The European Law Students' Association

John H. Jackson
Moot Court Competition

John H. Jackson Moot Court Competition: 2023-2024

Team: 106

John H. Jackson Moot Court Competition

2023 - 2024

RUTENIA - CARBON CHARGE

BURLANDIA

(Complainant)

vs

RUTENIA

(Respondent)

SUBMISSION OF THE COMPLAINANT

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VCLT	*Vienna Convention on the Law of Treaties*, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155
Border Tax Adjustment	*Border Tax Adjustment* (L/3464) - Report of the Working Party adopted on 2 December 1970
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2. <u>Panel reports</u>

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US - Spring Assemblies	GATT, L/533 30S/107, United States - Imports of Certain Automotive Spring Assemblies report, 11 June 1982, adopted on 26 May 1983

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EC – Bananas III	WT/DS27/R, European Communities – Regime for the Importation, Sale and Distribution of Bananas, 22 May 1997, Adopted on 25 September 1997
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US – Shrimp (21.5 – Malaysia)	WT/DS58/RW, United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia), 15 June 2001, Adopted on 21 November 2001
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II. ELSA DOCUMENTS

Short Title	**Full Title**
Case	Case Rutenia - Carbon Charge, The John H. Jackson Moot Court Competition, 2023/2024, 22nd Edition
Clarification question	22nd Edition John H. Jackson Moot Court Competition, 2023/2024, Clarification Questions

LIST OF ABBREVIATIONS

Abbreviation	Description
AB	Appellate Body
ABR	Appellate Body Report
Art(s).	Article(s)
CO2	Carbon Dioxide
DSU	Dispute Settlement Understanding
EC	European Community
EU	European Union
GATT/ GATT 1994	General Agreement on Tariffs and Trade (updated 1994 version)
GHG(s)	Greenhouse Gas(es)
GNI	Gross National Income
HS	Harmonized System
IPCC	Intergovernmental Panel on Climate Change
LDC(s)	Least Developed Country(ies)
MFN	Most Favoured Nation
MS(s)/WTO MS(s)	World Trade Organization Member State(s)
NDC(s)	National Determined Contribution(s)
NZF/ NZF Act	Net Zero Future Act
OECD	Organization for Economic Co-operation and Development
PR	Panel Report
SIDS(s)	Small Island and Developing State(s)
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNSC	United Nations Security Council
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

STATEMENT OF FACTS

1. Rutenia, Burlandia, Korsania, and Artania are original WTO Members from the Intermarium region that have ratified the UNFCCC and the Paris Agreement.
2. Burlandia is a lower-middle-income country of 100 million people with a GNI per capita of USD 4,200. In its NDC, the country committed to reducing GHG emissions in accordance with its developing country status. Burlandia committed to replace 40% of the fossil fuel-based energy used in its industrial processes with green energy by 2030, conditional upon low-cost international climate finance and technology transfer. In July 2022, Burlandia introduced an energy excise tax on all fossil fuels used in the manufacturing and transportation sectors. It also strengthened its forest conservation law. The country heavily relies on the glass production industry and exports to Rutenia. Lacking technical and administrative capacity, its largest glass-producing conglomerate, Vetro, does not have a mechanism in place for tracking carbon emissions.
3. Rutenia is an island country with a population of 30 million people. As a developed country, it aims to reach 'climate neutrality' by 2050. Rutenia also has a large glass manufacturing industry but stands out as the main importer of the region. DIM, Rutenia's largest producer and exporter of furniture, purchased 60% of the flat glass used in its production from foreign suppliers in 2021, including those located in Burlandia, Korsania, and Artania, and 40% from domestic suppliers.
4. Korsania is an upper-middle-income country with a GNI per capita of USD 14,500. Despite several commitments made at the international level, Korsania spends twice as much on subsidizing fossil fuels than renewable energy. Artania is a SIDS and LDC. Korsania and Artania export flat glass mainly to Rutenia.
5. In February 2022, the IPCC published a report highlighting the necessity to reduce GHG emissions quickly to comply with the objectives of the Paris Agreement. The UNSC convened for a first-ever open debate on sea-level rise and its implications for international peace and security. Several UN members expressed concerns over the "counterproductive securitisation of climate change", insisting that "there is no evidence that climate change drives displacement and directly causes armed conflicts" .
6. In April 2022, a national report was published by Rutenian climate experts exposing the risk of salinization and submersion due to sea-level rise for some of Rutenia's smaller islands and low-lying coasts and the displacement of people. RutInfo, a polling company in Rutenia, published an opinion poll that has shown respondents' concerns regarding the

consequences of climate change. Less than half of them indicated that concerns about climate change may push them to leave Rutenia and seek residence in another country.

7. In June 2022. Burlandia convened a high-level regional dialogue with the objective of enabling coordinated and cooperative approaches to industrial decarbonization, with in sight a genuine partnership for climate finance and technology transfer to developing countries. However, the dialogue has not resulted in any concrete action as Rutenia found the approach irrelevant.
8. In July 2022, Rutenia adopted the NZF Act, which entered into force in September 2022. Section 10 establishes a charge of USD 50 per tonne of carbon emissions embedded in the covered products, including glass, whether of domestic or foreign origin as per Article 2. As a result of the entry in force and application the the NZF Act, Vetro's exports of flat glass to Rutenia are subject to the carbon charge of USD 50 per tonne of CO2 emissions.
9. This measure aims to incentivise sustainable patterns of consumption and production in Rutenia and urgently needed emission-reduction action at the global level as per Article 1. However, the carbon charge is paired with a deduction for any explicit carbon price paid in the country of origin as per Article 4. In reaction, Korsania adopted in September 2022 an explicit domestic carbon tax of USD 30 per tonne of CO2 emitted for carbon-intensive products, including flat glass, and therefore benefits from the deduction while having a high polluting production supported by lobbying by the Korsanian business sector.
10. Moreover, the carbon charge is paired with exemptions for the covered products of LDCs and SIDSs as recognized by the UN, supposedly considering their special status under the Paris Agreement. This exemption is applied to Artanian’s exports, while Artania does not have a carbon pricing mechanism in place.
11. In March 2023, a resolution was adopted by the UN General Assembly, allowing the International Court of Justice to deliver an advisory opinion on the obligations of States under international law in respect of climate change. However, the relevant proceedings are still pending before the Court.
12. Burlandia initiated consultations with Rutenia on 19 December 2022. Both parties considered the consultations to be unsuccessful, leading Burlandia to request the establishment of a panel under DSU Articles 4.7 and 6 on 1 June 2023.

SUMMARY OF ARGUMENTS

I. The Net Zero Act is inconsistent with Article I:1

- Rutenia's measure falls within the scope of Article I:1 and is inconsistent with it since the measure grants an advantage to both Artenia and Korsania.
- Products originating in Artenia are exempted from Section 10 of the NZF Act because it is a SIDS/LDC. The exemption is not applied to exports of like products from Burlandia despite its developing status. Thus, the advantage conferred to Artenia is not extended immediately and unconditionally.
- A deduction from the carbon charge is applied to products originating in Korsania. The advantage conferred to Korsania is not extended immediately and unconditionally to all WTO MS since it is not accorded to Burlandia's like products, despite its implicit tax on carbon.

II. The NZF Act is inconsistent with Article III:2

- Rutenia's Carbon charge is an internal tax or charge and not a border measure because it occurs due to an internal factor. It thus falls under the scope of Art. III:2 and not II:1(b).
- As such, it is inconsistent with Article III:2, first sentence, because the methods of calculation and verification of taxation are unfairly advantageous to Rutenia's flat glass. Burlandia's flat glass is taxed in excess of Rutenia's flat glass.

III. The NZF Act is not justified under Article XXI b) iii)

- The NZF Act is not justified under Article XXI b) iii) because climate emergency cannot be characterized as an emergency in international relations, thus the NZF Act is not taken in time of such an emergency.
- Rutenia did not respect the obligation of good faith since it did not articulate the essential security interest said to arise from the emergency in international relations in a manner sufficient to demonstrate its veracity. Thus, Rutenia's measure does not meet the requirements of the Chapeau

IV. The NZF Act is not justified under Article XX(b) and (g)

- Rutenia's application of the exemption part of the NZF Act to Artenia's products constitutes an arbitrary and unjustifiable discrimination under the Chapeau. Rutenia's application of the deduction from the carbon charge on Korsania's products constitutes

arbitrary discrimination. The application of the NZF Act is a disguised restriction on international trade.

- The application of the measure is not necessary to protect human health and life because there are less trade-restrictive and reasonably available solutions to pursue the objective of protecting human, animal, and plant life and health more efficiently.
- The application of the measure has no relation to the conservation of exhaustible natural resources because there is no, and climate is not an exhaustible resource.

MEASURE AT ISSUE

[1] The measure at issue is Section 10 (named "Carbon Charge") of Rutenia's Net Zero Future Act (NZF Act), adopted on 1 July 2022 by the Parliament of Rutenia and entered into force on 1 September 2022.

LEGAL PLEADINGS

I. THE NZF ACT IS INCONSISTENT WITH GATT ARTICLE I:1

[2] The measure adopted by Rutenia discriminates against Burlandia's flat glass with respect to like products exported by Artania and Korsania. All these countries are WTO Members.

[3] Pursuant to GATT Article I:1 any advantage, favour, privilege or immunity granted by a WTO member to another WTO member in relation to tax or non-tax regulations, domestic or border, has to be extended immediately and unconditionally to the like product originating in or destined for the territories of all other contracting countries.[1] As such, Article I:1 thus prohibits discrimination among like imported products originating in or destined for, different countries. This clause is unconditional and multilateral (reciprocity is not needed).

[4] To determine whether a measure is inconsistent with Article I of the GATT, the measure must pass a four-part test.[2] The following elements must be demonstrated: (i) the measure at issue falls within the scope of application of Article I:1; (ii) the imported products are "like" products within the meaning of Article I:1; (iii) the measure confers an advantage, favour, privilege, or immunity on a product originating in the territory of any country; and (iv) the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

[5] If, as a preliminary condition, the Rutenian measure falls within the scope of Article I:1 of the GATT, the three other conditions must then be respectively met for each of Burlandia's claims, i.e. the exemption of the carbon charge for imports from Artania and the deduction of carbon prices to imports from Rutenia.

1. The NZF Act falls within the scope of application of Article I:1

[6] In the present case, Rutenia adopted a NZF Act which provides in its section 10, Article 2 - that "as of the entry into force of this Act, the covered products shall be subject to a charge of USD 50 per tonne of CO2 released into the atmosphere from the production of such goods". This measure can either be considered as (1) a tax or regulatory measure, (2) imposed at the

[1] Panel report, EC - Bananas III (21.5 - US), para. 7.555
[2] Appellate Body report, EC - Seal Products, para. 5.86

border or domestically.[3] Regardless, it falls under the scope of Article I:1 in all four cases because of the broad application encompassed by this provision.

[7] Pursuant to the NZF Act, Section 10, Article 4 - Carbon Charge Deduction, "To avoid double charging for carbon emissions embedded in imports of covered products, any explicit carbon price paid in the country of origin… shall be deducted from the applicable carbon charge on such products in Rutenia pursuant to Article 2." Moreover, Article 5 lays out exemptions: "to covered products originating in least-developed-countries (LDCs) and Small Island and Developing States (SIDSs), as recognised by the UN, considering their special status under the Paris Agreement." Tax deductions fall within the scope of Article I:1.[4]

[8] Thus, the Rutenian measures contained in the NZF Act (the tax, the deduction and the exemption) fall within the scope of application of Article I:1. It is now necessary to analyze the three other conditions for both discriminations respectively.

2. Rutenia's exemption is inconsistent with Article I:1 of the GATT

a) <u>Flat glass imported from Burlandia and Artania are "like product"</u>

[9] In US – Poultry (China), the Panel set out the main approaches to determining the likeness of products: "a like product analysis must always be done on a case-by-case basis. The traditional approach for determining 'likeness' has, in the main, consisted of employing four general criteria: '(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 behavior – in respect of the products; and (iv) the tariff classification of the products.'"[5] This echoed previous findings (EC - Asbestos and Japan - Alcoholic beverages).

[10] Flat glass exported by Artania and exported by Burlandia are obviously "like products": these products are physically identical flat glasses produced by the same GHG-emitting process of production, have the same HS code nº7005, and have the same end-uses for the domestic consumer. Indeed, expert reports show that Rutenia's largest furniture producer purchased 60% of its flat glass from foreign suppliers including those located in Burlandia and Artania in 2021. There is no criterion for differentiating between flat glass that carries a carbon charge and one that does not: this does not affect the fact that the finished products are *de facto* similar. For all of these reasons, flat glass exported by Burlandia and flat glass exported by Artania are like products with regards to the domestic consumers of Rutenia.

[3] Article 1 of NZF Act provides for a tax applicable to covered products, "whether of domestic or foreign origin"

[4] Panel report, Brazil – Taxation, para 7.1041

[5] Panel report, US - Poultry (China), paras. 7.424-7.425

b) The exemptions of the NZF Act create an advantage

[11] Having in mind that Burlandia's and Artania's exported flat glass are like products, it has to be considered whether the measure creates a *de jure* or *de facto* advantage. The panel in EC – Bananas III considered that "advantages" within the meaning of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.[6]

[12] The purpose of the Rutenian measure is to tax GHG emissions with a charge of USD 50 per tonne of carbon emissions embedded by the covered products, particularly flat glass in this case. Section 10, Article 5 of ZNF Act introduces exemptions, that is a *de jure* advantage for the covered products originating from LDCs and SIDS.

[13] This exemption is applied to Artanian's exports of flat glass because it is recognized as a SIDS. Regardless of the reasoning behind this exemption, the Rutenian policy confers a distinct advantage to Artania. Artania's flat glass exports to Rutenia remain untaxed, ensuring that the final cost to the consumer does not rise, unlike imports from countries subject to the carbon charge. This exemption therefore has a significant impact on the value of imported products by Rutenia, and benefits Artania by creating more favorable import opportunities, that is a *de facto* advantage.

[14] Artenia's exemption consequently provides both *de jure* and *de facto* advantages within the meaning of GATT Article I:1.

c) The advantage is not "immediately" and "unconditionally" extended

[15] As per the third requirement, pursuant the EC - Seal Products report[7] "a Member is proscribed from granting an 'advantage' to imported products that is not 'immediately' and 'unconditionally' extended to like products from all Members." i.e. without delay and without regulatory distinctions that "result in a detrimental impact on the competitive opportunities for like imported products from any Member."

[16] In the present case, the exemption of Section 10, Article 5 of the NZF Act is not applied to Burlandia despite its recognized quality as a developing country. Under Article 3 of the Paris Agreement, "the efforts of all Parties will represent a progression over time, while recognizing the need to support developing countries." Moreover, under Article 4, particularly paragraph 5, all Parties of the Paris Agreement must provide support to all developing countries, in line with the common but differentiated approach. The only distinction made for SIDSs and LDCs

[6] Panel report, EC - Bananas III, para. 7.239

[7] Appellate Body report, EC - Seal Products, para. 5.88

is in paragraph 6, which allows them to prepare and communicate strategies reflecting their special circumstances. This paragraph is therefore reflective of their parts and their NDCs to mitigate and adapt to climate change. It does not prescribe any differential treatment from other contracting Parties. Hence, Rutenia has created a perfectly artificial distinction between developing countries on the one hand and SIDS and LDCs on the other. The aim of the Paris Agreement is not to distinguish between developing countries and SIDSs or LDCs, nor to grant the latter a special status in relations to the common but differentiated approach. The aim is to consider two distinct blocks: developed countries and developing countries, including SIDS and LDCs which are encouraged to work on their inherent vulnerability to climate change. The latter block, considered as whole, must be supported as per Art 3 of the Paris agreement. There are no provisions that effectively prescribe additional or extra support for SIDSs and LDCs different from that of developing countries Therefore, the distinction made for the exemption is discriminatory and unduly based. This makes the measure not "unconditionally and immediately" extended to comparable WTO Members .

[17] Since the exemption was not immediately and unconditionally extended to exports of like products from Burlandia, imports of flat glass from Burlandia will fall significantly by around 27% between 2022 and 2023. This Results in a detrimental impact on the competitive opportunities for like imported products compared with Artania.

[18] In light of the above, products originating in Burlandia are not accorded immediately and unconditionally the advantages that are accorded to like products originating in other countries as Artania. So the Rutenian measure is inconsistent under Article I.1 of the GATT.

3. Korsania's deduction of carbon prices is inconsistent with GATT Article I:1

a) <u>The compared products are similar</u>

[19] As stated above, there are four criteria laid out in *US – Poultry (China)* to determine the likeness of products. Pursuant to Rutenia's Act, carbon-intensive flat glass imported to Rutenia will be imposed at a higher rate than non-carbon-intensive flat glass. Similarly, flat glass that was already subjected to an explicit carbon tax in its country of origin will be granted a proportionate deduction when imported to Rutenia.

[20] First, nothing indicates any difference in the nature, quality and properties of low-carbon and carbon-intensive flat glasses. Further, both fall under the same category in Rutenia's WTO Schedule of concessions (glass and glassware). On consumer habits, Rutenia's main furniture manufacturer buys flat glass from both domestic an foreign producers, including Burlandia and Artania. This proves that both products are effectively in the same market and there is no

difference of consumers' perception and behavior between them. The only possible way to differentiate the products would be through production processes and methods (PPMs). However, to date, this criterion is still not admitted within the general criteria for examining the similarity and it is hence pointless to make distinctions on the basis of PPMs which do not leave any traces on physical qualities of the product (non-product-related PPMs). Indeed, products having the same physical qualities, consumer preferences, end-uses and tariff classification (HS code nº7005) qualify as like products and, as such, must not be discriminated against. Moreover, no criterion is of use to effectively differentiate carbon-taxed and non-carbon-taxed flat glasses, for the final products are considered similar *de facto*.

[21] Thus, both imported flat glasses, whether carbon-taxed in the country of origin or not, and whether carbon-intensive or not, are similar products pursuant to article I:1.

b) The measure provides an "advantage, favour, privilege, or immunity"

[22] The AB found that "the words of Article I:1 refer not to some advantages… but to 'any advantage'; not to some products, but to 'any product'"[8] Thus, there is a broad conception for such advantages, which can be established both *de jure* and *de facto*. In Brazil - Taxation, the Panel found that "Insofar as one product receives a lower tax burden than another like product, there is a change in the conditions of competition for the like product relative to the less-taxed product."[9]

[23] Different arguments lead to the conclusion that the carbon charge deduction provides an advantage for the covered products that benefit from it.

1. It provides a *de jure* advantage, insofar as covered products that were carbon-taxed are allowed to be imported into Rutenia at lower rates of import charges compared to covered products that were not explicitly carbon-taxed. The requirement for the carbon tax to be explicit excludes entirely alternative mechanisms that equally mitigate carbon emissions without necessarily putting an explicit price on carbon. The measure thereby ignores implicit carbon taxes and implicit prices put on fossil fuels (such as Burlandia's[10]), which contradicts the provisions of Article I:1.
2. It also provides a *de facto* advantage insofar as countries that possess the technical, policy, and scientific resources necessary to adequately calculate and assess the carbon emissions of the covered products' manufacturers are the only ones that can explicitly

[8] Appellate Body report, Canada – Autos, para. 79
[9] Panel report, Brazil – Taxation, paras. 7.1041-7.1042.
[10] Case, p.2, para. 6

charge carbon emissions proportionally. Those who do not possess the technical capacities to do so are conversely at an unfair disadvantage as they cannot be subject to deductions, regardless of any other policy instruments put in place to mitigate carbon emissions. Hence, Burlandia submits that this "one size fits all" vision adopted by Rutenia's act disregards different stages of development of WTO MS.

c) <u>The measure is not immediately and unconditionally extended to like products originating in all WTO Members</u>

[24] In interpreting the term "unconditionally," the AB explained that Article I:1 safeguards equal competitive opportunities for similar imported products but does not prohibit Members from attaching conditions altogether. It allows regulatory distinctions between similar imported products, as long as these distinctions do not negatively impact the competitive opportunities for such products from any Member.[11] For instance, the exemption of import taxes to automobiles which met certain origin-neutral requirements was deemed inconsistent with Article I:1, because of the existence of a number of "conditions."[12] Whether conditions attached to an advantage offend Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products.[13]

[25] Regarding Rutenia's NZF Act, the deduction is applied sparsely depending on the country of origin of the covered products. This correction mechanism incurs a *de facto* infringement of the MFN obligation by only allowing for crediting explicit carbon pricing policies of third countries (that is, those based on carbon taxes or carbon trading systems). The exclusion of the recognition of implicit carbon prices resulting from non-pricing measures should be found to impose discriminatory conditions to different flat glass exporters. Imposing the full price of the carbon charge only on imports from countries that have not taken comparable actions to Rutenia is not only fundamentally conditional, but it also creates a detrimental impact on the competitive opportunities for flat glasses from Burlandia.

[26] Consequently, the measure is not immediately and unconditionally extended to like products originating in all WTO Members and is inconsistent with Article I:1.

[11] Appellate Body report, EC - Seal Products, para. 5.88
[12] Panel report, Indonesia – Autos, paras. 14.145-14.147
[13] Panel report, Canada - Autos, para. 10.29

II. THE NZF ACT IS INCONSISTENT WITH ARTICLE III:2

1. Rutenia's Carbon Charge is an internal tax or charge and not a border measure

[27] The issue of legal characterisation of the measure must be addressed to analyze whether it should be studied under Art II:1(b) (as Rutenia contends) or Art III:2 (as Burlandia submits). Ultimately, this boils down to determining whether the measure qualifies as a border measure or as an internal tax or charge. To undergo the distinction, one has to evaluate whether the fiscal measure was triggered by an internal or external event, as explained by WTO case law.[14]Thus, it must be determined if the measure is triggered by an "internal" factor, that is, something that takes place within the territory of Rutenia, or by an "external" factor, that is, something that occurs outside the territory of Rutenia.

[28] Burlandia submits that according to Article 1 of Section 10 of Rutenia's NZF Act, first paragraph, it is clear that the triggering element justifying the existence of the carbon charge is internal, as the measure aims to "incentivise sustainable patterns of consumption and production in Rutenia" and applies to goods placed on the market in Rutenia, regardless of their origin. Hence, the determining factor that guides and gives basis to the charge in the first place is access to the internal market of Rutenia. With this in mind, the measure should qualify as an internal tax or charge and is thus to be studied under Art III:2.

[29] The AB, in interpreting the term "internal charges" in Article III:2, explained that: "the obligation to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product."[15] According to the above-mentioned parts of the NZF Act, the obligation to pay the charge accrues not because of any external factors but because of the integration of carbon-embedded products inside the internal market of Rutenia. Thus, it is the distribution and sale inside Rutenia that triggers the carbon charge, which is why it should be qualified as an internal measure.

[30] Furthermore, according to Ad Article III, any internal tax or charge applied to imported products and to like domestic products and collected at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge**.** Thus, simply arguing that the carbon charge is a border measure on the ground that it is collected at the time or point of importation is not a sufficient argument to qualify the measure under Art II:1(b).

[14] Appellate Body report, China – Auto Parts, paras 159-164; Panel report, Argentina – Hides and Leather, para. 11.145

[15] Appellate Body report, China – Auto Parts, para 162

[31] Finally, the carbon charge is an internal measure insofar as it is applied to all covered goods placed on Rutenia's market, regardless of whether they are domestic or imported. The mere fact that the same carbon charge is applied identically to imported products (with adjustment) as to domestic products proves it is not a border measure but a fundamentally internal measure.

2. Rutenia's Carbon Charge is inconsistent with Article III:2 of GATT 1994

[32] Article III:1 sets a general principle prescribing Member States to equally treat domestic and foreign traded goods. The AB explained the purpose of Article III "is to avoid protectionism in the application of internal tax and regulatory measures… Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions"[16]

[33] More specifically, Article III:2 states that prohibits discrimination among imported and domestic products. As such, similar products imported or domestically produced must be treated the same way. The AB addressed the distinction between the first and second sentence of Article III:2.[17] First, one has to assess whether a measure aligns with the conditions set in the first sentence of Article III:2. If it does, it must then equally pass the test established by the second sentence, which contemplates a broader category of products than the first sentence. Alternatively, if the measure is found to be inconsistent with the first sentence, there is no need to examine its consistency with the broader second one.

a) <u>Inconsistency of the Carbon Charge with Article III:2, first sentence</u>

i. Rutenia and Burlandia's flat glass are like products

[34] Compared to other GATT provisions, the term "like products" in Article III:2, first sentence, should be construed narrowly — notably "because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure."[18] The AB identified three criteria to determine "like products" for the purposes of Article III:2, first sentence: (1) the product's end-uses in a given market; (2) consumers' tastes and habits; and (3) the product's properties, nature and quality.[19]

[35] An examination of the extent to which flat glass from Burlandia and Rutenia alike are capable of performing the same or similar functions reveals that they share the same end uses in Rutenia's internal market.

[16] Appellate Body report, Japan – Alcoholic Beverages II, p. 16
[17] Appellate Body report, Canada – Periodicals, pp. 22-23
[18] Appellate Body report, Japan – Alcoholic Beverages II, pp. 19-21.
[19] Appellate Body report, Canada – Periodicals, pp. 20-21.

[36] As stated below, the physical properties of low-carbon and carbon-intensive flat glass are identical. While it could be argued that sustainable methods of production might appear relevant when considering consumers' tastes and habits, no precedent backs up this unsafe assumption. Low-carbon and carbon-intensive flat glass remain competitive with one another on Rutenia's market[20]. There is no market division between "clean" and "polluting" flat glass.
[37] Burlandian and Rutenian flat glasses are in essence the same, as they possess the same properties, nature, and quality[21]. However, their methods of production differ, as Burlandia's flat glass is more carbon-intensive than Rutenia's. The carbon charge is a measure imposed on the carbon footprint of products. As the amount of emissions depends on the technology used for production, the measure relates to processes and production methods (PPM measure). In WTO case law, measures linked to PPMs were viewed as ones falling outside the scope of GATT provisions or violating them.[22] Non-product-related PPMs, such as the carbon footprint produced by the manufacturing of flat glass, do not leave any traces on the physical qualities of the product. Although environmental considerations are increasingly relevant to international trade, it is important to remain pragmatic in one's analysis of two perfectly similar products that were manufactured with different technologies. The AB found health risks to be relevant when examining the physical properties of the product (carcinogenicity), but rejected, however, the proposal to consider health risks as a separate criterion of likeness.[23] Besides, in the *Asbestos* case, the health risks were directly incorporated and transmitted through the very product itself, which is not the case for flat glass as the emissions only take place during manufacturing.
[38] Further, in the Philippines – Distilled Spirits report, the Panel reiterated the AB's holding in Mexico – Taxes on Soft Drinks that a "likeness" analysis should focus on the physical qualities and characteristics of the final product, rather than those of raw materials. The Panel further emphasized that "the difference in raw materials would only be relevant to the extent that it results in final products that are not similar".[24] Similarly, the amount of carbon emitted during the production of flat glass does not affect the final products' similarity.

[20] Case, p.2, para. 4
[21] Clarification question No. 6
[22] Appellate Body report, Japan - Alcoholic Beverages II, p. 114; Appellate Body report, EC - Asbestos, para. 101.
[23] Appellate Body report, EC - Asbestos, paras. 113 and 116
[24] Panel report, Philippines – Distilled Spirits, paras. 7.34-7.37

ii. Burlandia's flat glass is taxed in excess of Rutenia's

[39] In comparing taxing obligations between domestic and imported products in the context of Article III:2, first sentence, "even the smallest amount of 'excess' is too much."[25] Case law found that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens.[26] In finding a method for comparison, the Panel in Brazil – Taxation took a thorough look into the operation of the tax holistically in order to determine the effective tax burden on the products at issue.[27] The also AB underscored that "[a]ny measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence"[28] Finally, in Thailand – Cigarettes (Philippines) the Panel found that a measure fell within the scope of Article III:2, first sentence "to the extent that the manner in which the tax is collected affects the tax liability applied to imported goods."[29] These taxes or charges can be indirect.

[40] Burlandia finds two reasons why the Carbon charge taxes imported products in excess of domestic products.

ii. 1) The method of calculation is unfairly advantageous to Rutenia's flat glass producers

[41] The first paragraph of Article 1 of Annex III requires relevant installations to establish the total amount of carbon emissions from the production of the covered product during a given calendar year. While Burlandia does not dispute the monitoring methodologies and calculation method laid out in footnote 7, it does find this provision to create inherent inequalities among countries due to differences in technical capacities and financial resources. Many developing countries such as Burlandia face technical and administrative capacity constraints for monitoring and verifying carbon emissions released during the production processes of goods[30]. Consequently, as per Article 2.1 of the NZF Act, default values based on the average emission intensity of the 5% worst-performing installations in Rutenia for the relevant product would be applied to Burlandia's flat glass. This method of calculation puts importing companies at an unfair disadvantage compared to domestic companies insofar as these default rates are fundamentally arbitrary and inaccurately depict the actual emissions of the imported

[25] Appellate Body report, Japan – Alcoholic Beverages II, p.23. This finding was followed by the Panel in Panel report, Argentina – Hides and Leather, para. 11.243
[26] Panel report, Argentina – Hides and Leather, paras. 11.182-11.184
[27] Panel report, Brazil – Taxation, paras. 7.170-7.171
[28] Appellate Body report, Canada – Periodicals, p. 19
[29] Panel report, Thailand – Cigarettes (Philippines), paras. 7.610-7.611
[30] Case, p.3, para. 4

product. No data can corroborate that an imported product lacking a precise calculation per Annexe III is as carbon-intensive as the 5% worst-performing installations in Rutenia for that same product. Hence, a product could be produced through very low rates of carbon emissions and still be heavily and disproportionately taxed based on these default values for the mere reason that the company producing them was not able to present reliable data to track its carbon emissions.

[42] Therefore, foreign and domestic companies that produce flat glass with the same carbon emission ratios can be starkly differentially taxed. This disregards wholly Burlandia's efforts in decarbonising its national industries, exemplified by its 2022 energy excise tax on all fossil fuels used in the manufacturing and transportation sectors. Thus, the application of default values for flat glass exports from Burlandia results in significant disparities in tax charges between similar domestic and foreign flat glasses.

ii. 2) The method of verification is unfairly advantageous to Rutenia's flat glass producers

[43] The second paragraph of Article 1 of Annex III requires importers to submit a declaration accompanied by an attestation of verification of the total embedded carbon emissions by an accredited national entity. These Rutanian verifying entities are responsible for verifying the accuracy of the declared emissions and have the power to request producers of covered products to arrange verification visits by the representatives of the verifying entity.

[44] This provision demonstrates an excess in tax charges for two reasons. First, the requirement that the verifying entities must be established in Rutenia leads to additional financial charges for foreign producers since importers must carry out verifications not where the production took place, which would be the easiest and most financially efficient solution, but directly in Rutenia. This generates an additional administrative burden which carries an additional cost that is not borne by domestic producers. The temporary derogation mentioned in Article 3 of Annex III sets a fairer standard by allowing imported products to be verified under a monitoring and verification system directly in the third country where the installation is located. However, this provision is only made available until 31 December 2025, after which the circumstances leading to an excess in taxes will gain place. Second, the right given to verifying entities (which after 2025 will necessarily be Rutenian) to request flat glass producers to arrange (and hence, as can be assumed, finance) verification visits to their installations abroad adds another financial burden that is not borne by domestic producers. Arranging these visits is much less costly for domestic producers than for foreign ones.

[45] Accordingly, Rutenia failed to provide equality of competitive conditions for imported products in relation to domestic products.

[46] In conclusion, Rutenia's carbon charge is inconsistent with Article III:2, first sentence.

b) Inconsistency of the Carbon Charge with Article III:2, second sentence

[47] According to the finding in Canada – Periodicals quoted above, there is no need to further analyze the inconsistency of the measure with the second sentence since it was already found to be inconsistent with the narrower first sentence.

III. THE NZF ACT IS NOT JUSTIFIED UNDER GATT ARTICLE XXI

[48] Rutenia argues that any potential inconsistency with the GATT is justified under Art. XXI(b)(iii) since the measure was taken to protect its essential security interests in time of climate emergency, which allegedly constitutes an "other emergency in international relations". To justify a measure that is inconsistent with WTO rules under this article, it must meet one of the exceptions listed in Art. XXI and satisfy the conditions specified in the Chapeau. Under Art. XXI b) iii, a Party is allowed to take any measures it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations."

1. The NZF Act is not taken in time of "other emergency in international relations"

[49] To justify the application of the NZF Act under paragraph b) iii), Rutenia has to establish, through an objective assessment of relevant evidence,[31] that the measure was taken "in time of war or other emergencies in international relations." The wording of this provision suggests that an "emergency in international relations" must be at least comparable in its gravity to a "war" in terms of its impact on international relations.[32] Political or economic differences between Members are not sufficient to characterize such an emergency unless they give rise to defense and military interests, or maintenance of law and public order interests.[33]

[50] Burlandia submits that the situation that led to the adoption of the NZF law cannot be considered an emergency within the meaning of Art. XXI b) iii).

[51] Firstly, the social tensions[34] provoked by displacement that has arisen between Artenian and Rutenian are not linked to climate change. Indeed, Rutenia is particularly vulnerable due

[31] Panel report, Russia – Traffic in Transit, para. 7.82; Panel report, US – Steel and Aluminium Products (Turkey), para. 7.161

[32] Panel report, US – Steel and Aluminium Products (China), para. 7.154

[33] Panel report, Russia – Traffic in Transit, paras. 7.75-7.76

[34] Clarification question No. 31

to its increased risk of salinisation and submergence[35] and if Artenians wished to escape from the consequences of climate change they would not have immigrated to a country facing similar risks. As an insular country itself, Rutenia does not appear to be the most appropriate haven against climate change and global sea rise.

[52] Secondly, there is no objective evidence of the seriousness of the situation referred to by Rutenia. Indeed, the debate held at the UNSC failed to produce a consensus on the seriousness of climate change and its link to security interests. On the contrary, several UN Members expressed their concern about the "securitisation of climate change" and the inability of the UNSC to tackle the problem of climate change.[36] The ICJ has been requested to give an advisory opinion on the obligations of States with regard to climate change but the procedure is still pending.[37]

[53] The impact of climate change on international relations is not comparable to the severity and imminent distress of a war. In June 2022, Burlandia organized a high-level regional dialogue on industrial decarbonization.[38] If international relations were as severely affected by climate change as in wartime, Rutenia would have surely attended it to find common ground and put an end to it through a global response.

[54] For these reasons, a climate emergency cannot be characterized as "an emergency in international relations". Therefore, the NZF Act and its inconsistency with the GATT cannot be justified under Art.XXI b) iii).

2. Rutenia's measure does not meet the requirements of the Chapeau

[55] Should the measure fall within the exception of Article XXI b) iii), it still has to satisfy the requirements imposed by the Chapeau of Article XXI b). Each WTO Member has to define its essential security interest. Discretion in this matter is limited by Members' obligation to interpret and apply this provision in good faith. The obligation of good faith is designed to avoid the use of Article XXI as a means of circumventing GATT provisions by qualifying commercial interests as essential security interests. It requires the Member invoking it to articulate the essential security interest purporting to arise from the emergency in international relations in a manner sufficient to demonstrate its veracity, and with more specificity than would be necessary when the emergency in international relations involves armed conflict.[39]

[35] Case, p.5, para. 14, Report on 'Sea-Level Rising: Assessing and Tackling the Risks for Rutenian People
[36] Case, p. 15, para. 13
[37] Case, p. 6, para. 16
[38] Case, p. 5, para. 15
[39] Panel report, Russia – Traffic in Transit, para. 7.131-7.135

[56] The obligation of good faith extends to an examination of whether the measures are so remote or unrelated to the emergency that it is implausible that the member implemented the measure to protect its essential security interests arising from the emergency.[40]

[57] Under Article 1, section 10 of the NZF Act, the measure aims "to incentivize sustainable patterns of consumption and production in Rutenia and urgently needed emission-reduction action at the global level, with a view to furthering the goals of the Paris Agreement and addressing the climate crisis." While it does address the climate crisis, it does not specify or justify the need for this measure to address this crisis as such. Much of the provisions of this act lead to consider it quite remote from the climate emergency. Article 3 provides for a deduction of the carbon charge for covered products that were explicitly carbon-taxed before importation. The already discussed disregard for implicit carbon charges, which can amount to be just as efficient, if not more, than explicit carbon charges, is clear proof that Rutenia does not act as a state in a time of crisis. Burlandia is home to one of the largest tropical rainforests on Earth, which is widely considered a critical pillar in maintaining global climate stability as a high-carbon stock and biodiversity-rich ecosystem.[41] Burlandia strengthened its national forest conservation laws[42] as part of its NDCs which is another factor ignored by Rutenia's measure. With the large demonstrated economic impact the measure will have on Burlandia's trade, Rutenia puts at stake Burlandia's capacity to maintain these high-cost climate adaptation measures and is hence effectively acting against its proclaimed goals.

[58] Consequently, the requirements of the Chapeau are not met, which means that the inconsistency of the NZF Act cannot be justified under Article XXI b) iii).

IV. THE NZF ACT IS NOT JUSTIFIED UNDER GATT ARTICLE XX

[59] In its US - shrimp report[43], based on its findings in the US - Gasoline[44] report, the AB confirms that the methodology for analyzing Article XX GATT is two-fold: firstly, it must be ascertained whether there is any provisional justification for the inconsistent measure under paragraphs (a) to (j); secondly, the measure must be analyzed under the chapeau of Article XX GATT to ensure that it does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.

[40] Panel report, Russia – Traffic in Transit, para.7.138- 7.139
[41] Case, p. 2, para. 5
[42] Case, p. 2, para. 6
[43] Appellate Body report, US - Shrimp, para. 123
[44] Appellate Body report, US - Gasoline, p. 22

1. The measure cannot be considered necessary to protect human health and life under GATT Article XX(b)

[60] Under Article XX(b) of the GATT, nothing in the GATT "shall be construed to prevent the adoption or enforcement by any contracting party of measures" that are "necessary to protect human, animal or plant life or health." There is a two-step reasoning to conclude that a measure is provisionally justified under paragraph b: the policy of the disputed measure must fall within the range of policies designed to protect human, animal, or plant health or life (a); and it must be necessary to fulfill this policy objective (b).[45]

a) <u>The Act does not pursue the protection of human, animal or plant life and health</u>

[61] The 6th Assessment report published by the IPCC[46] shows that many countries have been hit hard by the effects of climate change over the past decades, and this situation cannot be remedied without collective efforts made by countries to combat it.

[62] However, the Rutenian measure does not mention the protection of human health and life as its objective. Similarly, no mention is made of the particular protection of animals or plants in the NZF Act. The measure is designed only "to incentivize sustainable patterns of consumption and production in Rutenia and urgently needed emission-reduction action at the global level." Hence, it can be assumed that the objectives of the measure appear to be twofold. First, it aims at cleaning up and greening the industrial sector of Rutenia to fulfill its updated NDC (which focuses exclusively on energy rather than human life). Second, this is a significant means for Rutenia to generate a large amount of fiscal revenue. There is no mention of how this substantial increase in fiscal revenue will be used and allocated. There is also no indication this will contribute to Rutenia's efforts to protect human, animal, and plant life.

b) <u>Rutenia's measure does not fulfill the test required under article XX(b)</u>

[63] Should the Panel find that the measure is necessary to protect human, animal, or plant life and health, Burlandia submits that the measure is not necessary to pursue this objective.

[64] To be provisionally justified under paragraph (b) of Article XX, a measure must comply with a test carried out through a case-by-case analysis including (1) the importance of the pursued objective, (2) the role of the measure, (3) the incidence of the measure on exportations and importations, and (4) the existence of a reasonably available and less restrictive alternative measure[47].

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[45] Panel report, US - Gasoline, para. 6.20
[46] Case, p. 4, para. 12
[47] Appellate Body report, Brazil - Retreaded Tyres, para. 156

[65] Under the US - Gambling[48] report, the burden of proof lies with the Complainant only for an alternative measure that is as effective, less trade-restrictive, and reasonably available.

[66] Article 4.5 of the Paris Agreement states that support shall be provided to developing country Parties for them to raise their ambitions and make finance flows conducive to low GHG emissions and climate-resilient development.

[67] The protection of human, animal, and plant life and health is a global issue that does not stop at the border of a state. Therefore, a unilateral trade-restrictive measure is not a reasonable and adequate solution. Concerted efforts are the only solution to reduce global GHG emissions with low-cost international climate finance and technology transfer[49]. With this in mind, Burlandia convened a high-level regional dialogue to enable coordinated and cooperative approaches to industrial decarbonization, intending to establish genuine partnerships for climate finance and technology transfer for developing countries. Only a global response can tackle a global problem pertaining to the protection of human, animal, and plant life and health. Rutenia refused to participate in negotiations for regional cooperation and therefore refused to explore a reasonably available and less trade-restrictive solution.

[68] There are therefore less trade-restrictive and reasonably available solutions to pursue the objective of protecting human, animal, and plant life and health more efficiently.

[69] Thus, the disputed measure is not provisionally justified under GATT Article XX (b).

2. The measure is not related to the conservation of exhaustible natural resources under Article XX(g) of the GATT

[70] According to Article XX(g), a measure "relating to the conservation of exhaustible natural resources" can be provisionally justified if it is made effective in conjunction with restrictions on domestic production or consumption.

[71] As established in US - Shrimp, it is necessary to prove (a) the existence of "exhaustible natural resources", (b) a link between the measure and the objective of conserving these exhaustible natural resources, and impartiality.[50]

a) <u>Rutenia's measure does not pursue the protection of exhaustible natural resources</u>

[72] The notion of "exhaustible natural resources" in paragraph g) has been extended to clean air by the USA - Gasoline PR.[51] Further, the exhaustible nature of a natural resource is accepted

[48] Appellate Body report, US - Gambling, para. 309 (applying the necessity test in the context of Article XIV of the GATS, drafted in the same terms as Article XX of the GATT).
[49] Article 4.5 of the Paris Agreement
[50] Appellate Body report, US - Shrimp, para. 118
[51] Panel report, US - Gasoline, para. 6.37

if that resource is likely to "become rare, exhausted or disappear, very often as a result of human activities."[52]

[73] According to the NZF Act Article 1, the measure aims "*to incentivize […] urgently needed emission-reduction action at the global level, […] addressing the climate crisis.*" In targeting emission-reduction action, Rutenia does not expressly target a specific resource. Substantially, the panel could accept clean air, as its quality can deteriorate due to carbon emissions. However, climate refers to long-term weather patterns in a specific region, and although it can change, it does not vanish. This makes it challenging to view climate as an exhaustible natural resource.

b) Rutenia's measure is not in line with the objective pursued

[74] The AB underscored the importance of establishing a coherent link between the employed means and the pursued objective.[53] This link does not have to be "necessary" or "essential", as it only has to be "primarily aimed" at conserving the depletable natural resource.[54]

[75] In the present case, no link is established between the carbon charge and the objectives of the Paris Agreement. In September 2022, Korsania introduced a domestic carbon tax regarding its carbon-intensive products and a reliable system for monitoring carbon emissions. However, Korsenia remains dependent on fossil fuels, spending "twice as much on subsidizing fossil fuels than renewable energy." As a result, KorGlass emitted 0.55 tonnes of CO2 per tonne of glass in 2022, which shows the lack of result of such a measure and the notable absence of a link with its environmental objective.

[76] The carbon charge does not apply to Korsania's glass exports, nor does Artania's flat glass export. However, independent studies estimated that Vetro's production emitted 0.65 tonnes of CO2 per tonne of flat glass in 2022. Meanwhile, in the same year, Artania's glass industry emitted 0.70 tonnes of CO2 per tonne of glass, and KorGlass emitted 0.55 tonnes of CO2 per tonne of glass. The projected sales in Rutania for 2023 show how Burlandia will be negatively impacted by the measure (Burlandia's exports of flat glass will decrease by around 27%) compared to its competitors because of both the deduction (Korsania's exports of flat glass will increase of about 31,6%) and the exemption (Artania's exports will increase of about 33%).[55] Therefore, Rutenia's measure favors Artania's glass industry, which pollutes more than

[52] Appellate Body report, US - Shrimp, para. 118
[53] Appellate body report, China - Rare Earths, para. 5.87
[54] Panel report, Canada - Herrings and Salmon, para. 4.6
[55] Sales of Flat Glass in Rutenia (thousand tonnes/year), by country of origin (Annex IV of the case)

Burlandia's. It also tends to Korsania's industry, an upper-middle-income country that should have more responsibilities and capabilities to pursue the Paris Agreement objectives pursuant to the "common but differentiated" principle.

[77] Burlandia does not challenge the measure's impartiality in this regard. However, Burlandia submits the lack of an *"exhaustible natural resources*", and a link between the measure and the objective of conserving these exhaustible natural resources. In conclusion, the measure cannot provisionally justify a violation under Article XX(g).

3. In any case, the NZF Act is inconsistent with the Chapeau of Article XX

[78] Should the Panel consider the Rutenian measure provisionally justified under paragraphs (b) or (g), this measure is not consistent with the Chapeau of Article XX.

[79] Under the Chapeau of Article XX, an otherwise provisionally justified measure under paragraph (a) to (j) must not be applied in a manner that would constitute (a) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (b) a disguised restriction on international trade to be justified.

a) <u>Rutenian measure is arbitrary or unjustifiable discrimination between countries where the same conditions prevail</u>

[80] Three elements are required to characterize arbitrary or unjustifiable discrimination[56]: (1) the measure must be applied in a way that constitutes discrimination,[57] (2) between countries where the same conditions prevail, (3) with an element of arbitrariness or unjustifiable, which can be characterized in relation to efforts for consensual means to achieve the implementation of trade barriers in relation with the object, by the absence of bias or by the lack of significant flexibility granted by the measure given the particular conditions prevailing in each exporting members.[58]

i. The exemption is an arbitrary and unjustifiable discrimination

[81] Artania was granted an exemption because of its SIDS status. Burlandia does not dispute the legitimacy of such an exemption, as it aligns with the Paris Agreement's differentiated responsibilities principle. However, Burlandia disputes the fact that this exemption was not extended to all developing countries, including Burlandia.

[82] By seeking consultation, especially on technology transfer, Burlandia has shown its willingness to transform its flat glass industry. At this stage of its development, Burlandia faces

[56] Appellate Body report, US - Shrimp, para. 150
[57] Appellate Body report, US - Gasoline, pp. 23 - 24
[58] Appellate Body report, US - Shrimp, paras. 164, 172 and 177

technical and administrative capacity constraints for monitoring and verifying carbon emissions released during the production process and Article 4.5 of the Paris Agreement requests all Parties to enhance support for developing countries. It is, therefore, unjustifiable discrimination not to grant Burlandia a similar exemption to that granted to Artania to enable it to comply with the requirements of the Rutenian measure when there are no more technical means available to Burlandia to transform its industry and reduce its carbon emissions. As a result, Burlandia will suffer an unfair decrease in flat glass sales of around 27% while Artania will benefit from an increase of around 33% from 2022 to 2023.

ii. The deduction granted to Korsania is an arbitrary discrimination

[83] Additionally, by denying to Burlandia any deductions, Rutenia failed to take into account the equivalent effect measures applied by Burlandia.

[84] Rutenia's measure lacks flexibility. It disregards Burlandia's comparable measures enacted by its 2022 energy excise tax on all fossil fuels used in the manufacturing and transportation sectors. Though it does not explicitly tax carbon within the meaning of the NZF Act, Burlandia's efforts are very much comparable in effectiveness. If Burlandia's tax on fossil fuels is not explicitly linked to carbon emissions, it is, however, possible to convert energy taxes into a CO2-equivalent basis, which should have led Rutenia to consider that Burlandia's measure is equivalent to a charge of on average USD 15 per tonne of CO2.[59]

[85] Thus, Burlandia should have benefited from the application of a deduction just like Korsana has. As a result, while Burlandia's exports of flat glass to Rutenia will decrease unjustifiably by around 27%, those from Korsania will increase by around 31,6%, from 2022 to 2023.

[86] Thus, the NZF Act is applied in a manner that constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail.

b) <u>Rutenian measure is a disguised restriction on international trade</u>

[87] Pursuant to the panel report US - Shrimp (21.5 - Malaysia),[60] there would be an abuse of Article XX(g), or XX(b) if the compliance with those paragraphs was "in fact only a disguise to conceal the pursuit of trade-restrictive objectives", i.e. the measure in its application only pursues a supposedly legitimate objective indirectly or transparently. Additionally, pursuant to the US - Spring Assemblies PR,[61] it is clear that the analysis of a disguised restriction on

[59] Case, p.2, para. 6
[60] Panel report, US - Shrimp (21.5 - Malaysia), paras. 5.141, 5.142 and footnote 250
[61] Panel report, US - Spring Assemblies, para. 56

international trade under the chapeau of Article XX focuses on "the application of the measure and not the measure itself."

[88] In the present case, the protection of human, plant, or animal health and life, and the environmental objectives are only pretexts used by Rutenia to apply a carbon charge unfavorable for Burlandia's exports and in favour of its domestic producers. Rutenia did not want to engage in Burlandia's 2022 high-level regional dialogue which shows it had no intention of negotiating with its trade partners.

[89] Further, Guta, the main and biggest flat glass manufacturer in Rutenia, has received renewable energy subsidies from the Rutenian government to decarbonise its production process[62]. These subsidies are designed to aid domestic Rutenian producers rally with the carbon charge while foreign producers are faced with a charge that is often disproportionate to their financial capacities. Burlandia for example, considering its developing status, cannot afford to subsidize low-carbon flat glass, as it is not part of its NDCs towards its climate ambitions. While such subsidies are not inconsistent per se with the GATT, this proves Rutenia's intention to disguise a manifest restriction to international trade.

[90] Finally, the protectionist intention behind the Rutenian measure is explicit in the speech of the Rutenian Prime Minister, Ms. Rada, to the Parliament, who affirmed with respect to the implementation of a carbon price: "I am further reassured that our domestic manufacturers have already made significant decarbonization efforts and hence, the new carbon levy will not disadvantage them vis-à-vis foreign competitors."

[91] In conclusion, the Rutenian NZF Act does not meet the requirement of the chapeau of Article XX of the GATT, and cannot be justified under this provision.

[62] Clarifying question No. 21

REQUEST FOR FINDINGS

For the above reasons, Burlandia urges the Panel to find that:

1. Art. 5, Section 10 of the NZF Act is inconsistent with GATT Art. I:1 of the GATT 1994.
2. Art. 4, Section 10 of the NZF Act is inconsistent with GATT Art. I:1 of the GATT 1994.
3. Section 10 of the NZF Act is covered by Art III:2 and does not fall under the scope of Art. II:1(b). As such, it is inconsistent with Art III:2, first sentence of the GATT 1994.
4. Section 10 of the NZF Act is justified pursuant to Art. XXI(b)iii) of the GATT 1994
5. Section 10 of the NZF Act is justified pursuant to Art. XXI(b) of the GATT 1994
6. Section 10 of the NZF Act is justified pursuant to Art. XXI(g) of the GATT 1994