Agreement Article 1.5 explicitly states that the Agreement’s provisions do not apply to sanitary and phytosanitary measures.

ISSUES UNDER THE GATT

II. Relationship between GATT Article XI:1 and Article III:4

- A. Issue. Should the import ban on eggs be examined under Article XI:1 (relating to import restrictions) or Article III:4 (related to the national treatment requirement for internal regulations), or both?
1. Measure. Pursuant to the Global Hen Protection Act, there is an import ban on eggs produced using cages of 2' x 2' x 2' or less.
 2. Provision. Note *Ad* Article III: “Any ... law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product *and* to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.”
 3. Jurisprudence.
 - a. GATT Panel Report, *U.S. - Tuna I*, DS21/R, unadopted (circulated September 3, 1991).
 - b. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.
 - c. Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002.
 4. Discussion.
 - a. Summary of Arguments FOR examination under Article III:4. The spirit of Note *Ad* Article III seems to be intended to bring measures that apply to both domestic and imported like products under Article III. Here, when examined together, the import ban under the Global Act and the domestic ban under the Domestic Act apply to both domestic and imported like products, and therefore Article III should apply. Anterra will argue that the measures are consistent with both GATT Articles III:4 and XI. Nevertheless, it is probable that Anterra will insist that the measure be examined only under Article III:4. The rationale behind that argument is that it is arguably more difficult to justify a measure under Article XI than under Article III:4.
 - b. Summary of Arguments AGAINST examination under Article III:4. The Note *Ad* Article III refers to a “law, regulation or requirement” in the singular. When examined on its own, the import ban in the Global Hen Protection Act clearly applies only to imported products, and does not apply to “like domestic products.” Bellona will argue that the measures violate Articles III:4 and XI, even though it

may find it less difficult to demonstrate a violation of Article XI since the latter does not require an examination of “like” products.

c. Analysis.

- i. To date, no WTO panel or Appellate Body report has addressed this precise question. Under the GATT, a panel appears to have ruled on a very similar factual situation. In the first *Tuna/Dolphin* case, the Panel concluded that the import ban at issue was not covered by the Note *Ad* Article III, and therefore did not fall within Article III, as the measure did not apply to “products.”⁵ The panel's findings in that case were based on the so-called “product/process” distinction, which distinguishes between a *product itself* and the *production process* for that product. This panel report was never adopted. The “product/process” distinction has been widely criticized by academic commentators, and it is not clear that it should play a role in addressing the issue here.
- ii. Since the establishment of the WTO, the issue of the relationship of Articles III:4 and XI:1 has been looked at only briefly. In *EC - Asbestos*, the panel found that because the measure applies to *both* the imported product *and* the like domestic product, it falls within the terms of the Note *Ad* Article III and is therefore subject to Article III:4 (as a result, the panel considered it unnecessary to determine whether Article XI:1 applies as well).⁶ However, in *EC - Asbestos*, unlike the present case, a *single* measure was at issue that applied to both domestic products and imports.
- iii. In addition, the Panel in *India - Autos* said that it cannot be excluded that different aspects of a measure may affect the competitive opportunities of imports in different ways, bringing them within the scope of *either* Article III (where competitive opportunities on the domestic market are affected) *or* Article XI (where the opportunities for importation itself, i.e., entering the market, are affected), or that there may be a potential for overlap between the two provisions.⁷ Again, a single measure was at issue.
- iv. Thus, these two WTO cases do not directly address the question at issue here: Where there are two separate and distinct measures, one establishing a ban on domestic products and the other establishing an equivalent ban on imports, does the Note *Ad* Article III apply and dictate that the measures be examined as an internal regulation under Article III? Furthermore, there is an important follow-up question: If Article III applies, does this mean that Article XI:1 does not apply?

⁵ GATT Panel Report, *U.S. - Tuna I*, DS21/R, unadopted (circulated September 3, 1991), para. 5.14.

⁶ Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001, paras. 8.91-99.

⁷ Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, paras. 7.223-224.

- v. The answer to these questions may depend on the particular perspective taken regarding the measures at issue.
- vi. The Note *Ad Article III* refers to any "law", "regulation" or "requirement," using the *singular* form. Thus, on its face the Note appears to envision a *single* law which applies to both domestic and imported products. Here, the primary law at issue is the Global Act. When the Global Act is examined on its own, there is only the import ban, so it would seem that the Note *Ad Article III* would not apply because domestic products are not covered. Thus, a strict textual interpretation of the words of the Note *Ad Article III* may indicate that the Note does not apply when *separate* measures are used to regulated domestic and imported products. Thus, there is good textual support for the proposition that the Note does not apply to the facts at issue here.
- vii. However, this approach may be too formalistic. It assumes that legislators and regulators will always be able to enact measures as one comprehensive package. However, in practice, this may be quite difficult. There are many reasons why separate actions would be taken for domestic and imported products. A strictly textual approach ignores this reality. Thus, despite the language used in the Note, in order to fulfill the purpose of the Note both measures might need to be considered together. Although the domestic and import bans were achieved through formally distinct measures, the two bans are clearly linked to one another. Under this view, the Global Act and the Domestic Act should be seen as part of the same policy implemented by Anterra. If the two Acts -- Global and Domestic -- are examined *jointly*, the import ban may be seen as the counterpart of the domestic ban. From this perspective, it could be argued that the Note *Ad* applies and the import ban under the Global Act must be examined under Article III.

III. GATT Article III:4

- A. Issue. Does the ban on certain eggs accord less favorable treatment to imports than that accorded to domestic like products in violation of Article III:4?
 - 1. Measures. Under the Global Hen Protection Act, there is an import ban on eggs produced using cages of 2' x 2' x 2' or less; under the Domestic Hen Protection Act there is a ban on domestic eggs produced in such cages, but there is no restriction on eggs produced by other methods.
 - 2. Provision. GATT Article III:4 states: "The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."
 - 3. Jurisprudence.

- a. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
 - b. Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
 - c. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
4. Discussion.
- a. Summary of arguments FOR: Bellona would argue that foreign eggs and Anterran eggs, produced by any method, are "like" products, and that the measures treat imported eggs less favorably than domestic like products since it bans the former based solely on their process and production method.
 - b. Summary of arguments AGAINST: Anterra would argue that through the combined domestic and import ban, the measures apply the exact same rules to domestic as to imported products. On the other hand, Anterra may also argue that the products are not "like" and therefore must not be subject to the same or equivalent treatment, i.e., a comparison of treatment under Article III:4 of imported eggs produced by hens kept in small cages, and domestic eggs produced by free range hens, is not appropriate since they are not "like" products.
 - c. Background.
 - i. In the section on the relationship of GATT Article III:4 and Article XI:1 we discussed the issue of whether Article III:4 applies to the ban. If it is decided that GATT Article III:4 does apply, the question is whether, through the domestic and import bans, imports are treated "less favorably" than "like" domestic products.
 - ii. GATT Article III is commonly said to be about "non-discrimination." However, the term "discrimination" is difficult to define, and over the years different GATT/WTO panels have taken different approaches to examining claims under this provision. We note several of these approaches here:
 - A The "like product" approach -- a violation of Article III:4 will be found where a measure treats "like products" differently, regardless of the proportion of imports and domestic products in the favored and disfavored categories. This is so because under this approach, if any individual foreign product is treated less favorably than a domestic "like product," a violation exists.
 - B The "product/process" distinction -- a violation of Article III:4 will be found where a measure regulates the process by which a product was made, rather than the product itself.

- iii. Each of these approaches finds support in at least one prior GATT/WTO panel or Appellate Body report. In our view, however, the most recent pronouncements by the Appellate Body on this issue, in *EC - Asbestos*, clarify the interpretation to this provision. According to the Appellate Body, there are two separate inquiries under this provision: whether the products at issue are "like"; and whether imported products are treated "less favourably" than domestic "like" products.
- d. "Like Products." Under the "like products" issue, the Appellate Body has stated that the key factors to be taken into account are: "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products."⁸ The products at issue here are eggs. Broadly speaking, there are two categories of eggs: eggs produced by free-range hens and eggs produced by hens kept in cages. In addition, there are a variety of sub-categories of eggs produced with caged hens, with varying cage sizes.
- i. With regard to categories (ii) and (iv), eggs from all the categories appear to be the same. With (i) and (iii), though, the issue is more complicated. Bellona should be expected to argue that in terms of the properties, nature and quality of the product, there is no evidence of a different appearance among the types of eggs. However, Anterra is likely to rebut by arguing that the eggs are not like, as evidenced by the fact that eggs produced by caged hens have a higher incidence of disease and are nutritionally inferior. As to consumers' tastes and habits, there is clearly, on the facts as provided here, some preference for eggs produced by free-range hens.
- ii. Whether the products at issue are "like" depends on weighing and balancing these four factors.
- e. "Less Favourable Treatment." If it is determined that eggs from free-range hens are "like" eggs produced by caged hens, Bellona must then demonstrate that "less favorable treatment" exists for foreign eggs. In this case, the measures *a priori* appear to treat these products in the same manner. Both foreign and domestic eggs are banned when produced by hens kept in cages of 2' x 2' x 2' or less. There is no explicit distinction in the text of the measure between the treatment of foreign and domestic eggs. However, even a measure that provides *de jure* equal treatment may result in *de facto* "less favorable" treatment for imports. Here, there are several relevant questions to ask to determine whether *de facto* "less favorable" treatment exists:
- i. What proportion of imports is adversely affected by the measures as compared to domestic products?⁹ For example, if most foreign products fall into the

⁸ Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted April 5, 2001, para. 101.

⁹ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281, paras. 49-54.

category disfavored by the measures, but most domestic products fall into the favored category, this would be evidence of a discriminatory effect against (or disparate impact on) imports. Note that this question could be asked as of two different dates -- the date of enactment of the domestic ban, and the date of enactment of the import ban. Here, the facts show that "the vast majority of [domestic] egg production is ... carried out with free range hens." By contrast, "[e]gg production in Bellona ... relies heavily on caged hens. Close to 80 percent of egg production uses these cages. Furthermore, about 90 percent of the cages used are 2' x 2' x 2' or less."

- ii. Is there anything in the wording of the measures that indicates a protectionist intent?¹⁰ An examination of the "objective" purpose of the statute shows a preference for free-range hens, which the facts indicate are more likely to be produced by domestic companies than by foreign companies.
- iii. Is there anything in the statements of legislators that indicates a protectionist intent?¹¹ As stated in the problem, several legislators from egg-producing states said that this law was "a great boon for their constituents" and that "the playing field for egg sales is now where it should be." Another said, "foreign egg producers have been taking advantage of us for too long now, and this legislation sets things right."

Whether there is "less favorable treatment" in the sense of Article III:4 will depend on weighing and balancing the answers to some or all of these questions.

B. Issue. Does the requirement to develop labeling rules, along with the proposed labeling regulations, accord less favorable treatment to imported products than that accorded to domestic like products?

1. Measure. Under the Global Hen Protection Act, there is a requirement that labeling regulations be developed for eggs; proposed regulations have been drafted. Proposed regulations state that eggs must be labeled with one of five marks, depending on their method of production:

- Produced by hens kept in very small cruel and inhumane cages of 1' x 1' x 1' or less
- Produced by hens kept in cruel and inhumane cages of 2' x 2' x 2' or less
- Produced by hens kept in cruel and inhumane cages of 3' x 3' x 3' or less
- Produced by hens kept in cruel and inhumane cages of greater than 3' x 3' x 3'
- Produced by free range hens that are not kept in cruel and inhumane cages

Additionally, the proposed regulations mandate that the product label must include the following text: "Eggs from caged hens contain higher amounts of fat and

¹⁰ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 100.

¹¹ Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, page 32.

cholesterol." Furthermore, all eggs produced by hens kept in cages must display the following warning by the surgeon general: "Warning by the Surgeon General: Eggs from hens kept in cages have a high risk of being infected with bacteria that can cause food poisoning. Do not consume raw. Wash your hands after handling."

2. Provision. GATT Article III:4 states: "The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."
3. Jurisprudence.
 - a. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.
 - b. Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281.
 - c. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.
4. Discussion.
 - a. Summary of arguments FOR: Bellona would argue that foreign eggs produced by hens kept in small cages and Anterran eggs produced by free range hens are "like" products, and that the labeling rules treat the imported products less favorably than domestic like products.
 - b. Summary of arguments AGAINST: Anterra would argue that under the labeling requirements, the measures apply the exact same rules to domestic as to imported products.
 - c. General Background.
 - i. As a preliminary matter, it should be noted that these regulations are not yet in effect. They are merely "proposed." Therefore, Anterra could argued that they are not yet "ripe" for challenge. The case law in this area supports the ability to challenge at least some measures that are not yet in effect. In the GATT *Superfund* panel report, it was stated: "The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken."¹² Similarly, in the *Chile - Alcohol* case, a WTO panel and the Appellate Body ruled, without discussing this issue, on an aspect of the measure at issue that would not become effective for over a year. By contrast, in the present situation the

¹² GATT Panel Report, *U.S. - Taxes on Petroleum ("Superfund")*, L/6175, adopted June 17, 1987, para. 5.2.2.

regulations have only been proposed, and are likely to be subject to modification. Therefore, the executive branch of Anterra's government still has a great deal of discretion to ensure that the measure is implemented consistently with WTO obligations. The mandatory/discretionary doctrine -- discussed below in more detail in the context of import ban -- is relevant here. Thus, Anterra should argue that even if the proposed regulations themselves are inconsistent with WTO rules, the discretion to formulate final regulations that are consistent with WTO rules means that the proposed regulations cannot be challenged.

ii. If, despite these preliminary issues, it is determined that the labeling measures may be considered, the claim under the GATT will be under Article III:4, which deals with domestic regulations other than tax measures.

d. "Like Products."

Whether the products at issue are "like" depends on weighing and balancing the four factors discussed in *supra* section III.A.4.d, at page 7.

i. "Less Favourable Treatment."

Whether there is "less favorable treatment" in the sense of Article III:4 will depend on weighing and balancing the answers to some or all of the questions discussed in *supra* section III.A.4.e, at page 7.

IV. GATT Article XI:1

A. Issue. Does the import ban violate GATT Article XI:1?

1. Measure. Under the Global Hen Protection Act, there is an import ban on eggs produced using cages of 2' x 2' x 2' or less. This ban is only partial, as it allows the Minister of Agriculture to exempt specific imports "in appropriate circumstances."
2. Provision. GATT Article XI:1 states: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member ..."
3. Jurisprudence.
 - a. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.
4. Discussion.

- a. Summary of arguments FOR: Bellona would argue that the import ban constitutes a "prohibition or restriction" on the "importation" of foreign products in violation of Article XI:1.
- b. Summary of arguments AGAINST: Anterra would argue that there is "discretion" to implement the ban consistently with Article XI:1.
- c. Analysis.
 - i. Bellona should argue that, on its face, an import ban on eggs violates GATT Article XI:1, as it constitutes a "prohibition or restriction" on the "importation" of eggs. Prior WTO panels have found that similar laws constitute violations of Article XI:1. For example, in *U.S. - Shrimp*, the panel noted that the measure at issue "expressly requires the imposition of an import ban on imports from non-certified countries" and concluded that the measure "imposes a 'prohibition or restriction' within the meaning of Article XI:1."¹³ However, the jurisprudence under Article XI:1 with regard to these types of measures has been rather brief. It appears that there is a general assumption that a measure that has been characterized as an "import ban" will violate Article XI:1, and therefore an in-depth analysis of the issues is not undertaken.
 - ii. Anterra would argue that there is "discretion" to implement the ban consistently with Article XI:1. In addition to the question of whether Article XI:1 even applies here (discussed above), we note that there is one other argument that this measure should not be held to violate Article XI:1. As explained by one panel, the traditional "mandatory/discretionary" doctrine provides that "legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation could be subject to challenge."¹⁴ The precise scope of this doctrine today is unclear, as different panels have taken different approaches. However, a number of panels have concluded that only measures that "mandate" action inconsistent with WTO rules will result in a violation.¹⁵ Under this approach to the doctrine, Anterra could argue that the import ban is "discretionary," and therefore cannot be challenged on its face, because the executive branch has the "discretion" to provide exemptions from the ban. Specifically, the Minister of Agriculture may exempt specific imports from the ban "in appropriate circumstances." Thus, by exercising this

¹³ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821, paras. 7.16-17.

¹⁴ Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, paras. 8.3-6.

¹⁵ Panel Report, *U.S. - Export Restraints*, WT/DS194/R, adopted August 23, 2001, and Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002.

discretion, it is possible for Anterra to act consistently with GATT Article XI:1 by exempting all imports from the ban.

- iii. On the other hand, Bellona may rebut Anterra's argument by citing the *U.S. - Section 301* panel which found that the mere existence of some "discretion" on the part of the implementing Member does not mean that a measure could not be challenged.¹⁶
- iv. The choice of approach to this doctrine is not decisive, as the limited exceptions provided in the measure do not make the law "discretionary." In particular, whether or not an exemption is granted depends in large part on the decision of specific companies to comply with certain rules. Thus, the power of the Anterra government Ministry is not sufficient to grant an exemption -- there must be additional actions taken by the private company. As a result, in situations where the private company has not complied with the conditions, an import ban is mandatory.

V. GATT Article XX(b)

A. Issue. Can the import ban be justified under GATT Article XX(b)?

1. Measure. Under the Global Hen Protection Act, there is an import ban on eggs produced using cages of 2' x2' x 2' or less.
2. Provision. GATT Article XX states in relevant part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (b) necessary to protect human, animal or plant life or health ..."
3. Jurisprudence.
 - a. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.
 - b. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.
 - c. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
4. Discussion.

¹⁶ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, paras. 7.53-80.

- a. Summary of arguments FOR. Bellona would argue that because there are less trade-restrictive measures that would accomplish the goal of protecting hens, the import ban cannot be justified under Article XX(b).
- b. Summary of arguments AGAINST. Anterra would argue that, weighing the trade-restrictiveness of the import ban, the contribution of the ban to the policy of hen protection, and the importance of hen protection, the ban is justified under Article XX(b).
- c. General background. Assuming a violation of either GATT Article III:4 or GATT Article XI:1 is found, Anterra could present a defense under the "General Exceptions" of GATT Article XX. GATT Article XX has two parts. First, a WTO Member invoking Article XX (in this case, Anterra) must demonstrate that its measure falls under one of the sub-provisions of Article XX. In this case, subparagraph (b), which covers, *inter alia*, measures "necessary" to protect human or animal life and health, appears to be the most relevant. Second, such WTO Member must prove that its measure does not violate the *chapeau* of Article XX.¹⁷
- d. Article XX(b).
 - i. The Appellate Body addressed Article XX(b) in the *EC - Asbestos* case. There, the Appellate Body noted that the issue is whether there is an alternative measure consistent with the GATT, or less inconsistent with it, which a Member could *reasonably be expected to employ to achieve its objectives*. It also considered that the extent to which the alternative measure contributes to meeting the objective of the policy is important. In this regard, it noted that the more important the policy pursued, the easier it will be to prove that a measure is necessary to meet those objectives.¹⁸ Based on this approach, the questions to ask with respect to Article XX(b) are: (1) Is there a less trade-restrictive measure that Anterra could reasonably be expected to employ to achieve its objectives? (2) To what extent would this alternative contribute to the objective of the policy? (3) How important is the policy goal pursued by Anterra?

A Is there a less trade-restrictive measure that could be used? There appears to be at least two such possible measures. First, labeling is an option that would almost certainly restrict trade less than an import ban. Labeling has been considered, but is not ready yet -- regulations are still being developed. In a strict sense, then, the import ban is not the least-trade restrictive. However, this ban is merely a temporary measure that is designed as a bridge to adopting a labeling scheme. Arguably, therefore, the import ban

¹⁷ Appellate Body Report, *U.S. - Shrimp*, WT/DS58/AB/R, adopted November 6, 1998, paras. 118-120.

¹⁸ Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted April 5, 2001, paras. 169-172.

should not be condemned on the basis of labeling as an alternative measure, as labeling will be used very soon.

- B In addition, there is the possibility of limiting the number of hens per cage to one. Studies have shown that this would be an effective way to promote human and animal health. Such a measure would probably be less trade restrictive -- instead of foreign companies being forced to abandon production with caged hens, they could modify their method of cage usage.
- C To what extent would this alternative measure contribute to the objective of the policy at issue? An import ban on eggs produced with hens in small cages would help deter the use of such cages by eliminating a market for such eggs. Thus, it clearly would contribute to its stated objective. By contrast, while they would contribute to the objective, it is likely that neither labeling nor a one hen per cage rule would contribute as much to hen protection as would the ban.
- D How important is the policy goal pursued by Anterra? Protecting animal welfare, the main objective of the measure, is important, although probably not as important as an objective like protecting human health. Here, the human health component exists as well due to the negative health effects of consuming caged hens, although it is probably not as strong as it was in the *EC - Asbestos* case.
- E To determine whether Article XX(b) has been met, each of these three factors must be balanced and weighed.

e. Article XX Chapeau.

- i. If Article XX(b) is satisfied, the respondent, Anterra, must then demonstrate that the conditions of the *chapeau* are also met. The *chapeau* requires that measures not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, ..." This inquiry tends to be very fact-specific, and it is therefore difficult to discern any general principles from the prior jurisprudence. Looking at the terms of the provision, there are three separate prohibitions: of "arbitrary discrimination," of "unjustifiable discrimination," and of "disguised restrictions on international trade."
- ii. With regard to the first two prohibitions, the initial question to be asked is whether "discrimination" exists. If so, it then must be determined whether this discrimination is "arbitrary" or "unjustifiable."

- iii. With regard to "discrimination," there are two issues. When the import ban is examined in connection with the domestic ban, it is difficult to argue that discrimination exists, as both imports and domestic products are subject to a ban. However, there are two ways that discrimination might still exist: if foreign companies are more likely to produce eggs with caged hens, the method that is disfavored by the ban; or if some Members are more likely to use this method than other Members.
- iv. Second, if discrimination exists, is this discrimination "arbitrary" or "unjustifiable." Here, a key issue may be the decision to have the ban cover only cages below of 2" x 2" x 2" or less, given that cages slightly above that size may also be problematic. Thus, it could be argued that this measure actually allows the behavior that it purports to condemn by permitting the use of some cages. Nonetheless, it does cover the most egregious cases of bad treatment of hens.
- v. Finally, as to the question of whether the measure is a "disguised restriction on international trade," the *EC - Asbestos* panel dealt with this question by stating that while the aim of a measure may be difficult to ascertain, the "design, architecture and revealing structure" of a measure may reveal whether the measure has "protectionist objectives."¹⁹ Thus, the question of the true intent of the measure may be relevant here.

B. Issue. Can the requirement for a labeling scheme and the proposed labeling regulations be justified under GATT Article XX(b)?

- 1. Measure. Under the Global Hen Protection Act, the Anterra government is to develop labeling requirements for hen-related products; proposed regulations have been drafted.
- 2. Provision. GATT Article XX provides in relevant part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (b) necessary to protect human, animal or plant life or health ..."
- 3. Jurisprudence.
 - a. Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted April 5, 2001
 - b. Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001
 - c. Appellate Body Report, *U.S. - Shrimp*, WT/DS58/AB/R, adopted November 6, 1998
- 4. Discussion.

¹⁹ Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001, paras. 8.237-239.

- a. Summary of arguments FOR: Bellona would argue that because there are less trade-restrictive measures that would accomplish the goal of protecting hens, the labeling requirements cannot be justified under Article XX(b).
- b. Summary of arguments AGAINST: Anterra would argue that, weighing the trade-restrictiveness of the import ban, the contribution of the ban to the policy of hen protection, and the importance of hen protection, the labeling requirements are justified under Article XX(b).
- c. General background. As noted above in the context of the import ban, GATT Article XX has two parts. First, a Member invoking Article XX must demonstrate that its measure falls under one of the sub-provisions of Article XX (sub-paragraph (b) is most relevant here). Second, a Member must provide that its measure does not violate the *chapeau* of Article XX.
- d. Article XX(b).

For a discussion of Article XX(b) *see supra* section V.A.4.d, at page 13.

- A Is there a less trade-restrictive measure that could be used? With regard to the labeling regulations, we note that this measure is certainly less trade-restrictive than the import ban, as imports may be sold in Anterra as long as they are properly labeled. Thus, aside from the requirement to be labeled a certain way, there is no restriction on imports. Therefore, this measure does not appear to be very trade-restrictive at all.
- B In addition, there is the alternative possibility of limiting the number of hens one per cage. However, this possibility would actually force foreign producers to change production methods, which appears to be more trade-restrictive than a labeling requirement.
- C To what extent would this alternative contribute to the objective of the policy at issue? The labeling requirements for eggs produced with hens in small cages would help deter the use of such cages, by making consumers aware of the circumstances of the egg production and so that they may refuse to buy eggs produced by caged hens. Thus, it clearly would contribute to its stated objective. On the other hand, labeling would not be as effective as a total ban or a one hen per cage rule.
- D How important is the policy goal pursued by Anterra? Protecting animal welfare is important, although probably not as important as an objective like protecting human health. Here, the human health component exists as well, although it is probably not as strong as it was in the *EC - Asbestos* case.

To determine whether Article XX(b) has been met, each of these factors must be balanced and weighed.

e. Article XX Chapeau.

- i. For a discussion of the chapeau of Article XX see supra section V.A.4.e, at page 14.
- ii. With regard to "discrimination," there are two issues. Under the labeling rules, all imports and domestic products are subject to labeling. Thus, the measures are non-discriminatory on their face. However, there are two ways that discrimination might still exist: if foreign companies are more likely to produce eggs with caged hens, the method that is disfavored by the labeling rules; or if some Members are more likely to use this method than other Members.
- iii. Second, if discrimination exists, it must be determined whether the discrimination is "arbitrary" or "unjustifiable." Here, a key issue may be the specific language used as part of the labeling, some of which may be considered "inflammatory" and designed to prejudice consumers against eggs produced by caged hens without letting them make their own decision.
- iv. Finally, as to the question of whether the measure is a "disguised restriction on international trade," the *EC - Asbestos* panel dealt with this question by stating that while the aim of a measure may be difficult to ascertain, the "design, architecture and revealing structure" of a measure may reveal whether the measure has "protectionist objectives."²⁰ Thus, the question of the true intent of the measure may be relevant here.

²⁰ *Idem.*

ISSUES UNDER THE SPS AGREEMENT

VI. Applicability of SPS Agreement

A. Issue: Does the temporary import ban constitute an SPS measure?

1. Measure. A temporary import ban on eggs produced using cages of 2' x 2' x 2' or less, that corresponds with the current domestic ban; the Minister of Agriculture may exempt specific imports "in appropriate circumstances," including exemption for imports from countries that are parties to the Animal Welfare Convention and that have complied with its provisions on hen protection; the possibility of exemptions for companies that cooperate with the Ministry to establish a plan to phase out their caged hen production.

2. Provisions.

a. SPS Agreement Article 1.1: This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.

b. SPS Agreement, Annex A.1:

“Sanitary or phytosanitary measure – Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

*“Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.”*

3. Jurisprudence.

a. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as

- modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699.
- b. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235.
 - c. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
4. Discussion. According to Article 1.1 of the SPS Agreement, two requirements need to be fulfilled for the SPS Agreement to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade. There are no additional requirements.²¹ According to Annex A.1, a “measure” includes “all relevant laws, decrees, regulations, requirements and procedures.” In addition, in order for the measure to be an SPS measure, it must pursue one of the specific SPS objectives listed in Annex A.1(a) to (d).
- a. Argument AGAINST the temporary import ban as an SPS measure.
 - i. Generally, the Global Hen Protection Act deals with the increased danger of food poisoning stemming from bacteria. Arguably, it falls under Annex A.1(b), that defines a type of SPS measure that is applied to protect human health from risks arising from “additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs “ (so-called food/feed-related SPS measures). On the other hand, it may be argue that only the mandatory warning from food poisoning of the surgeon general, to be included in product labels after the end of the temporary ban, pursues such objectives. That requirement applies to all eggs produced from hens kept in cages, regardless of the size of the cage. Bellona could argue that if the legislator had been truly concerned with consumer health when enacting the temporary ban, it would have imposed a general ban on cage eggs.
 - ii. Bellona may argue that the impairment of natural hen behavior that results in severe feather loss and excessive pecking is *not* a risk arising from “pests, diseases, disease-carrying organisms or disease causing organisms,” and is therefore not an SPS measure under the SPS Agreement Annex A.1.
 - iii. Bellona may also argue that an SPS measures can only protect human or animal health within the territory of the regulating Member. The health of hens in another WTO Members territory cannot be regulated by SPS measures, specially if it is not a migratory species.

²¹ Panel Report, *EC - Hormones (Complaint by the U.S.)*, para. 8.36. See also Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407, para. 8.30 (same conclusion regarding an import ban on importation of salmon).

iv. Finally, the ban meets the requirement that the measure affect international trade in order to be considered an SPS measure for purposes of the SPS Agreement. In *EC – Hormones*, the Panel stated that there was no doubt that an import ban on beef from cattle treated with growth promoting hormones has such effects.²²

b. Argument FOR the temporary import ban as an SPS measure.

- i. The ban is a measure since it is a “law” or “regulation.” In *EC-Hormones*, where the relevant measure was a ban on beef produced with the help of certain growth hormones, both parties and the Panel agreed that the EC’s ban was an SPS measure.²³
- ii. Anterra can be expected to argue that the temporary ban is applied to protect consumer health. It could refer to the studies by ISPACA and CHAH, that both have found a higher risk of bacteria infection for eggs produced with cages 2’ x 2’ x 2’. The Study by ISPACA found a higher risk of bacteria infection for such eggs (44% for 3’ x 3’ x 3’ eggs, compared to 69% for 2’ x 2’ x 2’ eggs and 85% for 1’ x 1’ x 1’ eggs). CHAH’s study yielded results that more clearly support such a claim as eggs from hens kept in cages of 3’ x 3’ x 3’ only had an increased risk of bacteria infection of 7% compared to 69% for 2’ x 2’ x 2’ eggs and 85% for 1’ x 1’ x 1’ eggs.
- iii. Anterra may try to argue that the impairment of natural hen behavior that results in severe feather loss and excessive pecking is a pest or disease and therefore falls under A, paragraph 1(a) of the SPS Agreement (pest/disease-related SPS measures).

B. Issue. Can the SPS Agreement apply to the proposed labeling scheme that has not yet entered into force?

1. Measure. After the initial two years period has elapsed a mandatory labeling scheme will replace both the domestic ban and the ban on imports. The Global Hen Protection Act requires the Ministry of Agriculture to draft a labeling scheme via a regulation. The Ministry has proposed a labeling regulation that will not become effective until two years have elapsed.
2. Jurisprudence.
 - a. Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303.

²² Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699, para. 8.36; See also Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, para. 8.30 (same conclusion regarding an import ban on importation of salmon).

²³ Panel Report, *EC -Hormones* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 8.21.

- b. GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, L/6175, BISD 34S/196.
3. Discussion.
 - a. Argument AGAINST. Anterra may argue that the labeling scheme is not in effect and cannot be challenged under the SPS Agreement. There is no case under the SPS Agreement that deals with the question as to whether a *proposed* measure can be challenged under the agreement. However, there are two cases under the GATT that examined measures that were proposed but not yet in effect.²⁴ In both cases the measure constituted a future law that was clearly defined and not subject to modification. The proposed labeling regulation is still subject to a review process and has not been finalized.
 - b. Argument FOR. Bellona is likely to argue that the labeling scheme can be challenged since its main elements are established by the Global Hen Protection Act and cannot be changed by regulation.
- C. Issue: Is the mandatory labeling concerning the production method an SPS measure?
1. Measure. After the initial two-year period has elapsed a mandatory labeling scheme will replace both the domestic ban and the ban on imports. According to the Global Hen Protection Act, a labeling scheme must be established through regulation “to indicate the treatment of hens used in egg production, with the intention of informing consumers of the harmful effects that small cages have on hens.” The label must contain a reference to the fact that keeping hens in cages is “cruel and inhumane.” The Ministry has already proposed a labeling regulation that suggests a scheme that requires labeling of all eggs according to their production method.
 2. Provisions. SPS Agreement Article 1.1 and Annex A.1.
 3. Discussion.
 - a. Argument AGAINST.
 - i. The mandatory labeling concerning the production method is not an SPS measure. Paragraph 1 of Annex A to the SPS Agreement specifically mentions packaging and labeling requirements directly related to food safety as examples of SPS measures. Bellona may argue that the production method labeling is not a measure directly related to food safety and is therefore not an SPS measure under Annex A.
 - ii. The so-called animal welfare measures are not usually within the scope of the SPS Agreement. The impairment of natural hen behavior that results in

²⁴See Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303; *see also* GATT Panel Report, *U.S. - Taxes on Petroleum (“Superfund”)*, L/6175, adopted June 17, 1987.

severe feather loss and excessive pecking is not a risk arising from “pests, diseases, disease-carrying organisms or disease causing organisms” and therefore does not fall under paragraph 1 of Annex A of the SPS Agreement. In addition, as noted above, Bellona may try to argue that the SPS measures can only protect human or animal health within the territory of the regulating Member.

- b. Argument FOR.
 - i. Anterra may attempt to posit that the mandatory production method labeling constitutes an SPS measure that is applied to protect animal health “from risks arising from ... pests, diseases, disease-carrying organisms or disease-causing organisms” under Annex A.1(a) of the SPS Agreement. According to that argument, behavioral disorders caused by inappropriate living conditions fall under the SPS Agreement’s term ‘disease.’
 - ii. Anterra may also argue that mandatory labeling schemes do affect international trade, if not directly, at least indirectly.
- D. Issue. Is the Mandatory reference to the nutritional disadvantages on the product label an SPS measure?
 1. Measure. After the initial two-year period has elapsed a mandatory labeling scheme will replace both the domestic ban and the ban on imports. Part 2 of the labeling scheme according to the Global Hen Protection Act requires that the product label of all cage eggs has to contain a reference to the nutritional disadvantages of such eggs. The proposed labeling regulation requires product labels to include the following text: “Eggs from caged hens contain higher amounts of fat and cholesterol.”
 2. Provisions. SPS Agreement Article 1.1 and Annex A.1.
 3. Discussion.
 - a. Argument AGAINST.
 - i. The mandatory labeling concerning labeling is not an SPS Measure. Annex A.1, specifically mentions packaging and labeling requirements “directly related to food safety” as examples of SPS measures. Bellona could argue that the mandatory nutrition labeling is not a measure directly related to food safety as it does not intend to suggest that eggs are unsafe.
 - ii. While concerned with human health, nutrition claims and concerns, quality and packaging regulations are generally not considered to be sanitary or phytosanitary measures and hence are normally subject to the TBT Agreement. There is no case law as yet, but it can be argued that fat and cholesterol do not seem to be additives, contaminants, toxins or disease-causing organisms.

- b. Argument FOR.
 - i. Anterra could argue that in the instant case the nutrition labeling is concerned with food safety, since the reference to the higher amounts of fat and cholesterol is motivated by a specific concern pertaining to the cardiovascular diseases of high levels of fat/cholesterol in food.
 - ii. As mentioned above, labeling affects international trade.
- E. Issue. Is the mandatory warning on the product label concerning the danger of serious food poisoning an SPS measure? See issue
- 1. Measure. The labeling scheme of the Global Hen Protection Act requires that the product label of all eggs produced with cages display a warning on the danger of serious food poisoning.
 - 2. Provisions. SPS Agreement Article 1.1 and Annex A.1.
 - 3. Discussion.
 - a. Argument FOR.
 - i. The mandatory food poisoning warning is an SPS measure. Teams will argue that the mandatory food poisoning warning is a labeling requirement that is directly related to food safety.
 - ii. The mandatory food poisoning warning is motivated by the protection of consumers from food poisoning due to the increased risk of cage hens being infected with bacteria (“disease-causing organisms in foods”). Thus, the warning on the danger of serious food poisoning by the Surgeon General is an SPS measure, falling under Annex A.1(b).
 - iii. As stated before, mandatory labeling schemes do affect international trade.
 - b. Argument 2. The mandatory food poisoning warning is not an SPS measure. It is difficult to perceive possible arguments that would persuade that the mandatory food poisoning warning does not fulfill the formal and the substantial requirement. However, a team could argue that labeling is not really affecting international trade, especially as it does not directly put restrictions on the import of a product.

VII. Does the temporary import ban conform to the general SPS Principles as established by Article 2.2 of the SPS Agreement?

- A. Issue: SPS measures may only be applied to the extent necessary to protect human or animal health (Article 2.2).

1. Provisions. SPS Agreement Article 2.2: Members shall ensure that any sanitary of phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health.
2. Discussion.
 - a. Generally, panels and the Appellate Body have held that Article 2 should be read in conjunction with Article 5. Article 5 contains more specific “codifications” of the general obligations in Article 2. A violation of Article 5 automatically constitutes a violation of Article 2. But not all violations of Article 2 are violations of Article 5.
 - b. Relevant context of this provision is likely to be Article 5.6 and 5.4 of the SPS Agreement as well as Article XX(b) of the GATT. Under the necessary standard of GATT Article XX(b) WTO Members have to apply an alternative measure, if the alternate measure is consistent with GATT, or less inconsistent with it, than the measure proposed and if the Member can reasonably be expected to employ this measure to achieve its objectives. Under the SPS Agreement Members have right to determine the level of protection of health that they consider appropriate in a given situation. The reasonableness has to be determined by a weighing of the importance of the policy goal and the extent to which the alternative measure is contributing to that policy goal (see GATT section above for analysis of Article XX).
 - c. Teams that claim that the Global Hen Protection Act is more trade restrictive than necessary will likely argue that alternative measures are available that are less trade restrictive, such as labeling, which arguably could be just as effective as a ban. It may be difficult to find arguments against the labeling regime as labeling is not particularly restrictive as a measure. Voluntary labeling, as opposed to mandatory labeling could be an alternative.
 - d. On the other hand, teams can claim that the ban is only temporary for the purpose of devising a comprehensive labeling scheme and should, thus, be justified. It is also important to keep in mind that WTO Members are free to impose the level or protection they deem appropriate. The important policy goal of human health could support the claim that the Global Hen Protection Act is not more trade restrictive than necessary.

B. Issue. Is the SPS measures based on scientific principles?

1. Provisions. SPS Agreement, Article 2.2: “Members shall ensure that any sanitary of phytosanitary measure ... is based on scientific principles ...
2. Jurisprudence.
 - a. Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407.

3. Discussion.

- a. Relevant provisions may be Article 3.1, 3.2, 3.3 as well as 5.1 and 5.2 (the Panel in *Australia – Salmon* found, that 5.1 and 5.2 are specific applications of Article 2.2) of the SPS Agreement.²⁵

C. Issue. Is the SPS measure maintained without sufficient scientific evidence (Article 2.2)?

1. Provisions. SPS Agreement Article 2.2: “Members shall ensure that any sanitary or phytosanitary measure ... is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.”

2. Jurisprudence.

- a. Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407.
- b. Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by the Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315.

3. Discussion.

- a. In *Australia – Salmon*, the Panel held that an SPS measure that is not based on a risk assessment is not based on scientific principles as required by Article 2.2. A violation of SPS Agreement Article 5.1 and 5.2, thus, entails a violation of Article 2.2 (not maintained with sufficient scientific evidence). However, given the more general nature of SPS Agreement Article 2.2, not all violations of SPS Agreement Article 2.2 will automatically be a violation of SPS Agreement Article 5.1 or 5.2.²⁶
- b. According to the Appellate Body in *Japan – Agricultural Products*, this part of Article 2.2 SPS Agreement requires that “there be a rational or objective relationship between the SPS measure and the scientific evidence” and cited Articles 5.1, 3.3 and 5.7 as relevant context.²⁷ The Panel in *Australia - Salmon* cited both 5.1 and 5.2 as additional relevant context and specific applications of this part of Article 2.2.²⁸ Whether there is a rational and objective relationship has to be “determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.”²⁹

²⁵ Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, para. 8.52.

²⁶ *Idem.*

²⁷ Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by the Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315, para. 84.

²⁸ Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, para. 8.52.

²⁹ Panel Report, *Japan – Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by the Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315, para. 84.

VIII. An SPS measure may not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail (Article 2.3 first sentence).

A. Issue: Does the SPS measure arbitrarily or unjustifiably discriminate between Members?

1. Relevant Provisions. SPS Agreement, Article 2.3: “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members...”
2. Jurisprudence.
 - a. Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2035.
 - b. Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407.
3. Discussion.
 - a. According to the Panel in *Australia – Salmon (21.5)* three elements are required for a violation of this provision: (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (2) the discrimination is arbitrary or unjustifiable; and (3) identical or similar conditions prevail in the territory of the Members compared.³⁰
 - b. Discrimination can include discrimination between different products.³¹ Relevant context of this provision is Article 5.5, which is a specific application of Article 2.3. However, a violation of Article 2.3 can occur, where there is no violation of Article 5.5.³² Furthermore, relevant context are Article I:1, III:4 and parts of the Chapeau of Article XX GATT.³³ There does not seem to be a *de jure* discrimination between eggs from different WTO Members. However, it could be argued that Bellona’s producers are *de facto* discriminated against as “egg production in Bellona relies heavily on caged hens.” 80% of eggs are produced in cages. 90% of these cages are 2’ x 2’ x 2’ or less.
 - c. Teams could bring the same argument against the labeling scheme, although, unlike the ban, the labeling scheme applies to all eggs, not only eggs produced with cages of 2’ x 2’ x 2’ or less.

³⁰ Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, *para.* 7.111.

³¹ Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2035.

³² Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, *paras.* 243-245.

³³ *Id.*, *para.* 251 (*finding that this provision takes up obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and incorporates part of the "chapeau" to Article XX of the GATT 1994*).

B. Issue. Is the SPS measure applied in a manner that constitutes a disguised restriction on international trade (Article 2.3 second sentence)?

1. Relevant Provision. SPS Agreement, Article 2.3: "... Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."
2. Jurisprudence.
 - a. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
 - b. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.
3. Discussion.
 - a. There has not been a case directly dealing with this part of Article 2.3. The Panel in *EC-Asbestos* dealt with this issue under the Chapeau of Article XX of the GATT, which includes the same phrase. It held that "design, architecture and revealing structure" of a measure may reveal whether a measure has "protectionist objectives".³⁴ The Appellate Body in *Australia – Salmon* held that relevant context of Article 2.3 is the Chapeau of Article XX GATT.³⁵
 - b. There is some evidence in our case that some of the Members of Parliament were influenced by trade restrictive objectives, especially the representatives from egg-producing states. However, others were motivated by animal welfare concerns. In any case, the legal value of these statements is limited.

IX. SPS Agreement Article 3.3

A. Issue. Is the Animal Welfare Convention an international standard, guideline or recommendation?

1. Provision.
 - a. SPS Agreement, Article 3.3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

³⁴ Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001, paras. 8.237-239.

³⁵ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.

2. Jurisprudence.
 - a. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
3. Discussion.
 - a. Article 3.3 applies to any SPS measure which “results in a higher level of sanitary of phytosanitary protection than would be achieved by measures based on the relevant international standard.” Bellona may argue that the Animal Welfare Convention is not an international standard and that in fact there are no international standards in relation to the measures in question and therefore the analysis under SPS Agreement Article 3.3 is unnecessary.

X. SPS Agreement Articles 5.1 and 5.2

A. Introductory remarks. Risk Determination - Risk Assessment – Risk Management.

1. Article 5.1 and 5.2 require that a WTO Member undertake a risk assessment and base their SPS measure on that risk assessment. A risk assessment has to be distinguished from scientific studies that scientifically examine a certain risk (like in our case the studies by ISPACA and CHAH). That stage of the enactment of an SPS measure sometimes is referred to as risk determination. The SPS Agreement refers to scientific studies in Article 5.2 listing permissible “factors” a Member can use for its risk assessment. The risk assessment serves the purpose of triaging the available scientific evidence and other factors listed in Article 5.2 of the SPS Agreement and determining what might be the actual risk a Member is facing. A risk assessment, hence, involves a review of evidence available. Finally, once that risk assessment has been undertaken, a decision has to be made what SPS measure (including what level of protection) to adopt. This phase, sometimes referred to as risk management, is not explicitly addressed in the SPS Agreement. Several obligations in Article 5 influence that phase of the regulatory process, however.
2. A logical analysis of an SPS measure under Article 5.1 and 5.2 proceeds as follows: (1) Has the WTO Member undertaken a risk assessment? (2) Has it examined risks covered by the SPS Agreement (Article 5.1 in conjunction with Annex A, para. 4)? (3) Has it taken into account factors set out by Article 5.2? (4) Is the SPS measure based on the risk assessment (Article 5.1).

B. Issue. Is SPS measure based on a risk assessment as defined by Annex A, paragraph 4?

1. Provisions.
 - a. SPS Agreement Article 5.1. “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into

account risk assessment techniques developed by the relevant international organizations.”

- b. SPS Agreement Annex A, paragraph 4. “*Risk Assessment* – The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential of adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuff.”
2. Jurisprudence.
 - a. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
 - b. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235.
 - c. Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407.
 - d. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
 3. Discussion.
 - a. SPS Agreement Annex A, paragraph 4 distinguishes between two different types of risk assessments (1) for pest/disease-related SPS measures and (2) for food/feed-related SPS measures.³⁶
 - b. *A pest/disease-related risk assessment*. (1) Identification of the disease concerned as well as the associated potential biological and economic consequences; (2) Evaluation of the likelihood of the disease and of the associated potential biological and economic consequences; and (3) Evaluation of likelihood of disease according to the sanitary measure which might be applied.³⁷ Evaluation of likelihood requires “some evaluation or estimation of the likelihood or probability, expressed either qualitatively or quantitatively.” The evaluation does not need to be done quantitatively and does not need to establish a certain threshold level or degree of risk (expressed either quantitatively or qualitatively).³⁸

³⁶ Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, para. 8.68.

³⁷ Panel Report, *Australia – Salmon*, WT/DS18/R and Corr. 1, adopted November 6, 1998, para. 8.72.

³⁸ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 8.80.

- c. A food/feed-related risk assessment requires the evaluation of the potential for adverse effects. According to the Panel in *EC – Hormones* such an evaluation requires: (1) Identification of the adverse effects on human/animal health; and (2) Evaluation of the potential of occurrence of these effects.³⁹
- d. Argument FOR the proposition that the Global Hen Protection Act is based on a risk assessment.
 - i. If a team argues that the Global Hen Protection Act addresses *food/feed-borne risks* it would have to demonstrate that there has been a risk assessment that evaluated the potential for adverse effects to human/animal health. The study commissioned with CHAH and its subsequent consideration in the process of legislation suggests that there was a risk assessment. That study also identifies adverse effects on human health (danger of food poisoning). Furthermore, while the CHAH study did not find any significant increased amounts of fat/cholesterol, there was an alternative study that lead to that results.
 - ii. If a team argues that the Global Hen Protection Act addresses *pest/disease-related risks* it would have to demonstrate that there was a risk assessment that involved an identification of the risk as well as an evaluation of the likelihood of entry of that risk with and without the proposed SPS measure in place. However, the study commissioned with CHAH and its subsequent consideration in the process of legislation suggests that there was a risk assessment. That study identified the risks (behavioral disorders of hens) and the likelihood of such disorders (expressed in percent values). It also identified the likelihood of the occurrence of such disorders with the SPS measure in place as the study examined impairment of hen behavior under different conditions of egg production (different cages sizes and free range).
- e. Argument AGAINST the proposition that the Global Hen Protection Act is based on a risk assessment.
 - i. A team may argue that there was no food/feed-related risk assessment as the study by CHAH did not identify the risk of humans getting food poisoning, but the risk of eggs being infected with bacteria that can cause food poisoning. Furthermore, there are no studies conducted with regard to the health effects of increased levels of fat/cholesterol in eggs on human health. The ISPACA study merely examined whether there are increased levels of fat/cholesterol.
 - ii. Regarding the pest/disease-related risk assessment, a team may argue that the risk assessment lacks an evaluation of the likelihood of the disease (behavioral impairment of hens) under the proposed SPS measures.

C. Issue. Did the risk assessment take into account the factors set out in SPS Agreement Articles 5.2 and 5.3.

³⁹ Panel Report, *EC – Hormones (Complaint by Canada)*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.101.

1. Provisions.

- a. SPS Agreement, Article 5.2. “In the assessment of risks, Member shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”
- b. SPS Agreement, Article 5.3. “In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Member shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.”

2. Jurisprudence.

- a. Appellate Body Report *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

3. Discussion.

- a. Article 5.2 of the SPS Agreement provides a list of factors that WTO Members shall take into account in the assessment of risk. Article 5.2 is not a closed list.⁴⁰ Article 5.3 lists economic factors Members shall take into account when assessing the risks to animal and plant life or health in the process of enacting a pest/disease-related SPS measure. The Appellate Body has outlined some general criteria that such factors have to fulfill in order to be taken into account. For example, such factors must be evaluated in a “process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions [...]”⁴¹
- b. Argument FOR. Anterra has taken into account the factors listed in Article 5.2 and 5.3 in its risk assessment. The Ministry of Anterra has mainly referred to the study by CHAH in its legislative process, while the Parliament seems to have placed more emphasis on some results by the ISPACA study. The studies examine the risk of impairment of hen health, the risk of consumption of higher amounts of fat/cholesterol from caged hens, and the risk of food poisoning from the higher likelihood of bacteria infection in caged hens.

⁴⁰ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 187.

⁴¹ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 187.

- c. Argument AGAINST. Anterra has not taken into account the factors listed in SPS Agreement Articles 5.2 and 5.3 assessment. It could be argued that the two scientific studies do not satisfactorily address the factors set out in SPS Agreement Articles 5.2 and 5.3.

D. Issue. Is the SPS measure based on a risk assessment?

1. Provisions. SPS Agreement Article 5.1: “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”
2. Jurisprudence.
 - a. Appellate Body Report *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
3. Discussion.
 - a. The SPS measure must be actually based on the risk assessment. Article 5.1 is not a mere procedural requirement, but requires “that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measures at stake.”⁴² The determination of the presence or absence of that relationship has to be determined on a case-by-case basis.⁴³
 - b. The Appellate Body has given an indication of how this case-by-case analysis has to be conducted. WTO Members do not have to follow the “view of a majority of the relevant scientific community.” A Member may act “in good faith on the basis of ... a divergent opinion coming from qualified and respected sources.”⁴⁴ Especially so where the risk involved is “life-threatening” and is “perceived to constitute a clear and imminent threat to public health and safety.”⁴⁵ This statement by the Appellate Body could suggest that there must be a weighing between the breadth of acceptance of a certain view in the scientific community and the magnitude of the risk to be addressed.
 - c. Argument FOR. The Global Hen Protection Act is based on a risk assessment.
 - i. Temporary Ban: Both studies mentioned in the case found significantly increased levels of bacteria infection for eggs from caged hens (cages 2’ x 2’ x

⁴² Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 193 (employing a contextual reading of article 5.1 in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, underlining added).

⁴³ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 194.

⁴⁴ *Idem*.

⁴⁵ *Idem*.

- 2' or smaller). Furthermore, both studies agreed that caging in cages of the size 2' x 2' x 2' or less leads to the most serious effects on hen behavior.
- ii. Food Poisoning Warning: Both studies found significantly increased levels of bacteria infection for eggs from caged hens. The CHAH study, however, found only a 7 % increase for eggs from hens kept in cages of 3' x 3' x 3' or larger while the ISPACA study found a 44 % increase. Both studies come from “qualified and respected sources.” Thus, it could be argued that Anterra was justified to base its food poisoning warning on the results of the ISPACA study.
 - iii. Nutritional Disadvantages Reference: Only one study found such nutritional disadvantages (ISPACA). However, the measure was arguably justified given the qualified and respected service and the risks involved.
 - iv. Production method labeling: Both studies confirmed that hen behavior is impaired to varying degrees depending on the size of the cages the hens are kept in. Therefore, Anterra’s labeling scheme is based on a risk assessment.
- d. Argument AGAINST. The Global Hen Protection Act is not based on a risk assessment.
- i. Temporary ban: Given the results of both studies (*e.g.*, significantly increased levels of bacteria infection for eggs from caged hens) it may be difficult to argue that the ban is not based on the risk assessment, although the scientific bias of ISPACA may be an issue.
 - ii. Food poisoning warning: It may be argued that ISPACA is well-known for its bias in favor of animal welfare and should not be considered as relevant scientific evidence. Furthermore, it could be argued that neither study has examined the risk of getting food poisoning from eggs.
 - iii. References to nutritional disadvantages: It could be argued that one study found such nutritional disadvantages (ISPACA) and thus there is insufficient scientific basis for the labeling requirement. Furthermore, that study did not examine the adverse health effects of fat and cholesterol from cage eggs.
 - iv. Production method labeling: Egg production in larger cages (3' x 3' x 3' and larger) does not lead to severe behavioral effect on hens if the number of hens is restricted to two (CHAH) or one (ISPACA) hen per cage. The studies, thus, do not support the labeling of eggs, especially its reference to the fact that cages are “cruel and inhumane”.

XI. Article 5.5 of the SPS Agreement

- A. Issue. Is Anterra consistent in applying its appropriate levels of protection?

1. Provisions. SPS Agreement, Article 5.5: With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.
2. Jurisprudence.
 - a. Appellate Body Report *EC - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
 - b. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
3. Discussion.
 - a. The goal of Article 5.5 is “achieving consistency in the application of the concept of appropriate level of ... protection” each WTO Member applies in its legislation. However, that “goal does not establish a *legal obligation* of consistency of appropriate levels of protection” and “the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times.”⁴⁶ The relevant context of Article 5.5 constitutes Article 2.3. Article 5.5 is “marking out and elaborating a particular route leading to the same destination set out in Article 2.3.”⁴⁷
 - b. For there to be a violation of Article 5.5, three distinct elements must be present: (1) the Member imposing the measure must have adopted “its own appropriate levels of sanitary protection against risks to human life or health in several different situations”; (2) “those *levels of protection* exhibit arbitrary or unjustifiable differences (‘distinctions’ in the language of Article 5.5) in their treatment of different situations.” and (3) the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade.”⁴⁸
 - c. Different Levels of Protection in Different Situations.
 - i. This first requirement requires a comparison of different levels of sanitary protection. Therefore, there is a basic requirement that “situations exhibiting differing levels of protection cannot ... are comparable..., that is, unless they present some common element or elements sufficient to render them

⁴⁶ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 213.

⁴⁷ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 212.

⁴⁸ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 214.

comparable.”⁴⁹ For the area of *pest/disease-related risks*, the Appellate Body in *Australia – Salmon* found that there are comparable situations, where different situations involve "a risk of spread of the same or similar disease or a risk of the same or similar associated potential biological and economic consequences.”⁵⁰ Translated into the area of *food-/feed-borne risks* that would mean that different comparable situations involve either similar or the same additives, contaminants, toxins or disease causing organisms or a risk of the same or similar adverse effects on human or animal health.

- ii. There is no information in our case on other areas of sanitary regulation of Anterra. Teams could only refer to the differences in protection established by the Global Hen Protection Act itself.
- d. Arbitrary or Unjustifiable Differences in Levels of Protection.
- i. WTO jurisprudence suggest that if differences in level of protection do not correspond to the appropriate level of risk then those differences are “arbitrary or unjustifiable.”⁵¹ In *Australia – Salmon* the Appellate Body found that this second requirement was fulfilled as Australia had not addressed the risk from the treatment of herring. That risk presented “at least as high a risk - if not a higher risk - than the risk associated with ocean caught Pacific salmon.”⁵²
 - ii. The teams could argue that at least some of the differences exhibited by the Global Hen Protection Act are arbitrary or unjustifiable: Under the temporary import ban there is a significant difference in protection for eggs from hens kept in smaller cages and eggs from hens kept in larger cages. All eggs exhibit equal risks (although not similar in magnitude). On the other hand teams could argue that these differences in the level of protection are justified because there are different effects on human and animal health from the methods of production employing different sizes of cages for hens.
- e. Resulting in Discrimination or a Disguised Restriction on International Trade.
- i. The last element refers “to the *measure* embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade.”⁵³ Whether there is discrimination or a disguised restriction must be determined on a case-by-case

⁴⁹ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 217.

⁵⁰ Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, *para.* 146.

⁵¹ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 221-235.

⁵² Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, *para.* 158.

⁵³ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 214

basis.⁵⁴ Panels and the Appellate Body apply an analysis that is strongly based on the facts in each case identifying “warning signals” and “other factors” that, taken together, indicate whether a measure violates Article 5.5.⁵⁵ Elements that have been taken into account are the presence/absence of arbitrary or unjustifiable differences, the degree of differences in the levels of protection, the violation of or compliance with Article 5.1/5.2, sudden changes in a risk assessment, the absence/presence of parallel domestic control measures, or genuine consumer concerns.⁵⁶

- ii. Depending on the arguments made by the teams under Article 5.1 and the other factors of Article 5.5, a team could argue whether there were “warning signals” present. They will have to find additional factors, however, to underline that there is a violation of the third requirement under Article 5.5. Such factors may be that some Members of parliament seem to have been motivated by protectionist purposes or that, under the temporary ban, there is a significant difference between eggs from hens kept in smaller cages and hens kept in larger cages/free range hens.

XII. SPS Agreement Article 5.6

A. Issue: Are the measures in question more trade restrictive than required?

1. Provisions.

- a. SPS Agreement, Article 5.6. “Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”
- b. Footnote. Article 5.6 is accompanied by a footnote that states: “For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.”

2. Jurisprudence.

- a. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.

⁵⁴ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, *para.* 240.

⁵⁵ See e.g. Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, *para.* 159.

⁵⁶ Appellate Body Report, *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, paras. 215, 240, 245. Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, paras. 159-177.

- b. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
3. Discussion.
 - a. WTO Members are free to choose the level of health protection they consider appropriate. Thus, even a zero risk approach – made effective through a ban on a certain product- is not necessarily WTO inconsistent *per se*. However, a WTO Member will have to enact the measure that allows to attain the level of risk protection chosen in the least trade restrictive way, i.e. no less restrictive "alternative SPS measures [may] meet the appropriate level of protection as determined by the Member concerned."⁵⁷
 - b. This article establishes a three-pronged test with the following cumulative elements: (1) Is there an alternative SPS measure reasonably available taking into account technical and economic feasibility? (2) Does this measure achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) Is this measure significantly less restrictive to trade than the SPS measure contested.⁵⁸
 - c. Thus, teams will likely argue that alternative measures can achieve the appropriate level of protection chosen by Anterra.⁵⁹ For example, Bellona could argue that the effective chosen level of protection by Anterra is fully and comprehensively represented in the “final” measure (the labeling scheme) and that the temporary ban is therefore more trade restrictive than required. With regard to this measure, Bellona could argue that voluntary labeling would achieve the same results as mandatory labeling. Anterra, on the other hand, could argue that the ban justifiably represents a higher temporary appropriate level of protection. It could defend its mandatory labeling scheme by stating that it reflects the appropriate level of protection, which would not be achieved by a voluntary labeling scheme.

⁵⁷ Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, para. 204.

⁵⁸ Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, para. 194.

⁵⁹ Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998: VIII, 3327, para. 204.

ISSUES UNDER THE TBT AGREEMENT

XIII. Applicability of TBT Agreement under TBT Agreement Annex 1.1

- A. Issue. Should the entire Global Hen Protection Act be examined – as a *whole* – to determine if it is a “technical regulation” under Annex 1.1 to the TBT Agreement?
1. Measure. The Global Hen Protection Act has two main components:
 - a. Import ban. The Act prohibits importation of eggs produced with cages of 2’ x 2’ x 2’ or less, subject to certain exemptions. The Minister of Agriculture may exempt imports from the prohibition either (1) if an egg producer has cooperated with the Ministry to establish a plan to phase out the production of eggs with caged hens or (2) if the imported eggs come from a country that is party to the Animal Welfare Convention and complies with its hen protection provisions.
 - b. Labeling requirement. The Act mandates that, two years from the Act’s application, a labeling scheme applicable to all eggs – domestic and imported – will replace the bans on domestic and imported eggs produced using cages of 2’ x 2’ x 2’ or less. Labels will indicate the treatment of the hens that produced the eggs being purchased and inform consumers of the harmful effects of small cages.
 2. Jurisprudence.
 - a. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.
 3. Discussion.
 - a. Measure as “integrated whole.” In *EC – Asbestos*, the Appellate Body reversed the Panel’s *separate* analysis of whether, first, a prohibition on asbestos and asbestos-containing products, and, second, a series of exceptions to that prohibition, qualified as “technical regulations.” According to the Appellate Body, the Panel should have examined the measure *as a whole* because the general prohibition and exceptions formed an “integrated whole,” containing “both prohibitive and permissive elements,” which could only be understood in relation to each other.⁶⁰
 - b. Issue likely has no legal significance. Both provisions likely qualify as “technical regulations” and thus are subject to the TBT Agreement – whether analyzed together or separately. The provisions are examined separately below. But arguments on both sides are plausible.

⁶⁰ Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras. 60-65.

- c. Argument 1. Examine provisions separately. Anterra clearly could have enacted the import ban and the labeling requirement in separate legislation. The two provisions do not form an “integrated whole” similar to the prohibition and exceptions in *EC – Asbestos*.
 - d. Argument 2. Examine Global Hen Protection Act as a whole. The provisions clearly relate to each other. The import ban is a temporary measure complementary to the labeling requirement that ultimately will supersede it. While the level of “integration” between these measures is less than that in *EC – Asbestos*, the Appellate Body left unclear how far the concept of the “integrated whole” may extend.
- B. Issue. Is the import ban a “technical regulation”?
1. Measure. The import ban prohibits importation of eggs produced using cages of 2’ x 2’ x 2’ or less, subject to certain exemptions. The Minister of Agriculture may exempt imports from the prohibition either (1) if an egg producer has cooperated with the Ministry to establish a plan to phase out the production of eggs with caged hens or (2) if the imported eggs come from a country that is party to the Animal Welfare Convention and complies with its hen protection provisions.
 2. Provision. TBT Agreement, Annex 1.1: Defines “technical regulation” as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”
 3. Jurisprudence.
 - a. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.
 - b. Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002.
 4. Discussion.
 - a. Doctrine. To qualify as a “technical regulation,” a measure must be: (1) a document that lays down one or more product characteristics; (2) with respect to *identifiable* – though not necessarily *expressly identified* – products; (3) compliance with which is mandatory.⁶¹ “Product characteristics” include, *inter alia*, “objectively definable features, qualities, attributes, or other distinguishing

⁶¹ See Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras. 66-68; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 176.

marks” and “terminology, symbols, packaging, marking, or labelling requirements.”⁶²

- b. Application. The import ban seems likely to qualify as a “technical regulation” under the TBT Agreement. A description of a method of production (i.e. produced without cages of 2’ x 2’ x 2’ or less) is expressly included in the definition of “technical regulations” under Annex 1.1. The Appellate Body has confirmed that a “negative” description of product characteristics or related processes (such as a *ban* on the importation of eggs produced in small cages) meets the definition of “product characteristics.”⁶³
- C. Issue: Is the labeling requirement a “technical regulation”?
1. Measure. The labeling requirement mandates that, two years from the Act’s application, a labeling scheme applicable to all eggs – domestic and imported – will replace the bans on domestic and imported eggs produced using cages of 2’ x 2’ x 2’ or less. Labels will indicate the treatment of the hens that produced the eggs being purchased and inform consumers of the harmful effects of small cages.
 2. Provision. See above.
 3. Jurisprudence. See above.
 4. Discussion. The labeling requirement seems likely to qualify as a “technical regulation.” TBT Agreement Annex 1.1 specifically cites “labelling requirements as they apply to a product, process, or production method” as within the scope of “technical regulations.” The labeling requirement here applies to a production method.

XIV. TBT Agreement Article 2.1

- A. Issue: Does the import ban violate the Most-Favored Nation (MFN) guarantee under TBT Agreement Article 2.1?

Specifically, does the Global Hen Protection Act’s exemption for imports from countries that are parties to the Protocol and comply with its hen protection provisions provide more favorable treatment to eggs produced in 2’ x 2’ x 2’ cages in these countries and eggs produced in exactly the same manner in other third countries?

1. Measure. The Global Hen Protection Act prohibits the import of eggs produced using cages of 2’ x 2’ x 2’ or less. The Minister of Agriculture may exempt imports from the prohibition either (1) if an egg producer has cooperated with the Ministry to establish a plan to phase out the production of eggs with caged hens or (2) if the

⁶² See Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras. 67; Appellate Body Report, *EC - Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 189.

⁶³ See Appellate Body Report, *EC - Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paras. 183-185.

imported eggs come from a country that is party to the Animal Welfare Convention and complies with its hen protection provisions.

2. Provision. TBT Agreement Article 2.1: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating *in any other country*.”
3. Discussion. The MFN obligation in Article 2.1 has not been interpreted by a Panel or the Appellate Body. The requirements in Article 2.1 are similar to the MFN and National Treatment (NT) provisions under GATT Article I:1⁶⁴ and Article III:4,⁶⁵ however. Under Article 2.1, imported products from one Member shall be accorded treatment “no less favorable” than that accorded to “like products” from other countries with respect to technical regulations.⁶⁶
 - a. Like products. Whether products are “like” depends on four criteria: (1) physical characteristics; (2) end-uses; (3) consumer preferences; and (4) tariff classifications.⁶⁷ The “likeness” analysis is a highly factual determination whose outcome depends largely on the evidence presented regarding these criteria.
 - i. Yes, like products. The exemption for products from countries that are party to the Protocol and comply with its hen protection provisions permits Anterra’s Minister of Agriculture to distinguish between *identical* products based solely on national origin. Under the exemption, Anterra may permit the importation of eggs produced with 2’ x 2’ x 2’ cages from a country that is a party to the Protocol and complies with its hen protection provisions. But the Protocol does not require its parties to ban production using cages of 2’ x 2’ x 2’ or less. Thus, the exemption presents the possibility for importation of eggs produced in 2’ x 2’ x 2’ cages that – if they came from third countries not party to the Protocol – otherwise would fall under the import ban. The extent to which this possibility will be realized depends on (1) what other exemptions exist and (2) whether the Minister of Agriculture exercises his discretion to grant the exemptions.

⁶⁴ GATT Article I provides, in relevant part:

[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

⁶⁵ GATT Article III:4 provides, in relevant part:

Imported products “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

⁶⁶ While worded somewhat differently, the elements in TBT Agreement Article 2.1 are similar to the elements of an MFN claim under GATT Article I:1. See Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.138 (MFN obligation violated if (1) an “advantage,” (2) is not accorded to all “like products” (3) “unconditionally”).

⁶⁷ See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, § (H)(1)(A); Appellate Body Report, *EC – Asbestos*, para. 101.

- ii. No, not like products. Anterra may argue that consumers prefer to purchase eggs from companies based in countries that have demonstrated their commitment to hen protection through membership in the Convention – even if the particular companies continue to use small cages in egg production.
- iii. Less favorable treatment.
 - A YES, less favorable treatment. The measure discriminates *de jure* based on national origin between products from third countries party to the Convention and compliant with its terms and all other third countries.
 - B NO less favorable treatment. The measure does not discriminate *de jure* based on national origin because the Protocol is open to all Members. The issue of discrimination must be framed here in terms of whether each Member has the *opportunity* to obtain most favorable treatment. Framing the issue in this manner is consistent with the Appellate Body’s approach in *U.S. – Shrimp*, holding that the U.S. failure to engage *all* shrimp-exporting Members in serious negotiations to establish bilateral or multilateral agreements protecting sea turtles was a factor supporting a finding of “unjustified discrimination” under GATT Article XX.⁶⁸ Here the Panel faces the mirror-image case, in which *all* Members have an *equal opportunity* to join the Protocol and thereby take on both its burdens and its benefits.
- iv. Mandatory/discretionary principle. Bellona’s MFN challenge seems unlikely to succeed due to the “mandatory/discretionary” principle. Under this principle, “a Member may challenge, and a WTO Panel may rule against, a statutory provision of another member ‘as such’ ... provided the statutory provision ‘mandates’ the Member either take action which is inconsistent with its WTO obligations or not take action which is required by its WTO obligations.”⁶⁹ Anterra has the burden to show that the challenged measure is “mandatory.”⁷⁰ Here, the Act merely “allows” the Minister of Agriculture to exempt products from certain countries. It does not *mandate* such action. It thus is unclear how Bellona might demonstrate that the Act “mandates” the MFN violation. In the absence of mandatory legislation, Bellona must await an opportunity to challenge Anterra’s legislation “as applied.”

⁶⁸ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 166-171.

⁶⁹ Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22. For an interpretation of the mandatory/discretionary doctrine that permits challenges to discretionary legislation in certain situations, *consider, e.g.*, Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815.

⁷⁰ Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

B. Issue. Does the import ban violate the NT guarantee under TBT Agreement Article 2.1?

1. Measure. The Global Hen Protection Act prohibits the import of eggs produced using cages of 2' x 2' x 2' or less. The Minister of Agriculture may exempt imports from the prohibition either (1) if an egg producer has cooperated with the Ministry to establish a plan to phase out the production of eggs with caged hens or (2) if the imported eggs come from a country that is party to the Animal Welfare Convention and complies with its hen protection provisions.
2. Provision. TBT Agreement Article 2.1: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products *of national origin* ...”
3. Discussion. The NT obligation in Article 2.1 has not been interpreted by a Panel or the Appellate Body. The requirements in Article 2.1 are similar to the requirements under GATT Article III:4, however. Under GATT Article III:4, a violation of the NT obligation will be found if imports are accorded treatment “less favorable” than that accorded to “like products” of domestic origin.⁷¹
 - a. Like products. Whether products are “like” depends on four criteria: (1) physical characteristics; (2) end-uses; (3) consumer tastes and preferences; and (4) tariff classifications.⁷² The “likeness” analysis is a highly factual determination whose outcome depends largely on the evidence presented regarding these criteria. Arguments on both sides are plausible here:
 - i. Yes, “like products”: Eggs produced with 2' x 2' x 2' cages are “like” eggs produced by free range hens or by hens in larger cages because they have the same general physical characteristics, end-uses, and tariff classifications. The only difference between the eggs is their method of production, and at least one GATT Panel suggests that the production process is not relevant to the “likeness” inquiry.⁷³
 - ii. No, not “like products”:
 - A First, the products are “unlike” due to their different production methods. The fact that production methods are relevant to the “likeness” inquiry – at least under the TBT Agreement – is evidenced by the inclusion of “related processes and production methods” in the definition of “technical regulations” in Annex 1.1 of the TBT.

⁷¹ See, e.g., Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001, paras. 8.112-8.157.

⁷² See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, § H(1)(A); Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted April 5, 2001, para. 101.

⁷³ See, e.g., GATT Panel Report, *United States – Restrictions on Imports of Tuna I*, DS21/R, unadopted (circulated September 3, 1991).

- B Second, even if production methods do not, on their own, impact the “likeness” analysis, they impact consumer preferences as evidenced by the Consumenta poll. Consumers care about inhumane production methods and the health risks and nutritional deficiencies associated with eggs produced in cages of 2’ x 2’ x 2’ or less. The Appellate Body previously has recognized the impact of health risks on consumer preferences in the context of “likeness.”⁷⁴
- C Third, eggs produced by hens in cages of 2’ x 2’ x 2’ or less have different physical characteristics from eggs produced by free range hens or hens in larger cages. Eggs produced in cages of 2’ x 2’ x 2’ or less are more likely to have a high content of certain types of bacteria and have a weaker nutritional content.
- b. Less favorable treatment. The import ban does not present *de jure* less favorable treatment. Read in conjunction with the previously enacted Domestic Hen Protection Act, *all* eggs produced in cages of 2’ x 2’ x 2’ or less – both of domestic and foreign origin – are banned. It is less clear whether *de facto* discrimination exists, however:
- i. Yes, *de facto* less favorable treatment: The facts indicate that, due to the success of the Domestic Hen Protection Act, “domestic production shifted almost entirely away from caged hen production to free range hens.” Thus, the import ban (in conjunction with the domestic ban) today serves the domestic egg industry by placing a heavier burden on imported products (made in cages of 2’ x 2’ x 2’ or less) than on “like” domestic products (eggs made with free-range hens). Some decisions indicate that, where legislation draws a line between two products that are “like,” while one product is primarily domestic and the other primarily foreign, this line in itself constitutes “less favorable treatment.”⁷⁵
- ii. No *de facto* less favorable treatment: Because the domestic ban was enacted prior to the import ban, a proper comparison between levels of domestic and foreign production would contrast domestic production *prior to* the domestic ban with import levels *prior to* the import ban. It is not meaningful to argue that domestic levels of production of a particular product decreased upon the ban of such production. Further, cases indicate that more than a disparate impact is required for a showing of *de facto* discrimination. As stated by the Appellate Body in *Korea – Beef*, “whether or not imported products are treated ‘less favourably’ than like domestic products should be assessed . . . by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.”⁷⁶ This measure only

⁷⁴ See Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, adopted April 5, 2001, para. 122.

⁷⁵ See Panel Report, *EC - Asbestos*, WT/DS135/R, adopted April 5, 2001, paras. 8.154-8.157.

⁷⁶ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 135-137.

modified the conditions of competition to the extent that it ended a period of *more favorable treatment* for imports, which had not been subject to the existing domestic ban.

XV. TBT Agreement Article 2.2

A. Issue. Does either the import ban or the labeling requirement violate TBT Agreement Article 2.2?

1. Measure. The Global Hen Protection Act has two main components:

- a. Import ban. The Act prohibits importation of eggs produced with cages of 2' x 2' or less, subject to certain exemptions. The Minister of Agriculture may exempt imports from the prohibition either (1) if an egg producer has cooperated with the Ministry to establish a plan to phase out the production of eggs with caged hens or (2) if the imported eggs come from a country that is party to the Animal Welfare Convention and complies with its hen protection provisions.
- b. Labeling requirement. The Act mandates that, two years from the Act's application, a labeling scheme applicable to all eggs – domestic and imported – will replace the bans on domestic and imported eggs produced using cages of 2' x 2' or less. Labels will indicate the treatment of the hens that produced the eggs being purchased and inform consumers of the harmful effects of small cages.

2. Provision. TBT Agreement Article 2.2: “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”

3. Discussion. No Panel or Appellate Body Report has analyzed the Article 2.2 requirements. Students may base their interpretations of certain phrases in Article 2.2 on the interpretation of similar phrases in SPS Article 5.6 (SPS measures shall not be “more trade restrictive than required” to achieve their appropriate level of protection) and GATT Article XX (General Exceptions). Arguments on both sides seem plausible with respect to the conformity of the import ban and the labeling requirement. Below are several arguments that should be considered:

- a. The existence of the domestic ban prior to the Global Hen Protection Act's enactment strongly suggests that the Global Hen Protection Act was not “adopted or applied with a view to ... creating unnecessary obstacles to international trade.”

- b. Bellona may argue, however, that statements by some Anterra legislators support finding that the import ban was adopted “with a view to creating unnecessary obstacles to international trade.” One legislator in Anterra commented, upon the bill’s passage, that “foreign egg producers have been taking advantage of us for too long now, and this legislation sets things right.” Another stated that the law was “a great boon for their constituents.” A third said, “the playing field for egg sales is now where it should be.”
- c. Both the import ban and the labeling requirement appear to fulfil the “legitimate objectives” of “human health or safety” and “animal ... life or health.” Studies indicate that the production of eggs with caged hens is harmful to the hens and creates health risks for humans who consume these eggs. Students may find it helpful here to rely on case law interpreting similar phrases (e.g. “protect human, animal or plant life or health”) under GATT Article XX.
- d. Because the Act’s objectives appear to be legitimate, the Article 2.2 analysis likely will focus on whether the import ban and the labeling requirement are “not more trade restrictive than necessary” to fulfil these objectives. The Appellate Body set forth three criteria for the analysis of whether a measure is “more trade restrictive than required” under SPS Article 5.6,⁷⁷ which may aid the analysis under TBT Agreement Article 2.2. Under these criteria, a measure is more trade restrictive than necessary if an alternative measure: (1) is “reasonably available taking into account technical and economic feasibility;” (2) “achieves [the] appropriate level of sanitary ... protection;” and (3) is “significantly less restrictive to trade” than the contested measure.⁷⁸ Ultimately, these are the issues that must be considered regarding the conformity of the import ban and the labeling requirement under Article 2.2. (It may be helpful here to refer to the discussion above of Bellona’s claim under SPS Agreement Article 5.6).
- e. Anterra may argue that the import ban is not subject to a challenge under TBT Agreement Article 2.2 “as such.” The extent to which the import ban imposes *any* obstacle to international trade is entirely at the discretion of the Minister of Agriculture. Indeed, insufficient information exists to rule out the possibility that the Minister has the discretion to exempt *all* eggs from the import ban. Thus, under the mandatory/discretionary doctrine (discussed in detail above), Bellona must challenge the import ban “as applied.”

⁷⁷ SPS Agreement Article 5.6 provides:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

SPS Agreement Article 5.6 is accompanied by a footnote that provides:

For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

⁷⁸ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 180.

XVI. TBT Agreement Article 2.4

- A. Issue. Is either the import ban or the labeling requirement a “relevant international standard” under TBT Agreement Article 2.4?
1. Procedural context. Bellona may choose to raise a claim under TBT Agreement Article 2.4 in anticipation of a likely defense by Anterra under the same Article. If Anterra seeks to invoke Article 2.4 as a defense, it likely will argue that it is legally bound under Article 2.4 to conform with the “relevant international standards” set forth in the Protocol. Its measures with respect to hen protection, therefore, must be viewed as consistent with its other obligations under the TBT Agreement.
 2. Measure. The Global Hen Protection Act bans importation of eggs produced by hens in cages of 2’ x 2’ x 2’ or less, subject to certain exceptions. The Act also sets forth a labeling scheme for all eggs that will identify the conditions under which the eggs were produced. The labeling scheme takes effect two years from the Act’s application.
 3. Provision. TBT Agreement Article 2.4: “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”
 4. Jurisprudence.
 - a. Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R.
 5. Discussion. The *EC – Sardines* case presents the only analysis of Article 2.4 by a Panel or the Appellate Body. In *EC – Sardines*, the Panel and Appellate Body relied on the following questions to determine whether a disputed measure was consistent with Article 2.4: (1) is the standard a “relevant international standard”? (2) does the national measure comply with the “relevant international standard”; and (3) would the “relevant international standard” be an “ineffective or inappropriate means” to fulfill the “legitimate objectives pursued?”⁷⁹
 - a. Is the Protocol a “relevant international standard”? Under the test set forth in *EC – Sardines*, three criteria will determine whether the Protocol is a “relevant international standard”: (1) is the Protocol a “standard” under the definition in TBT Agreement Annex 1.2? (2) is the Protocol an “international body” under the

⁷⁹ See Panel Report, *EC – Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, paras. 7.61-7.139

definition in TBT Agreement Annex 1.4? (3) is the international standard relevant to the disputed measure at hand?

- b. Is the Protocol a “standard” under TBT Agreement Annex 1.2? Under TBT Agreement Annex 1.2,⁸⁰ a “standard” provides, “for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which *compliance is not mandatory*.”
- i. Bellona has a strong textual argument that the Protocol’s mandatory labeling requirement disqualifies it from status as a “standard.”
 - ii. Anterra plausibly (though likely not persuasively) may argue that the *non-mandatory* portion of the Protocol – “encouraging” the ban of egg production with caged hens as the “preferred hen protection measure” – is an “international standard.” It seems more natural, however, to read the Protocol as requiring *either* that its Members enforce the ban or that they institute a labeling requirement. Such a reading yields *one mandatory provision* requiring that Members take one of two alternative actions.
 - iii. Anterra may argue that the phrase “with which compliance is not mandatory” in the definition of “standard” in Annex 1.2 is intended to *include* voluntary standards but not to *exclude* mandatory ones. From a policy perspective, it arguably is illogical to create binding disciplines for voluntary standards but to exclude pre-existing mandatory standards from these disciplines. Existing mandatory standards likely have greater international support, inasmuch as they countries already agreed to be bound by them. The negotiating history of the definition of “standard” may weigh against this argument, however.⁸¹
- c. Is the Protocol an “international body” under TBT Agreement Annex 1.4? Under TBT Agreement Annex 1.4, an international body or system is defined as a “body or system whose membership is open to the relevant bodies of at least all Members.” The Protocol is open to all WTO Members and appears to be a “system.” The Protocol is not a “body,” however. The notion of a recognized “body” suggests formal standard-setting bodies with their own staffs and technical expertise. Significant ambiguity arises here, because the definition of “standard” under Annex 1.2 refers only to approval by a “recognized *body*” but the definition of such a “body” refers also to “systems.” It is unclear whether “system” is intended to be interchangeable with “body” in this context or, rather, whether the

⁸⁰ TBT Agreement Annex 1.2 defines a “standard”:

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

⁸¹ See G/TBT/W/11, “Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics,” 29 August 1995, para. 26 (“Since 1969 delegations had emphasized that in order to regulate the application of standards, it was important to draw a clear distinction between mandatory regulations and voluntary standards”).

specific reference to “body” in the definition of standards seeks to exclude “systems.”

- d. If the Protocol is found a “relevant international standard,” does the Global Hen Protection Act comply with its terms? If the Protocol is found to be an international standard, Anterra has a very strong argument that its Act complies with the Protocol. The Protocol requires that Members either ban egg production with caged hens or enact labeling requirements. Anterra has created a legislative scheme that initially utilizes a ban, which is superseded after two years by a labeling requirement. This measure seems in conformity with the Protocol. Bellona’s only plausible counter-argument requires conceptually separating the Protocol’s “encouragement” of a ban from its “requirement” that Members enact a labeling scheme. If Bellona can show that the language about the ban is merely hortatory, then it may argue that Anterra’s ban exceeds the level of protection set forth in the relevant international standard.
- e. Implications of “relevant international standard” defense are unclear. The implications of simultaneously finding Anterra (1) in violation of some of its obligations under the TBT Agreement and (2) required to comply with the Protocol as a “relevant international standard” under Article 2.4 are unclear. Unlike the SPS Agreement, the TBT Agreement does not grant a presumption of conformity with its obligations to measures that conform to international standards.⁸² Thus, it is uncertain how to resolve these potentially conflicting obligations.

⁸² Cf. SPS Agreement Article 3.2, which provides:

Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

ISSUES UNDER THE AGREEMENT ESTABLISHING THE WTO

XVII. WTO Agreement Article XVI:4

- A. Issue. Do any of the provisions of the Global Hen Protection Act violate Article XVI:4 of the WTO Agreement?
1. Provision. WTO Agreement, Article XVI:4: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”
 2. Jurisprudence.
 - a. Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593.
 - b. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.
 3. Discussion. Students should recognize that a violation of Article XVI:4 exists when another provision of the WTO Agreement or any Annexed Agreement has been violated. “When a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4.”⁸³ In other words, “a violation of Article XVI:4 ‘automatically’ results from the breach of another provision of the WTO Agreement.”⁸⁴ Whether a violation exists in this case thus depends on the outcome of the underlying claims.

DC1 632505v1

⁸³ Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593, para. 6.223.

⁸⁴ *Id.*, Note 457. See also Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, paras. 300-302.