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BENCH MEMORANDUM

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RUTENIA - CARBON CHARGE

22nd John H. Jackson Moot Court Competition

Bench Memorandum

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This memorandum is designed to provide background information and guidance to those serving as panellists for the Written Submissions and/or the Regional or Final Oral Rounds. The memorandum highlights the key issues under each legal claim and provides an overview of the relevant WTO law as well as of possible arguments of each party. It is not meant to provide exhaustive or definitive answers to any of the legal and policy questions posed.

The contents of this document are confidential and must not be disclosed to Participants of the Competition or their Coaches. Your discretion in handling this document is crucial to maintain the integrity of the Competition process.

This document includes the Addendum from May 2024, which reflects the jurisprudential developments in DS600.

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1 INTRODUCTION AND OVERVIEW OF THE CASE

1.1 Broader context

1.1. The case invites participating teams and panellists to reflect upon the complex and unsettled question of whether, and under which conditions, WTO Members can use trade tools in the global fight against climate change. More specifically, it deals with the topical issue of domestic carbon pricing and border carbon adjustments, which are climate policy instruments that are becoming increasingly popular among countries in the context of the heterogenous and asymmetrical approach to climate change mitigation envisaged under the 2015 Paris Agreement.

1.2. While the climate crisis is widely recognised as the most pressing sustainability threat of our times, WTO Members need to reconcile their collective and individual regulatory responses to this challenge with their WTO obligations. This, in turn, raises the question of whether WTO law is adequately equipped to distinguish measures that pursue legitimate regulatory goals from those that seek to protect domestic industries under the guise of 'climate conservation' or 'climate security'. In particular, can a list of exceptions (Articles XX and XXI of the General Agreement on Tariffs and Trade 1994 (GATT)) that was drafted over seventy years ago do justice to the regulatory realities of the global climate crisis? And, conversely, is there a danger that, in an effort to accommodate those realities, the exceptions are hallowed out and stretched to a degree that makes WTO law lose all traction?

1.2 Measure at issue and key facts

1.3. The case concerns a dispute between two WTO Members and Contracting Parties to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement: Burlandia (complainant) and Rutenia (respondent). They are both located in the Intermarium region, together with Artania and Korsania, which are also original Members of the WTO and have equally ratified the UNFCCC and Paris Agreement. These four countries differ in their development levels and in the climate policies they have adopted to meet their mitigation commitments under the Paris Agreement, which is not surprising given that this agreement endorses a nationally-determined and differentiated approach to implementation among its Contracting Parties. Such policies range from *explicit* (or direct) carbon pricing instruments (such as carbon taxes and emission trading systems),[1] to *implicit* (or indirect) carbon pricing instruments (such as fuel excise taxes),[2] as well as non-pricing measures (e.g., provision of renewable energy subsidies or phase-out of fossil fuel subsidies).

[1] *Explicit* carbon pricing mechanisms increase the costs of producing carbon-intensive products by putting a price directly on carbon emissions released during the production process of such goods ('embedded' emissions).
[2] Although the term *implicit* carbon pricing is often used in academic and policy circles, there is no universally agreed definition of what policies can be considered as pricing carbon emissions indirectly. Nonetheless, both the IMF and the OECD include energy excise taxes as a form of implicit (or indirect) carbon pricing, since they increase the costs of producing carbon-intensive products by putting a price on the fuel-based energy used during the production of such goods, even if it is not directly based on the carbon emissions embedded in these products. See e.g., OECD, *Taxing Energy Use 2019 – Using Taxes for Climate Actio*n (OCED Publishing, 2019), available at: https://www.oecd.org/tax/taxing-energy-use-efde7a25-en.htm.

1.4. The measure at issue is a 'carbon charge' introduced by Rutenia under the Net Zero Future (NZF) Act, following a series of climate-related climate developments at the domestic, regional, and international levels that are described in the Case.[3] As of 1 September 2022, Rutenia applies a charge of USD 50 per tonne of carbon dioxide (CO2) released into the atmosphere from the production certain carbon-intensive goods ('embedded' carbon emissions), including flat glass, which is the product at issue in this dispute.[4]

1.5. Section 10 of the NZF Act contains special provisions which result in differential treatment in the application of the carbon charge to Rutenia's trading partners (Burlandia, Korsania and Artania): (i) a carbon charge deduction, which credits explicit carbon prices (in the form of taxes/fees or emissions trading allowances) paid in the country of origin (which benefits Korsania);[5] and (ii) an exemption for Least Developed Countries (LDCs) and Small Island Developing States (SIDS), which fully exempt these countries from the carbon charge (which benefits Artania).[6] Moreover, given that Burlandia does not have a monitoring and verification system in place for carbon emissions, default values are used to determine the carbon intensity of the flat glass it exports to Rutenia.[7]

1.6. The Tables below seek to provide a visual summary of the factual pattern in the dispute, but are by no means exhaustive of all relevant facts. In this regard, panellists are advised to read both the Case and the Clarification Questions document carefully. In the legal analysis part of the bench memo, we will refer to the relevant Case facts in outlining possible arguments for the parties.

Table 1 – Country Profiles

Country	Development level	Flat glass producer & carbon-intensity (2022)	Explicit carbon pricing	Other climate policies
Rutenia	High-income (GNI per capita of USD 40,000)	-Guta -0.40 tonnes CO2 emissions per tonne of flat glass	-Carbon charge (USD 50 per tonne of CO2 emissions) -Reliable monitoring and verification system (MVS) for carbon emissions	-Energy efficiency standards -Renewable energy subsidies
Burlandia	Lower-middle-income (GNI per capita of USD 4,200)	-Vetro -0.65 tonnes of CO2 emissions per tonne of flat glass (estimate) -Subject to default values (0.68 tonnes of CO2 emissions per tonne of flat glass)	-No explicit carbon pricing -No MVS	-Energy/fuel excise tax (equivalent to emission-weighted average of USD 15 per tonne of CO2) -Phase out of fossil fuel subsidies

[3] Case, paras. 11-16.
[4] NZF Act, Articles 1-2.
[5] NZF Act, Article 4.
[6] NZF Act, Article 5.
[7] Case, para. 6; Clarification Questions (Q15; Q16).

				-Forest conservation law (world's largest rainforest)
Korsania	Upper-middle-income (GNI per capita of USD 13,100)	-KorGlass -0.55 tonnes of CO2 emissions per tonne of flat glass	-Carbon tax (USD 30 per tonne of CO2 emissions) -Reliable MVS in place	-Renewable energy subsidies -No phase out of fossil fuel subsidies
Artania	LDC/SIDS (GNI per capita of USD 1,000)	-Small glass industry -0.70 tonnes of CO2 emissions per tonne of flat glass	-No explicit carbon pricing -No MVS	-None (no mitigation commitments under NDC)

Table 2 – Sales of Flat Glass in Rutenia (thousand tonnes/year), by country of origin

Country	**2021 (pre-charge)**	**2022 (charge introduction)**	**2023 (projected, post-charge)**	**Percentage change between 2021 and 2023**
Rutenia	280	300	325	+16%
Burlandia	300	260	190	-37%
Korsania	80	95	125	+56%
Artania	40	45	60	+50%

Table 3 – Carbon Charge (2022)

Country	**Nominal carbon charge**	**Carbon-intensity for flat glass**	**Actual carbon charge, per 100 tonnes of flat glass**
Rutenia	USD 50 per tonne of CO2 emitted	0.40 tonnes CO2 per tonne of flat glass	USD 2000
Burlandia	USD 50 per tonne of CO2 emitted	0.68 tonnes of CO2 per tonne of flat glass[8]	USD 3400
Korsania	USD 20 per tonne of CO2 emitted[9]	0.55 tonnes of CO2 per tonne of flat glass	USD 1100
Artania	NA[10]	NA	NA

[8] Burlandia is subject to the default values pursuant to Article 3.2 of Section 10 of the NZF Act.
[9] Korsania has a domestic carbon tax of USD 30 per tonne of CO2 emitted and, hence, benefits from the carbon charge deduction (USD 50 – USD 30) pursuant to Article 4 of Section 10 of the NZF Act.
[10] Artania is an LDC/SIDS and, hence, is fully exempted from the carbon charge pursuant to Article 5 of Section 10 of the NZF Act.

1.3 Main legal and interpretative questions

1.7. The legal claims in the Case are made under the GATT and confront the participating teams with a number of complex interpretative and systemic questions, some of which have not been considered in WTO jurisprudence. These include:

- The relevance of the carbon intensity (or carbon footprint) of products in determining their likeness under Articles I and III GATT, which relates to the broader unsettled issue of environmental processes and production methods (PPMs) and WTO law;
- The panel's duty to conduct an objective assessment of the applicability of the relevant provisions of the WTO covered agreements and the threshold issue of whether the carbon charge at issue is properly characterised as a border measure (Article II GATT) or an internal measure (Article III GATT);
- The relationship between Articles XX and XXI GATT and, in particular, whether a respondent may raise both defences and still maintain a coherent line of argumentation - i.e., is the objective of the measure at issue 'climate security' or 'climate conservation', or both?;
- The extent to which Article XXI(b)(iii) GATT could accommodate concerns other than traditional defence and military interests in situations of international armed conflicts, and more specifically whether trade-restrictive measures aimed at addressing risks from climate change in times of a global climate crisis can be justified under that provision;
- The choice for the respondent between paragraphs (b) (public health) and (g) (environmental conservation) of Article XX GATT and how to grapple with the legal tests and evidentiary requirements posed by each exception in the context of trade-restrictive climate measures;
- The relationship between the non-discrimination disciplines in WTO law (Article I and Article XX (chapeau) GATT) and the country-based differentiation provisions under the Paris Agreement, and in particular whether a trade-related climate measure that differentiates between countries according to their development levels and mitigation commitments can be compatible with WTO law;
- The equivalence requirement under Article XX GATT (chapeau) and how it may be applied in the context of highly heterogenous climate change mitigation policies across countries.

1.8. Finally, it is important to note that the Case is – and needs to be – an over-simplification of reality. Not only are there only four countries and one product, but also some highly technical, real-life issues are either presented in a simplified manner (e.g., monitoring, reporting and verification systems for carbon emissions),[11] or assumed to be undisputed by the parties (e.g.,

[11] NZF Act, Annex III to Section 10; Implementing Regulation 7/2023 in Clarification Questions (Q89).

methods for measuring and calculating the carbon footprint of products),[12] even though they remain contentious in practice due to the lack of commonly agreed methodologies. These choices had to be made to avoid the Case becoming overly complicated, and ensuring it is manageable for participants and panellists within the space and time constraints of the moot court competition. For this same reason, no legal claims are raised under other GATT provisions (e.g., the Enabling Clause), nor under the Agreement on Technical Barriers to Trade (TBT), even though these may be relevant to the measure at issue. In this regard, panellists are kindly reminded that their questions should concern the legal claims and facts specified in the Case (including the Clarification Questions).

1.9. We hope that you will enjoy judging the Case!

[12] NZF Act, Annex III to Section 10.

TIMELINE OF THE DISPUTE

Date	Event
As of October 2017	**Rutenia** adopts a number of climate policies, including introduction of mandatory energy efficiency standards and provision of a substantial range of renewable energy subsidies
October 2020	Green Party wins the elections in **Rutenia**
December 2020	**Rutenia** undertakes to "cut GHG emissions economy-wide by at least 70% by 2030 compared to 1990 levels, with a view to reaching 'climate neutrality' by 2050 in accordance with Article 4.1 of the Paris Agreement"
August 2021	**Burlandia** commits to "reduce GHG emissions by 28% compared to 2005 levels by 2030, and to make every possible effort towards achieving the long-term objective of net-zero emissions by 2070 in light of its developing-country status and national circumstances"
March 2021	**Korsania** commits to "cut GHG emissions economy-wide by at least 50% by 2030 compared to 1990 levels, with a view to reaching 'climate neutrality' by 2050"
February 2022	**IPCC** published 6th Assessment Report ("Climate Change 2022: Impacts, Adaptation and Vulnerability")
March 2022	**UN Security Council** convenes meeting on sea-level rise and its implications for international peace and security
April 2022	**Rutenian** leading public university published report on "Sea-Level Rising: Assessing and Tackling the Risks for Rutenian People"
June 2022	**Burlandia** convenes a high-level regional dialogue with a view to enabling coordinated and cooperative approaches to industrial decarbonization, which has not resulted in concrete action
1 July 2022	**Rutenian** Parliament adopted the Net Zero Future Act
July 2022	**Burlandia** introduces an energy excise tax on all fossil fuels used in the manufacturing and transportation sectors and adopts a programme for the progressive phasing-out of all remaining fossil fuel subsidies by 2030
September 2022	**Korsania** introduces a domestic carbon tax of USD 30 per tonne of CO2 emitted for carbon-intensive products
1 September 2022	**Rutenia's** Net Zero Future Act enters into force
March 2023	**UN General Assembly** requests the International Court of Justice to deliver an advisory opinion on the obligations of States under international law in respect of climate change
1 June 2023	**Burlandia** requests the establishment of a WTO panel

LIST OF ABBREVIATIONS

Abbreviation	Description
AB	Appellate Body
CBDRRC	Common but Differentiated Responsibilities and Respective Capabilities
CO2	Carbon dioxide
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (1994)
EU	European Union
GATT	General Agreement on Tariffs and Trade (1994)
GHGs	Greenhouse Gases
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
LDCs	Least Developed Countries
MEA	Multilateral Environmental Agreement
ODC	Other duty or charge
OECD	Organization for Economic Co-operation and Development
MERCOSUR	Mercado Común del Sur
MFN	Most Favoured Nation
NDC	Nationally Determined Contribution
NZF	Net Zero Future Act
PPM	Process and Production Methods
SIDS	Small Island Developing States
TBT	Agreement on Technical Barriers to Trade (1994)
UNFCCC	United Nations Framework Convention on Climate Change (1992)
US	United States of America
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties (1969)
WTO	World Trade Organization

SCORE SHEET

ASSESSMENT CRITERIA		POINTS AVAILABLE	POINTS AWARDED
ANALYSIS OF THE LEGAL ISSUES	**Article I:1 GATT – *de jure* claim** • Measure covered by Article I:1 GATT (0.2) • "Like products" (0.8) • "Advantage" (0.4) • "Immediately and unconditionally" (0.6)	**2**	
	Article I:1 GATT – *de facto* claim • Measured covered by Article I:1 GATT (0.2) • "Like products" (1) • "Advantage" (0.5) • "Immediately and unconditionally" (0.8)	**2.5**	
	Article III:2 GATT First sentence • "Like products" (0.7) • Taxation in excess (0.6) Second sentence • "Directly competitive or substitutable products" (0.7) • "Not similarly taxed" (1) • "So as to afford protection to domestic production" (2) *Teams may choose to argue only the first or the second sentence of Article III. If teams can explain their choice strategically, address the requirements of Article 6.2 of the DSU, and their arguments are well-developed, all 5 points may be allocated.*	**5**	
	Article II:1(b) GATT • Applicability and objective assessment (0.5) • Internal vs border measure (1.5)	**2**	
	Article XXI GATT • "Taken in time of war or other emergency in international relations" (5) • Articulation of essential security interests and plausibility (2)	**7**	
	Article XX GATT – Subparagraphs • Choice of paragraph and relationship with Article XXI defence (1) • Paragraph (g) (2) • Paragraph (b) (2) *Teams may choose to raise a defence under only one of the paragraphs and should not be penalized for this. If teams can explain their choice strategically and their arguments are well-developed, 5 points may be allocated for paragraph (b) or (g), as applicable.*	**5**	
	Article XX GATT – Chapeau • "Same conditions" (2) • "Arbitrary or unjustifiable discrimination" (4.5)	**6.5**	
ARGUMENTATION & WRITING STYLE	Structure, organization, and weighting of arguments	**6**	
	Creativity of argumentation	**6**	
	Clarity and tone of written expression.	**4**	
	Correct use of legal terminology, grammar, spelling, and citation	**4**	
	OVERALL SCORE	**50**	

2 LEGAL CLAIMS

2.1 ARTICLE I:1 of the GATT

2.1.1 Legal claims and key issues

2.1. Burlandia makes two legal claims under Article I:1 GATT (*de jure* and *de facto*).

2.2. Firstly, Burlandia submits that the exemption from the carbon charge for covered products originating in LDCs and SIDS under Article 5 of Section 10 of the Act and its application to flat glass from Artania is inconsistent with Article I:1 GATT. Given that the exemption from the carbon charge is granted to flat glass from some countries but not others on the basis of its (LDCs/SIDS) origin, it is a *de jure* discrimination claim. As elaborated below, it would be difficult for Rutenia to sustain the argument that such an origin-based discrimination does not violate Article I:1 GATT. Hence, during the oral pleadings, responding teams may concede on most/all aspects of this legal claim – and should not be penalised for doing so and moving straight to a defence of the measure under Article XX GATT.

2.3. **Note to panellists**: The GATT Enabling Clause is **not** part of the legal defences indicated in the Case and, as such, teams (and panellists) should refrain from raising it.[13] The question of whether any discrimination in favour of LDCs/SIDS is justifiable will be addressed under the chapeau of Article XX GATT (see sections 2.5.10-2.5.12 below).

2.4. Secondly, Burlandia submits that the deduction of explicit carbon prices paid in the country of origin from the carbon charge for covered products pursuant to Article 4 of Section 10 of the Act and its application to flat glass from Korsania is inconsistent with Article I:1 GATT. Unlike the first claim, this one is a *de facto* discrimination claim, under which two elements of the legal test under Article I:1 GATT may prove more contentious. Under *de facto* violation claims, an origin-based presumption of likeness cannot be made, and a detailed likeness analysis is necessary. Here, the argumentation is likely to focus on consumers' preferences and behaviour, since the facts of the Case and the Clarification Questions are straightforward on the other three likeness criteria. In addition, the granting of the carbon charge deduction on its face appears to be *origin-neutral* (i.e., explicit carbon prices paid in the country of origin) and, hence, the "immediately and unconditionally" element of Article I:1 GATT also requires more elaboration.

2.1.2 Relevant WTO provision

2.5. Article I:1 GATT provides:

General Most-Favoured-Nation Treatment

[13] See Clarification Questions (Q124). There are a number of reasons why this choice was made, among others because of time/space limitations. Arguably, the exemption from the carbon charge would not fall within the scope of paragraph 2(b) of the GATT Enabling Clause (as interpreted by the Appellate Body in *Brazil – Taxation* (See Appellate Body Report, *Brazil – Taxation,* paras. 5.406-5.414), nor within the scope of paragraph (d) therein (which is limited to preferential treatment of LDCs, not including all SIDS).

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [WTO Member] 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 [WTO Members].

2.6. Four questions must be addressed to determine whether the measure at issue is consistent with the most-favoured-nation (MFN) treatment obligation, namely:

i. Whether the measure at issue is covered by Article I:1 GATT;
ii. Whether the products concerned are "like products";
iii. Whether the measure grants an "advantage" to a product originating in the territory of any country; and
iv. Whether the advantage at issue is granted "immediately and unconditionally" to all like products originating in (or destined for) the territory of all WTO Members.[14]

2.1.3 Relevant jurisprudence

2.7. With regard to the **scope** of application of Article I:1 GATT, it is evident from the text that it covers a broad range of measures, including both border and internal measures, and this has been recognised in WTO jurisprudence. Hence, whether classified as a border ("charge of any kind imposed on or in connection with importation") or internal measure ("a matter referred to in paragraphs 2 and 4 of Article III"), the carbon charge at issue is quite certainly covered by Article I:1 GATT. While teams are expected to address this first element of the legal test, they may do so succinctly – and should not be penalised for this.

2.8. Turning to **like products**, a determination of whether the products concerned are "like" is, essentially, a determination about whether and to what extent these are competing in the relevant market. To determine whether the products at issue are in a competitive relationship, a panel must examine on a case-by-case basis all relevant factors, and mainly four criteria: (i) the products' properties, nature and quality (i.e., their physical characteristics); (ii) the products' end-uses (i.e., the extent to which products are capable of performing the same, or similar, functions); (iii) consumers' tastes and habits (more comprehensively termed consumers' preferences and behaviour); and (iv) the products' tariff classification.[15] This is commonly known as the traditional approach for determining likeness. However, in *EC – Asbestos*, the Appellate Body (AB) emphasised that:

> […] These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither treaty-mandated, *nor a closed list of*

[14] See e.g., Appellate Body Reports, *EC – Seal Products*, para. 5.86.
[15] See e.g., Panel Report, *US – Poultry (China)*, para. 7.425.

> *criteria* that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* the pertinent evidence."[16]

2.9. In cases of *de jure* discrimination (i.e., where the measure at issue makes regulatory distinctions between products exclusively on the basis of their origin), WTO panels have not considered it necessary to conduct a detailed likeness analysis. Instead, they have proceeded on an origin-based presumption of likeness, assuming that the products concerned were like.[17] In *US – Poultry (China)*, the panel recalled that:

> […] the complainant did not need to identify specific [imported] products and establish their likeness in terms of the traditional criteria in order to make a *prima facie* case of "likeness". Instead, when *origin is the sole criterion* distinguishing the products, it has been sufficient for a complainant to demonstrate that there can or will be [imported] products that are "like".[18]

2.10. Note that a product's process and production method has not been considered as a separate criterion for assessing likeness in WTO jurisprudence. However, a PPM may be of relevance in the determination of likeness if it has an impact on one (or more) of the four abovementioned traditional criteria – and notably, consumers' preferences and behaviour.[19] That is, if consumers in a given market are increasingly sensitive to the environmental conditions (e.g., carbon intensity) under which products are produced, a situation could arise in which there is in fact no (or only a weak) competitive relationship between an environmentally-friendly product and environmentally-unfriendly product. However, in practice, it is unlikely that all or most consumers in a given market would be unwilling to substitute between products (or find them not to be "like" in WTO law terms) just because of their embodied environmental impact. Teams can be expected to put forward creative arguments on the likeness of products in light of their carbon footprint – and panellists may question the WTO jurisprudential approach to PPMs during oral pleadings.

2.11. As to **advantage**, the text of Article I:1 GATT refers to "*any* advantage, favour, privilege or immunity granted by any [WTO Member]" (emphasis added), which has been given a broad meaning in WTO jurisprudence. In *Canada – Autos*, the AB found that Canada's import duty exemption accorded to motor vehicles originating in some countries (in which affiliates of certain designated manufacturers were present) granted an "advantage" within the meaning of Article I:1 GATT, and noted that:

> […] The words of Article I:1 refer not to *some* advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "*any advantage*"; not to *some* products, but to "*any product*", and not to like products from *some* other Members, but to all like products originating in or destined for "*all other*" Members.[20]

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[16] Appellate Body Report, *EC – Asbestos*, para. 102 (emphasis added).
[17] See e.g., Panel Reports, *US – Poultry (China)*, para. 7.429; *Russia – Railway Equipment*, paras. 7.897-7.899; *US – Steel and Aluminium Products (Turkey)*, fn 346 to para. 7.60.
[18] Panel Report, *US – Poultry (China)*, para. 7.427 (emphasis added), referring to the Panel Report, *China – Publications and Audiovisual Products*, para. 7.1446.
[19] In the context of Article III:4 GATT, see Appellate Body Report, *EC – Asbestos*, paras. 114-115.
[20] Appellate Body Report, *Canada – Autos*, para. 79.

2.12. In *Brazil – Taxation*, the panel found that tax reductions accorded to motor vehicles imported from some WTO Members but not others constituted an "advantage" within the meaning of Article I:1 GATT, and stated that:

> [A]n advantage within the meaning of Article I:1 GATT exists when a measure alters the conditions of competition for certain imported products relative to other imported products […] Applying this to the present dispute, the [p]anel considers that the tax reductions challenged under Article I:1 do indeed act as advantages relative to the like imported products that do not receive that tax reduction. Insofar as one product receives a lower burden than another like product, there is change in the conditions of competition for the like product relative to less-taxed product.[21]

2.13. In relation to **immediately and unconditionally**, measures imposing *origin-based* conditions to the granting of an advantage have been consistently held to be incompatible with Article I:1 GATT since the GATT panel report in *Belgium – Family Allowances*, which concerned an exemption from an internal charge depending on the type of family allowances in place in the country of origin.[22] For instance, the panel in *US – Steel and Aluminium (Turkey)*, which concerned country exemptions excluding steel and aluminium products of certain origins from the application of additional duties, found that:

> [I]t is undisputed that the additional duties apply to all qualifying products imported into the United States and that the relevant exemptions apply to products from select countries […] *solely on the basis of their origin*. Therefore, with respect to the imposition of the customs duties, the country exemptions accord an "advantage" to steel and aluminium products from exempted countries that is not accorded immediately and unconditionally to "like products" originating in non-exempted countries.[23]

2.14. When it comes to *origin-neutral* conditions, WTO jurisprudence has been less categorical. The AB in *EC – Seal Products* noted that:

> [A]s Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like products from all Members, it does not follow that [it] prohibits a Member from attaching *any* conditions to the granting of an "advantage" […] Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like products from *any* Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.[24]

2.15. However, the panel in *US – Tuna II (Mexico) (Article 21.5)*, clarified that it is irrelevant whether a WTO Member could modify its laws or practices so as to conform with origin-neutral conditions

[21] Panel Reports, *Brazil – Taxation*, paras. 7.1041-7.1042.
[22] GATT Panel Report, *Belgium – Family Allowances*, para. 3; see also Panel Report, *Canada – Autos*, para. 10.25.
[23] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.60 (emphasis added). While this Panel report was not adopted, it refers to previous adopted Panel reports, and may be relied upon by teams due to factual similarities (i.e., country-based exemptions).
[24] Appellate Body Reports, *EC – Seal Products*, para. 5.88.

(in that case, dolphin-safe labelling requirements). The panel clarified that Article I:1 "is concerned with the conditions of competition as they exist, and not as they might exist if the Member whose like products have suffered the detrimental impact were to somehow modify its practices".[25]

2.16. Finally, note that the regulatory purpose (or legislative intent) of the measure at issue has not been a relevant consideration under Article I GATT in WTO jurisprudence. In particular, in *EC – Seal Products*, the AB rejected the European Union's argument that the analysis under Article I:1 GATT must consider the rationale for a measure's detrimental impact on competitive opportunities for like products and, more specifically, whether it stems exclusively from a legitimate regulatory distinction. It held that:

> A panel is not required, under Article I:1, to assess whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[26]

2.17. Panellists may question this approach during oral pleadings, if arguments on regulatory purpose are made by participating teams or on their own initiative.

2.18. In relation to the trade effects of the measure at issue, the AB held in *EC – Seal Products* that, since Article I GATT "protects expectations of competitive opportunities for like products from all WTO Members", a finding of inconsistency with this provision is "not contingent upon the actual trade effects" of the challenged measure.[27]

2.1.4 Arguments for Burlandia (*de jure* claim)

2.19. Burlandia may argue:

- **Measure covered**: the carbon charge at issue is covered by Article I:1 GAT as "a matter referred to in paragraph 2 […] of Article III";
- **Likeness**: an origin-based presumption of likeness can be applied (as per *US – Poultry (China)*),[28] because the only criterion for granting the exemption from the carbon charge under Article 5 of Section 10 of the NZF Act is the origin of products (i.e., LDCs/SIDS);
- **Advantage**: the exemption from the carbon charge grants flat glass from Artania an "advantage" within the meaning of Article I:1 GATT, because it "alters the conditions of competition" (as per *Brazil – Taxation*)[29] in favour of flat glass from Artania (exempted) relative to like flat glass from Burlandia and other WTO Members (non-exempted);
- **Immediately and unconditionally**: the exemption from the carbon charge applies to products from select countries (i.e., LDCs and SIDS) *solely* on the basis of their origin, and such an origin-based condition is inconsistent with Article I:1 GATT. It accords flat glass from Artania, which is exempted pursuant to Article 5 of Section 10 of the NZF Act, an

[25] Panel Report, *US – Tuna II (Mexico) (Article 21.5)*, para. 7.450.
[26] Appellate Body Reports, *EC – Seal Products*, para. 5.93. In other words, Article I:1 prohibits discriminatory treatment, including measures that did not intend to discriminate but did so inadvertently.
[27] Appellate Body Reports, *EC – Seal Products*, para. 5.87.
[28] See para. 2.9. above.
[29] See para. 2.12. above.

advantage that is not extended immediately and unconditionally to like flat glass originating in other WTO Members, including Burlandia (drawing parallels with *US – Steel and Aluminium Products (Turkey)*).[30]

2.1.5 Arguments for Rutenia (*de jure* claim)

2.20. Rutenia may argue:

- **Measure covered**: to be consistent with its claim under Article II:1(b) GATT,[31] Rutenia may argue that the carbon charge at issue is covered by Article I:1 GATT as a "charge of any kind imposed on or in connection with importation", rather than as an internal measure. In any event, Rutenia is likely to concede that the measure at issue is covered by Article I:1 GATT.
- **Likeness**: Rutenia may find it difficult to rebut the origin-based presumption of likeness and may thus concede on this point. Alternatively, Rutenia may seek to distinguish the current factual scenario from WTO cases where origin-based likeness was presumed,[32] by arguing that origin *per se* is *not* the *sole* criterion distinguishing the products. It is rather the special status of LDCs/SIDS as recognised by the United Nations (UN) and under the Paris Agreement,[33] which is an objective criterion and not simply a select group of countries at Rutenia's discretion. However, this argument may be hard to sustain given the existence of the GATT Enabling Clause as exception to Article I:1 GATT in relation to more favourable treatment of developing countries.[34] But even if this argument is accepted, and a full likeness analysis is conducted, the products at issue would most likely be found to be "like". Artanian flat glass is *more* carbon-intensive (i.e., 0.70 tonnes of CO2 per tonne of flat glass in 2022) than Burlandian flat glass (i.e., 0.65 tonnes of CO2 per tonne of flat glass) and, hence, Rutenia cannot really argue these are not "like products" on the basis of consumers' preferences for climate-friendly products in Rutenia. Based on the facts of the Case, such products also have the same physical characteristics, end-uses and tariff classification[35] – and this should not be disputed by Rutenia.
- **Advantage**: In light of WTO jurisprudence (*Canada – Autos* and *Brazil – Taxation*),[36] it would hard for Rutenia to dispute that the exemption from the application of the carbon charge grants an "advantage" within the meaning of Article I:1 GATT – and hence, responding teams are likely to concede on this point.
- **Immediately and unconditionally**: It would be hard for Rutenia to dispute that the exemption from the carbon charge is subject to an origin-based condition, and it may well

[30] See para. 2.13. above.
[31] See section 2.2 below.
[32] See para. 2.9. above. In these WTO cases, a select group of countries was benefitting from the advantage accorded: see e.g., Panel Reports, *EC – Tariff Preferences*, para. 7.58 (12 selected beneficiaries of tariff preferences under Drugs Arrangement) and *US – Steel and Aluminium Products (Turkey)*, para. 7.60 (Australia, Argentina, Brazil and Republic of Korea benefitting from duty exemptions).
[33] NZF Act, Section 10, Article 5; Clarification Questions (Q1; Q4).
[34] Appellate Body Report, *EC – Tariff Preferences*, para. 90.
[35] Case, paras. 7-8; Clarification Questions (Q6, Q7, Q10).
[36] See paras. 2.11. - 2.12. above.

concede on this being inconsistent with Article I:1 GATT (e.g., as the US did in *US – Steel and Aluminium Products (Turkey)*).[37]

2.1.6 Arguments for Burlandia (*de facto* claim)

2.21. Burlandia may argue:

- **Measure covered**: the carbon charge at issue is covered by Article I:1 GATT as "as a matter referred to in paragraph 2 […] of Article III";
- **Likeness**: Flat glass from Burlandia and flat glass from Korsania are "like products", because there are no differences in their physical characteristics,[38] nor in their end-uses (i.e., in both instances, it is used by "DIM to produce windows, doors, mirrors and table tops"),[39] and they are classified under the same HS Code.[40] In addition, Burlandia may rely on the market shares of flat glass[41] to show that these products are in strong competitive relationship with each other in the Rutenian market and DIM – as the main direct buyer of flat glass in Rutenia – treats such products as substitutable, irrespective of their carbon footprint.[42]
- **Advantage**: the carbon charge deduction accords flat glass from Korsania an "advantage" within the meaning of Article I:1 GATT, since it "alters the conditions of competition" (as per *Brazil – Taxation*)[43] in favour of flat glass from Korsania (reduced carbon charge of USD 20 per tonne of CO2 emitted) relative to like flat glass from Burlandia and other WTO Members (full carbon charge of USD 50 per tonne of CO2 emitted).
- **Immediately and unconditionally**: Article 4 of Section 10 of the NZF Act accords flat glass from Korsania an advantage that is not extended immediately and unconditionally to like flat glass originating in other WTO Members, including Burlandia. Although the condition for granting the carbon charge deduction appears origin-neutral, it is *de facto* country-based (i.e., some countries have explicit carbon pricing instruments in place and others do not) and has a detrimental impact on competitive opportunities for flat glass from Burlandia (not qualifying for the carbon charge deduction) vis-à-vis like flat glass from Korsania (benefitting from carbon charge deduction). While a finding of an Article I violation is not contingent upon the actual trade effects of the challenged measure (as per *EC – Seal Products*),[44] Burlandia could point the data on flat glass sales in Rutenia (Annex III of the Case) as additional evidence of this detrimental impact. As per *US – Tuna II (Mexico) (Article 21.5)*, the fact that Burlandia *could* adopt explicit carbon pricing in order to benefit from the carbon charge deduction is irrelevant – what matters for the purpose of

[37] See para. 2.13. above.
[38] Clarification Questions (Q6 and Q7).
[39] Case, paras. 7 and 8.
[40] Clarification Questions (Q10).
[41] Case, Annex IV.
[42] Case, para. 4: "In 2021, DIM purchased 60% of the flat glass used in its production from foreign suppliers, including those located in Burlandia, Korsania, and Artania, and 40% from Guta and other smaller domestic suppliers".
[43] See para. 2.12. above.
[44] See para. 2.18. above.

Article I GATT is that the condition in Article 4 of Section 10 of the NZF Act has upset the conditions of competition as they exist (and not as they *might* exist).[45]

2.1.7 Arguments for Rutenia (*de facto* claim)

2.22. Rutenia may argue:

- **Measure covered**: to be consistent with its claim under Article II:1(b) GATT,[46] Rutenia may argue that the carbon charge at issue is covered by Article I:1 GATT as a "charge of any kind imposed on or in connection with importation", rather than as an internal measure. In any event, it is likely to concede that the measure at issue is covered by Article I:1 GATT.
- **Likeness**: Based on the facts of the Case, Rutenia should not dispute that flat glass from Burlandia and flat glass from Korsania have the same physical characteristics, end-uses and tariff classification.[47] Rutenia may argue, however, that there are differences in consumers' preferences and behaviour towards the carbon intensity of products (including flat glass), which are evident in the electoral victory of the Green Party in October 2020[48] and the strong public concerns over climate change, with the "recent opinion poll conducted by RutInfo, [showing] that 73% or Rutenians consider climate change and its adverse effects to be the largest existential threat facing Rutenia in the coming years".[49] In making this argument, Rutenia would disagree with Burlandia that the relevant consumer is DIM (using flat glass an input), and argue that it is the tastes and preferences of Rutenian citizens (as end-consumers of glass products) that have to be examined.
- **Advantage**: In light of WTO jurisprudence (*Canada – Autos* and *Brazil – Taxation*),[50] it would hard for Rutenia to dispute that the carbon charge deduction grants an "advantage" within the meaning of Article I:1 GATT – and hence, responding teams are likely to concede on this point;
- **Immediately and unconditionally**: It would be difficult for Rutenia to dispute that the condition for granting the carbon charge deduction (explicit carbon pricing) has a detrimental impact on competitive opportunities for flat glass from Burlandia relative to like flat glass from Korsania. However, Rutenia may seek to argue that there is a legitimate rationale for such a detrimental impact -i.e., to duly credit carbon prices paid in the country of production and avoid double charging for carbon emissions embedded in imports of the covered products into Rutenia.[51] Albeit, as previously noted, this line of argumentation based on the regulatory purpose was rejected by the AB in *EC – Seal Products*[52], and it would

[45] See para. 2.15. above.
[46] See section 2.2 below.
[47] Case, paras. 7-8; Clarification Questions (Q6, Q7, Q10).
[48] Case, para. 11.
[49] Case, para. 14.
[50] See paras. 2.11. - 2.12. above.
[51] This is explicitly mentioned in Article 4 of Section 10 of the NZF Act.
[52] See para. 2.18. above.

be more appropriate for Rutenia to raise arguments regarding the legitimate objective of the measure the GATT exceptions.

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
Who should be considered the 'consumers' for the purpose of the likeness analysis? The manufacturers (DIM) purchasing flat glass as an input into the production of glass products, or the end consumers of such glass products (Rutenian citizens)?	Who should be the relevant 'consumer' in the specific circumstances of this case – DIM as the direct buyer of flat glass, or Rutenia citizens buying the final glass products (e.g., mirrors)? If the latter, how would Rutenian citizens know about the carbon intensity of the flat glass used an input into the production of such glass products?
Are the four traditional criteria for determining likeness a closed list, preventing the Panel from considering other evidence? Can we really consider flat glass from Burlandia (estimated 0.65 tonnes of CO2 emitted per tonne of flat glass) to be "like" flat glass from Korsania (0.55 tonnes of CO2 emitted per tonne of flat glass), despite the significant differences in their carbon footprint?	If Rutenian consumers regard carbon-intensive flat glass and low-carbon flat glass as not being "like" (i.e., not substitutable products), why did the Rutenian Government see a need to introduce a carbon charge?
Is the current WTO interpretative approach to likeness inflating the chances that trade measures regulating environmental PPMs breach the GATT non-discrimination obligations? How plausible is it that the majority of consumers in a given market would be unwilling to substitute between two products *just* because of the different environmental conditions under which they are produced?	Should PPMs (here, carbon intensity) be an independent factor in determining the likeness of products? Wouldn't this inflate the chances of finding products are *not* "like" (and hence, non-applicability of Article I GATT), given that PPMs are very likely to differ across countries (e.g., consider carbon-intensities in four countries in the Case)?
Does your *de facto* discrimination claim imply that Rutenia should disregard explicit carbon pricing policies in other countries (such as Korsania) and simply double charge for the carbon emissions embedded in the products covered by the NZF Act? If your answer is yes, would this be appropriate in light of the purpose of Article I to protect competitive opportunities for like products from all WTO Members?	Does the regulatory objective of the measure matter under the Article I analysis? If your answer is yes, are you transposing the "arbitrary or unjustifiable" discrimination standard from the chapeau of Article XX to Article I GATT?

2.2 ARTICLE II:1(b) of the GATT

2.2.1 Legal claim and key issues

2.23. Burlandia claims that Rutenia's imposition of the carbon charge on flat glass from Burlandia is inconsistent with Article III:2 GATT. In response, Rutenia submits that its carbon charge is not an internal tax or charge but an "other duty or charge" (ODC) within the meaning of the second sentence of Article II:1(b) GATT.

2.24. The Panel would have to establish which of the two provisions (Article II:1(b), second sentence, or Article III GATT) is applicable to the measure at issue. If Rutenia succeeds in establishing that the measure at issue falls under Article II:1(b) and not Article III:2, there is unlikely to be a finding of violation because Burlandia did not make a claim under Article II:1(b) GATT in its panel request. By contrast, a finding of violation under Article III:2 GATT is more likely if it is established that that provision is applicable. Teams representing Rutenia are expected to address the substance of the Article III:2 claim in case the Panel disagrees with them that Article II:1(b) is not applicable.

2.25. There are two issues for teams to address: (i) the Panel's duty to conduct an objective assessment of the matter, including an objective assessment of the applicability of the relevant WTO covered agreements; and (ii) whether the carbon charge is a border measure subject to of Article II:1(b) GATT or an internal measure subject to Article III:2 GATT.

2.26. Teams representing Rutenia are expected to argue that if the Panel finds that the carbon charge is covered by Article II:1(b) GATT, which is not included in Burlandia's panel request, the claim will not be within the Panel's terms of reference and the Panel will have no jurisdiction to examine it. Teams representing Rutenia may also briefly point out that the carbon charge is an ODC under the second sentence of Article II:1(b) GATT, which has been properly recorded in Rutenia's Schedule of Concessions.

2.27. **Note to panellists**: Some teams may not spot the preliminary issue regarding the Panel's duty to determine the applicability of the relevant covered agreements. Panellists may prompt them with questions about the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In any event, all teams should be able to discuss the issue of 'internal' vs 'border' measure. Some teams may try to argue that the Panel should examine the consistency of the carbon charge with Article II:1(b) GATT and briefly argue that the carbon charge is an ODC that has been properly recorded in Rutenia's Schedule of Concessions and does not exceed the bound duty rate.[53] However, teams should not be let to spend time arguing a claim that is not in Burlandia's panel request – and hence, not within the Panel's terms of reference (or jurisdiction).[54] We advise panellists to proceed *arguendo* on the basis that Article III:2 GATT, on which Burlandia does make a claim in its panel request, applies to the carbon charge at issue.

[53] See Annex I to the Bench Memorandum for an overview of possible legal arguments.
[54] Article 7.1 DSU.

2.2.2 Relevant WTO provisions

2.28. Article 11 DSU provides, in relevant part:

Function of Panels

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

2.29. Article II:1(b) GATT, second sentence, reads:

> […] Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

2.30. Article III:2 GATT reads:

> The products of the territory of any [WTO Member] imported into the territory of any other [WTO Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [WTO Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [of Article III].

2.31. The Note *Ad* Article III GATT clarifies:

> Any internal tax or other internal charge, or 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 an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

2.2.3 Relevant jurisprudence

2.2.3.1 Applicability and objective assessment

2.32. With respect to WTO panels' duty to provide an objective assessment of the matter under Article 11 DSU, in *Indonesia – Iron or Steel*, the AB explained that:

> A panel is […] under a duty to examine, as part of its "objective assessment", whether the provisions of the covered agreements invoked by a complainant as the basis for its claims are "applicable" and "relevant" to the case at hand. Where a measure is not

> subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement.[55]

2.33. In *China – Auto Parts*, in addressing the question of whether the measure at issue was an "ordinary customs duty" under Article II:1(b) GATT or an "internal tax or other internal charge" under Article III:2 GATT, the panel stated that it had to "first decide which of these two provisions is applicable to the charge under the measures".[56] The panel explained that, in doing so, it was "fulfilling [its] duty under Article 11 of the DSU to determine the applicability of the provisions cited by the complainants to the contested measures".[57]

2.34. In addition to Article 11 DSU, WTO panels' duty to determine the applicability of relevant provisions is stipulated in Article 12.7 DSU, which provides that "the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes".

2.2.3.2 Internal measure vs border measure

2.35. The relationship between tariffs and internal taxes has been explored in WTO disputes, notably in *China – Auto Parts*. By contrast, the relationship between "other duties and charges" under the second sentence of Article II:1(b) GATT and internal taxes has not been addressed in any WTO dispute. Teams may draw some guidance from the panel and AB reports in *China – Auto Parts* to address the issue whether the carbon charge is an internal measure or an ODC.

2.36. With respect to the question of whether a measure is an internal measure or a border measure, the AB in *China – Auto Parts* stated that:

> […] a key indicator of whether a charge constitutes an "internal charge" within the meaning of Article III:2 of the GATT 1994 is "whether the obligation to pay such [a] charge accrues because of an internal factor (e.g., because the product was *re-sold* internally or because the product was *used internally*), in the sense that such 'internal factor' occurs *after the importation* of the product of one Member into the territory of another Member.[58]

2.37. By contrast, the AB in *China – Auto Parts* explained that "[t]he right of a WTO Member to impose a customs duty, and the *obligation* of an importer to pay such a duty, accrue at the very moment the product enters the customs territory of that Member and by virtue of the event of importation."[59] Therefore, "[f]or a charge to constitute an ordinary customs duty […] the obligation to pay it must accrue at the moment and by virtue of or, in the words of Article II:1(b), 'on', importation."[60]

[55] Appellate Body Report, *Indonesia – Iron or Steel*, para. 5.31.
[56] Panel Report, *China – Auto Parts*, para. 7.105.
[57] Ibid., fn 270 to para. 7.105.
[58] Appellate Body, *China – Auto Parts*, para. 163 (emphasis original).
[59] Ibid., para. 158 (emphasis original).
[60] Ibid., para. 158. See also Panel Report, *US – Steel and Aluminium (Norway)*, para. 7.20.

2.38. With respect to the relevance of the time when a charge is collected to the determination of whether it is an "ordinary customs duty" or an "internal charge", the AB in *China – Auto Parts* noted that:

> [T]he moment at which a charge is collected or paid is not determinative of whether it is an ordinary customs duty or an internal charge. Ordinary customs duties may be collected after the moment of importation, and internal charges may be collected at the moment of importation.[61]

2.39. The AB found support for this conclusion in the Note *Ad* Article III, which specifies that when an internal charge is "collected or enforced in the case of the imported product at the time or point of importation", such a charge "is nevertheless to be regarded" as an internal charge. Therefore, the AB said, "[w]hat is important […] is 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."[62]

2.40. The AB in *China – Auto Parts* considered that:

> […] a panel's determination of whether a specific charge falls under Article II:1(b) or Article III:2 of the GATT 1994 must be made in the light of the characteristics of the measure and the circumstances of the case. In many cases this will be a straightforward exercise. In others, the picture will be more mixed, and the challenge faced by a panel more complex. A panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or core features of the measure at issue, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge. It is not surprising, and indeed to be expected, that the same measure may exhibit some characteristics that suggest it is a measure falling within the scope of Article II:1(b), and others suggesting it is a measure falling within the scope of Article III:2. In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify all relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant charge and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.[63]

2.2.4 Arguments for Burlandia

- **Applicability**: The first preliminary issue teams would have to address is whether the Panel can engage with Rutenia's argument that the carbon charge is an ODC within the meaning of the second sentence of Article II:1(b) GATT and not an "internal tax or charge" subject to Article III:2 GATT. Because the WTO jurisprudence is well established

[61] The *Ad* Article III GATT specifies that when an internal charge is "collected or enforced in the case of the imported product at the time or point of importation", such a charge "is nevertheless to be regarded" as an internal charge.
[62] Appellate Body Report, *China – Auto Parts*, para. 162.
[63] Ibid., para. 171.

on this point,[64] Burlandia may agree with Rutenia that, in line with its duty to conduct an objective assessment of the matter, the Panel must first establish which of the two provisions (second sentence of Article II:1(b) or Article III GATT) is "applicable" to the measure at issue.

- **Internal/border measure**: With respect to the substantive argument that the carbon charge is an internal measure, Burlandia may point out that the event that triggers the application of the carbon charge is the use of the covered products in Rutenia and, therefore, as per the AB in *China – Auto Parts*,[65] the carbon charge is an internal measure under Article III:2 GATT. Burlandia should argue that the obligation to pay the carbon charge accrues internally, after a covered product enters the customs territory of Rutenia, and by virtue of its sale, offering for sale, distribution or use in Rutenia. In this regard, Burlandia should refer to the facts of the Case indicating that, by 1 February of each year, domestic manufacturers and importers of the covered products shall submit to the National Tax Administration (NTA) a declaration with the information requited by the NZF Act. On the basis of this information, the NTA calculates the amount of the carbon charge, which is payable directly to the NTA via its e-payment system.[66] Burlandia should argue that these are the "core features" that should be accorded the most significance for characterizing the carbon charge (as per the AB in *China – Auto Parts*).[67]

2.2.5 Arguments for Rutenia

- **Applicability**: Rutenia should argue that in line with its duty to conduct an objective assessment of the matter, the Panel must first establish which of the two provisions (second sentence of Article II:1(b) or Article III GATT) is "applicable" to the measure at issue. Rutenia is expected to argue that a determination that Article III GATT is inapplicable should lead to the end of the dispute on this issue because Burlandia has not made any claim under Article II GATT in its panel request.

- **Internal/border measure**:

- The carbon charge is a border measure, i.e. an ODC under Article II:1(b) GATT, second sentence. As per *China – Auto Parts*,[68] Rutenia could argue that the obligation to pay the carbon charge accrues due to the emission of CO2 in the production of the covered products outside of Rutenia, and that it is at the moment and by virtue of importation of such products into Rutenia that such an obligation arises. Rutenia could point out that the National Tax Administration, which administers the carbon charge, receives the customs declaration from the National Customs Authority and informs this authority that the charge has been duly paid. In addition, customs authorities do not authorize the import of the covered product until the producer has paid the carbon charge due for the preceding

[64] See paras. 2.32. - 2.33. above.
[65] See para. 2.36. above.
[66] Clarification Questions (Q87).
[67] See para. 2.40. above.
[68] See para. 2.36. 2.37. above

year.[69] Rutenia could argue that these are the "core features" of the carbon charge demonstrating that it is a border measure (as per the AB in *China – Auto Parts*).[70]

- As a more creative argument, Rutenia could submit that the AB's findings in *China – Auto Parts* as to the first sentence of Article II:1(b) GATT are not directly applicable to the second sentence.[71] In this regard, Rutenia could point to the textual differences between the first and second sentences of Article II:1(b) GATT. In particular, the first sentence contains the wording "on their importation" whereas the second sentence uses the term "on or in connection with importation".[72] In addition, the second sentence of Article II:1(b) GATT also contains a qualifier "of any kind" (as opposed to the reference to "ordinary customs duties" in the first sentence). Rutenia could therefore argue that the scope of measures covered by the second sentence is broader than that covered by the first sentence and thus would definitely include the carbon charge at issue.

- In a similar vein, Rutenia could also argue that Article II:1(b) GATT, second sentence, applies not only to other duties and charges "of any kind imposed on or in connection with the importation", but also to those "directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date", which could suggest that the scope of the second sentence is broader than that of the first sentence.

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
If the Panel were to decline to examine Rutenia's allegation that its carbon charge is not an "internal tax or charge" but an ODC within the meaning of the second sentence of Article II:1(b) GATT, would the Panel be acting consistently with its obligation to conduct an objective assessment of the matter under Article 11 DSU?	What is the legal basis for the Panel to examine Rutenia's assertion that its carbon charge is not an "internal tax or charge" but an ODC within the meaning of the second sentence of Article II:1(b) GATT?
Assuming that the Panel finds that the carbon charge is not an internal tax within the meaning of Article III:2 GATT but an ODC within the meaning of Article II:1(b) GATT, can the Panel proceed to examine the consistency of the carbon charge with that provision?	Assuming that the Panel finds that the carbon charge is not an internal tax within the meaning of Article III:2 GATT but an ODC within the meaning of Article II:1(b) GATT, can the Panel proceed to examine the consistency of the carbon charge with that provision? If the Panel cannot address Burlandia's claim because Article III:2 GATT is not applicable and Article II:1(b) GATT is outside its terms of reference, what options does that leave for Burlandia?

[69] Clarification Questions (Q87).
[70] See para. 2.40. above.
[71] See paras. 2.35. - 2.40. above.
[72] Underlining added.

What are the "core features" that should be accorded the most significance for characterizing the carbon charge as an internal or a border measure (as per the AB in *China – Auto Parts*)[73]? What is the relevance of the fact that the carbon charge is administered based on information received from the National Customs Authority and that the customs authorities do not authorize the import of the covered product until the producer has paid the carbon charge due for the preceding year (Clarification Question 87)?	What are the "core features" that should be accorded the most significance for characterizing the carbon charge as an internal or a border measure (as per the AB in *China – Auto Parts*)[74]? What is the relevance of the fact that it is the National Customs Authority that calculates the amount of the carbon charge, which is payable directly to the National Customs Authority via its e-payment system (Clarification Question 87)?
The panel/AB in *China – Auto Parts* findings relate to the first sentence of Article II:1(b) GATT. Given the textual differences between the first and the second sentences of Article II:1(b) GATT (i.e. "on … importation" vs "on or in connection with importation" and the reference to "of any kind" in the second sentence), is the scope of border measures covered by the first sentence different from those covered by the second sentence? If your answer is yes, are the panel/AB findings in *China – Autos* directly relevant to this dispute?	The panel/AB in *China – Auto Parts* relate to the first sentence of Article II:1(b) GATT. Given the textual difference between the first and the second sentence of Article II:1(b) GATT (i.e. "on … importation" vs "on or in connection with importation" and the reference to "of any kind" in the second sentence), is the scope of border measures covered by the first sentence different from those covered by the second sentence? If your answer is yes, are the panel/AB findings in *China – Autos* directly relevant to this dispute?

2.3 ARTICLE III:2 of the GATT

2.3.1 Legal claim and key issues

2.41. Burlandia claims that Rutenia's imposition of the carbon charge on flat glass from Burlandia is inconsistent with Article III:2 GATT. Burlandia's panel request does not specify whether its claim is under the first or the second sentence of Article III:2 GATT, which may lead Rutenia to question whether Burlandia's panel request complies with the requirements of Article 6.2 DSU.[75]

[73] See para. 2.40. above.
[74] See para. 2.40. above.
[75] In *Korea – Dairy*, the AB stated that there may be circumstances when the mere listing of treaty articles would not satisfy the standard of Article 6.2 DSU. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2 (Appellate Body Report, *Korea – Dairy*, para. 124).

While panellists may give extra points to the teams that would spot this issue during the oral pleadings, teams are not expected to spend much time on it.

2.42. The argumentation will be different under each sentence of Article III:2 GATT because the legal tests under the two sentences differ. Under the first sentence, Burlandia should argue that the products concerned are "like products" and that flat glass from Burlandia is "taxed in excess" of domestic flat glass. Under the second sentence, Burlandia will argue that: (i) the products at issue are "directly competitive of substitutable"; (ii) they are not "similarly taxed"; and (iii) the carbon charge is applied "so as to afford protection to domestic production".

2.43. Given that its panel request is formulated broadly, Burlandia could choose whether to make an argument under the first or the second sentence of Article III:2 GATT, or both. In light of the differences in the legal tests between the two sentences, teams should think strategically in making such a choice, taking into account the facts of the Case. In particular, whereas it may be easier to establish that the low-carbon flat glass from Rutenia and high-carbon flat glass from Burlandia are "directly competitive or substitutable" under the second sentence, there is an additional requirement that the measure must be applied "so as to afford protection to domestic production", which may be more difficult for teams to establish.

2.3.2 Relevant WTO provision

2.44. Article III:2 GATT reads:

> The products of the territory of any [WTO Member] imported into the territory of any other [WTO Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [WTO Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [of Article III].

2.45. Paragraph 2 of the Note *Ad* Article III GATT provides:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

2.3.3 Relevant jurisprudence

2.46. There are two questions which need to be answered to determine whether there is a violation of the first sentence of Article III:2 GATT:

i. Whether imported and domestic products are "like products"; and

ii. Whether the imported products are "taxed in excess" of the domestic products.[76]

2.47. As part of the legal test under Article III:2 GATT, first sentence, there is no need to establish the presence of a protective application. Rather, the first sentence is, in effect, an application of the general principle stated in Article III:1 GATT.[77]

2.48. With respect to the first element, a determination of "**like products**" is, essentially, a determination about whether and to what extent the products concerned are in a competitive relationship in the relevant market. The four likeness criteria discussed above in relation to the MFN treatment obligation[78] have also been used to determine whether products are "like" under the first sentence of Article III:2 GATT.[79] However, it is important to note that the definition of "like products" under Article III:2 GATT, first sentence, must be construed narrowly because of the existence of the concept of "directly competitive or substitutable products" used in the second sentence of that provision.[80] Hence, Article III:2 GATT, first sentence, covers "products that are close to being perfectly substitutable […] whereas products that compete to a lesser degree would fall within the scope of the second sentence".[81]

2.49. The phrase "**taxed in excess**" in the first sentence of Article III:2 GATT refers to "any amount of tax on imported products 'in excess of' the tax on domestic 'like products'".[82] The AB has thus considered that this requirement is not qualified by a *de minimis* standard and that "even the smallest amount of 'excess' is too much".[83] Moreover, the prohibition of discriminatory taxes in Article III:2 GATT, first sentence, is not conditional on a trade effects test. As stated by the AB in *Japan – Alcoholic Beverages II*:

> [I]t is irrelevant that the 'trade effects' of the tax differential between imported and domestic products, as reflected in the volume of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.[84]

2.50. *In Argentina – Hides and Leather*, the panel emphasised that Article III:2 GATT, first sentence, requires a comparison of *actual* tax burdens rather than merely of *nominal* tax rates, because:

> […] Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where

[76] Appellate Body Report, *Canada – Periodicals*, pp. 22-23.
[77] Panel Report, *Argentina – Hides and Leather*, para. 11.137.
[78] See para. 2.8. above.
[79] See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20. However, the traditional four criteria of likeness are "neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products." Thus, "[t]he kind of evidence to be examined in assessing the 'likeness' of products will, necessarily, depend upon the particular products and the legal provision at issue." (Appellate Body Report, *EC – Asbestos*, paras. 102-103).
[80] See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.
[81] Appellate Body Report, *Philippines – Distilled Spirits*, para. 149.
[82] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 26.
[83] Ibid., p. 26.
[84] Ibid., p. 23.

> different methods for computing tax bases lead to a heavier tax burden for imported products.[85]

2.51. The panel further noted that the regulatory objective of the measure is irrelevant: "Article III:2, first sentence, is not concerned with taxes or charges as such or the purposes Members pursue with them, but with their economic impact on competitive opportunities of imported and like domestic products".[86] Similarly, the panel in *Brazil – Taxation* pointed out that the legal standard under this provision is not based on:

> […] any consideration of the rationale or justification for the measure. The justification for a (WTO-inconsistent) tax treatment can be assessed in the context of the general exceptions of Article XX GATT.[87]

2.52. To determine whether there is a violation of the second sentence of Article III:2 GATT, three questions must be addressed:

i. Whether the imported products and the domestic products at issue are "directly competitive or substitutable products";
ii. Whether the directly competitive or substitutable imported and domestic products are "not similarly taxed"; and
iii. Whether the dissimilar taxation of the directly competitive or substitutable imported domestic products is "applied … so as to afford protection to domestic production".[88]

2.53. In relation to the first element, the AB has observed that the category of "**directly competitive or substitutable**" products is broader than that of "like products".[89] How much broader that category of "directly competitive or substitutable products" may be in a given case is a matter for the panel to determine based on all the relevant facts in that case.[90] The four traditional criteria described above are also relevant to determining whether the products at issue are "directly competitive or substitutable". The AB in *Korea – Alcoholic Beverages* held that imported and domestic products are "directly competitive or substitutable" when they are "in competition" in the marketplace, which is a dynamic process and requires consideration of both latent and extant consumer demand - i.e., whether the products currently are, or are capable of being, interchangeable. The term "directly" suggests "a degree of proximity in the competitive relationship between the domestic and the imported products." The requisite degree of competition is met where the imported and domestic products are characterized by a high, but

[85] Panel Report, *Argentina – Hides and Leather*, para. 11.183.
[86] Ibid., *Argentina – Hides and Leather*, para. 11.182.
[87] Panel Report, *Brazil – Taxation*, para. 7.153.
[88] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24. The AB explained that, unlike the first sentence of Article III:2, the second sentence specifically invokes Article III:1 and thus the question of whether dissimilar taxation is applied so as to afford protection to domestic production has to be addressed as a separate issue.
[89] While (close to) perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118).
[90] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

imperfect, degree of substitutability.[91] The analysis under Article III:2, second sentence, must be focused on domestic and imported directly competitive or substitutable products as a group.[92]

2.54. In relation to the second element, the AB has explained that the phrase "**not similarly taxed**" in the *Ad* Article III "must not be construed so as to mean the same thing as the phrase 'in excess of' in the first sentence".[93] According to the AB, "in any given case, there may be some amount of taxation on imported products that may well be 'in excess of' the tax on domestic 'like products' but may not be so much as to compel a conclusion that 'directly competitive or substitutable' imported and domestic products are 'not similarly taxed' for the purposes of the *Ad* Article III:2, second sentence".[94] The AB also noted that the amount of differential taxation must be more than *de minimis* to be deemed "not similarly taxed" in any given case. Whether any particular amount of taxation is *de minimis* must be determined on a case-by-case basis.[95] In previous disputes in which it was found that the products at issue were not similarly taxed, the amounts of the tax difference were quite significant.[96] However, in *Chile – Alcoholic Beverages*, even the incremental 4 percentage point difference between each of the tax sub-categories of the New Chilean System, ranging from the 27 per cent and 47 per cent *ad valorem* rates, was considered *per se* as more than *de minimis*.[97]

2.55. It should also be noted that, unlike under the first sentence of Article III:2 GATT, the issue of whether nominal tax rates or actual tax burdens should be examined for the purpose of establishing whether the products are "not similarly taxed" under the second sentence of that provision has not been addressed in previous WTO disputes. This is mainly because in those WTO disputes, unlike in the present case, the dissimilar taxation was already found with regards to the different *nominal* tax rates for imported and like domestic products provided for in the measures at issue.[98] However, in light of the general purpose of Article III (i.e., to ensure the equality of competitive opportunities for domestic and imported products), it appears that the reasoning of

[91] Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 114-118. The AB held that this would be the case where the imported and domestic products are "interchangeable" or offer "alternative ways of satisfying a particular need or taste" (para. 115).
[92] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 52. Grouping of products for purposes of analysis under Article III:2 "involves at least a preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis" (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 142).
[93] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 26.
[94] Ibid., pp. 26-27.
[95] Ibid., pp. 26-27. See also Appellate Body Report, *Chile – Alcoholic Beverages*, para. 49.
[96] In *Japan – Alcoholic Beverages II*, the tax differential that was considered more than *de minimis* ranged from 1.3 to 9.6 times; in *Korea – Alcoholic Beverages*, the tax differential that was considered more than *de minimis* ranged from 1.4 to 2.8 times; and in *Chile – Alcoholic Beverages*, the tax differential that was considered more than *de minimis* was an overall differential of 1.75 times between the lowest ad valorem rate (27 per cent) and the highest (47 per cent) (Panel Report, *Philippines – Distilled Spirits*, fn 584 to para. 7.153). In *Canada – Periodicals*, imported split-run editions of periodicals were taxed in an amount equivalent to 80% of the value of all advertisements in a split-run edition, whereas domestic non-split-run periodicals were not subject to the same tax (Appellate Body Report, *Canada – Periodicals*, p. 29). In *Korea – Alcoholic Beverages*, the tax rate on imported whisky was more than three times the rate on diluted soju (Panel Report, *Korea – Alcoholic Beverages*, para. 10.100). In *Philippines – Distilled Spirits*, imported distilled spirits were subject to approximately 10, 20 or 40 times the excise tax applied to directly competitive or substitutable domestic spirits (Panel Report, *Philippines – Distilled Spirits*, para. 7.154).
[97] Panel Report, *Chile – Alcoholic Beverages*, para. 7.110
[98] See para. 2.50. above.

the panel in *Argentina – Hides and Leather* concerning *actual* tax burdens in relation to the first sentence of Article III:2 GATT could equally apply to the second sentence.[99]

2.56. With respect to the third element of "**so as to afford protection to domestic production**", the AB in *Japan – Alcoholic Beverages II* explained that:

> [A]n examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application […] Most often, there will be other factors to be considered as well.[100]

2.57. In *Japan – Alcoholic Beverages II*, the AB emphasised that determining whether the measure is applied so as to afford protection to domestic production is "not an issue of [subjective] intent", and further stated:

> […] It is not necessary for a Panel to sort through the many reasons legislators and regulators for what they do and weigh the relative significance of those reasons to establish legislative intent or regulatory purpose. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "applied to imported or domestic products so as to afford protection to domestic production". This is an issue of how the measure in question is applied.[101]

2.58. In contrast to its position in *Japan – Alcoholic Beverages II*, the AB in *Canada – Periodicals* did ascribe some significance to the statements of representatives of the Canadian government which reflected that protectionism was an intended objective of the tax measure at issue (e.g., "the Government reaffirms its commitment to protect the economic foundations of the Canadian periodical industry" and "Canada also admitted that the objective and structure of the tax is to insulate Canadian magazines from competition").[102] The AB did so after finding that "the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive" and that "[t]here is also ample evidence that the very design and structure of the measure is such as to afford protection to

[99] See para. 2.50. above.
[100] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[101] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 27-28. See also Appellate Body Reports, *Japan – Alcoholic Beverages II*, pp. 27-28; *Korea – Alcoholic Beverages*, para. 150; *Chile – Alcoholic Beverages*, paras. 71-72.
[102] Appellate Body Report, *Canada – Periodicals*, p. 31

domestic periodicals".[103] In other words, it appears that the AB in *Canada – Periodicals* relied on the statements about legislative intent to confirm its finding of the protectionist application of the dissimilar taxation.

2.59. In *Chile – Alcoholic Beverages*, the AB further clarified that "a measure's purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production".[104]

2.60. Finally, similar to the first sentence, the AB rejected the argument in *Korea – Alcoholic Beverages* that a finding that an internal tax measure affords protection under the second sentence of Article III:2 GATT must be supported by evidence of some identifiable trade effects. The AB stated that "Article III is not concerned with trade volumes" and that the complaining party did not have to "prove that tax measures are capable of producing any particular trade effects".[105]

2.3.4 Arguments for Burlandia

2.3.4.1 Article III:2, first sentence

- **Like products**: Burlandia can argue that flat glass from Burlandia (with higher carbon intensity) and flat glass from Rutenia (with lower carbon intensity) are "like products", because there are no differences in their physical characteristics,[106] nor in their end-uses (i.e., in both instances, the glass is used by "DIM to produce windows, doors, mirrors and table tops"),[107] and they are classified under the same HS Code.[108] In response to a potential argument by Rutenia regarding environmental PPMs affecting consumer tastes and habits, Burlandia could argue that the consumer of flat glass is DIM and not Rutenian citizens who are consuming the final glass products in which flat glass is used as input. Following this reasoning, the facts of the Case establish that these products are in a strong competitive relationship with each other in the Rutenian market[109] and DIM – as the main direct buyer of flat glass in Rutenia – treats such products as substitutable, irrespective of their carbon footprint.[110]

- **Taxation in excess**: Burlandia should argue that its flat glass is "taxed in excess" of that of Rutenian origin. In particular, in line with the panel's findings in *Argentina – Hides and Leather*,[111] Burlandia could point out that although Burlandian and Rutenian flat glass are subject to the same nominal tax rate of USD 50 per tonne of CO2,[112] the *actual* tax burden

[103] Ibid., p. 32.
[104] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 71.
[105] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 153.
[106] Clarification Questions (Q6 and Q7).
[107] Case, paras. 4 and 7.
[108] Clarification Questions (Q10).
[109] Case, Annex IV.
[110] Case, para 4: "In 2021, DIM purchased 60% of the flat glass used in its production from foreign suppliers, including those located in Burlandia, Korsania, and Artania, and 40% from Guta and other smaller domestic suppliers".
[111] See para. 2.50. above.
[112] NZF Act, Section 10, Article 2.

on Burlandian flat glass is higher than that on Rutenian flat glass.[113] That is, the actual tax burden for flat glass from Burlandia will be calculated based on the default value of 0.68 tonne of CO2 per tonne of flat glass,[114] whereas for Rutenian flat glass it will be calculated based on Guta's actual level of CO2 emissions, which is 0.40 tonnes CO2 per tonne of flat glass. As a a result, per 100 tonnes of flat glass, the actual carbon charge paid for flat glass from Burlandia would be USD 3400 (0.68 x 100 x 50 = 3400), whereas for flat glass from Rutenia only USD 2000 (0.40 x 100 x 50 = 2000).[115]

2.3.4.2 Article III:2, second sentence

- **Directly competitive or substitutable**: Burlandia could argue that even if flat glass from Burlandia and that from Rutenia are not "like products" in the sense of close to perfectly substitutes,[116] they are at least "directly competitive or substitutable" within the meaning of the second sentence of Article III:2 GATT. Burlania could rely on the arguments laid out in the previous section, keeping in mind the difference between the relevant legal standards.

- **Not similarly taxed**: Burlandia is expected to address two issues: (i) what is the proper basis for comparison (nominal rate of carbon charge v actual burden); and (ii) whether the amount of the tax differential is more than *de minimis*.

- With respect to the first issue, Burlandia could argue that the panel's approach in Argentina – Hides and Leather developed under the first sentence of Article III:2 GATT should also apply under the second sentence in light of the general purpose that provision (i.e., protecting the equality of competitive opportunities for domestic and imported products).[117] Therefore, it is the actual burden of the carbon charge on domestic and imported products that should be taken into account for the purpose of establishing the amount of the tax differential. In this regard, Burlandia should point out that the actual tax paid on Burlandian flat glass is significantly higher than that paid on Rutenian flat glass (USD 3400 of carbon charge per 100 tonnes of flat glass from Burlandia vs USD 2000 per 100 tonnes of flat glass from Rutenia).

- With respect to the second issue, Burlandia should argue that the amount of differential taxation in the present case is more than *de minimis* and that it compels a conclusion that the directly competitive or substitutable flat glass from Burlandia and Rutenia are not similarly taxed.[118] As noted, in most previous cases in which this criterion was met, the magnitudes of tax differences were significant[119], but in *Chile – Alcoholic Beverages* even a small amount was of difference was found to be more than *de minimis*.[120] Burlandia could argue that the difference in taxation (USD 1400 per 100 tonnes, or almost 60% higher for

[113] See Panel Report, *Argentina – Hides and Leather*, para. 11.183. See para. 2.50. above.
[114] Pursuant to Article 3.2 of Section 10 of the NZF Act; Clarification Questions (Q15, Q16).
[115] See Table 3 – Carbon Charge (2022).
[116] See para. 2.53. above.
[117] See para. 2.50. above.
[118] See para. 2.54. above.
[119] See para. 2.54. above and fn 96 thereto.
[120] See para. 2.54. above.

Burlandian flat glass) is more than *de minimis* and warrants a finding that the relevant products are not similarly taxed.

- **So as to afford protection to domestic production**: Burlandia should argue that the design, architecture, and the revealing structure of the carbon charge demonstrates that the dissimilar taxation is applied so as to afford protection to Rutenian flat glass.[121]

- First, in line with the AB's observation in *Japan – Alcoholic Beverages II* that the very magnitude in the difference in taxation could serve as evidence of protective application,[122] Burlandia could argue that the magnitude of the tax differential between Burlandian and Rutenian flat glass suggests the existence of a protective application of the carbon charge.

- Second, Burlandia could argue that the application of the verification methods[123] to flat glass produced in Rutenia and flat glass imported from Burlandia demonstrates the protective application of the carbon charge. Specifically, Burlandia could argue that the condition that emissions can be verified only by Rutenia-based entities makes it easier and cheaper for Rutenian producers of flat glass to get their emissions verified compared to foreign producers, since the "time and cost of verification … will be determined by factors such as the installation's functioning, level of activity and location".[124]

- Third, Burlandia could argue that the design of the default values (based on 5% of the worst performing installations in Rutenia) also demonstrates that the measure is designed to protect domestic producers.

- Fourth, Burlandia could refer to the data on sales of flat glass in Rutenia in Annex IV of the Case, which demonstrates that following the adoption of the measure, sales of flat glass from Burlandia have dropped, whereas sales of Rutenian flat glass have increased. Burlandia could argue that this data demonstrates the protective application of the carbon charge. In this regard, Burlandia could note that whereas the demonstration of trade effects is not required to establish a violation of Article III:2 (as per *Korea – Alcoholic Beverages*),[125] it could nevertheless be used as evidence of the measure's protective application.

- Fifth, Burlandia could point to Ms. Rada Strong's statement ("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")[126] as additional evidence of the protectionist application of carbon charge (as per *Canada – Periodicals*).[127]

[121] See para. 2.54. above.
[122] See para. 2.54. above.
[123] Annex III to Section 10 of the NZF Act, and Article 4 of Implementing Regulation 7/2023.
[124] Annex III to Section 10 of NZF Act, para. 2.
[125] See para. 2.60. above.
[126] Case, para. 11.
[127] See para. 2.58. above.

2.3.5 Arguments for Rutenia

2.3.5.1 Article III:2, first sentence

- **Like products**: Rutenia should not dispute that flat glass from Burlandia and flat glass from Rutenia have the same physical characteristics, end-uses and tariff classification, as these facts are clear in the Case.[128] However, Rutenia may argue that there are differences in Rutenian consumers' preferences and behaviour regarding the carbon intensity of products (including flat glass), which are evident in the electoral victory of the Green Party in October 2020[129] and the strong public concerns over climate change, with the "recent opinion poll conducted by RutInfo, [showing] that 73% or Rutenians consider climate change and its adverse effects to be the largest existential threat facing Rutenia in the coming years".[130] In this regard, Rutenia may point to the AB's observation in *EC – Asbestos* (in the context of Article III:4) that "it [is] likely that the presence of a known carcinogen in one of the products would have an influence on consumers' tastes and habits regarding that product".[131]

- **Taxation in excess**: Rutenia could argue that there is no taxation in excess because Article 2 of Section 10 of the NZF Act establishes the same rate of USD 50 per tonne of CO2 released into the atmosphere for all covered products from all sources (domestic and imported). However, it may be difficult for Rutenia to maintain this position in light of the panel's findings in *Argentina – Hides and Leather* that Article III:2, first sentence, requires a comparison of actual tax burdens – not nominal tax rates – imposed on imported products and like domestic products.[132] As explained above, when the actual amount of the carbon charge is calculated based on the respective levels of carbon intensity, 100 tonnes of flat glass from Burlandia will be taxed in excess (by USD 1400) vis-à-vis 100 tonnes of Rutenian flat glass.

2.3.5.2 Article III:2, second sentence

- **Directly competitive or substitutable**: Rutenia could argue that flat glass from Burlandia and flat glass from Rutenia are not directly competitive or substitutable products. Rutenia may rely on the same arguments as outlined above. However, this argument would be quite weak in light of the facts of the Case given that the category of "directly competitive or substitutable" is broader than that of "like" products.[133] Rutenia may thus choose to concede on this point and focus on establishing that the measure was not imposed "so as to afford protection to domestic production".

- **Not similarly taxed**: If the finding of the panel in *Argentina – Hides and Leather*, made under the first sentence of Article III:2 GATT, is also applicable to the second sentence,

[128] Case, paras. 7-8; Clarification Questions (Q6, Q7, Q10).
[129] Case, para. 11.
[130] Case, para. 14.
[131] Appellate Body Report, *EC – Asbestos*, para. 130. In response, Burlandia could point out that, unlike the present case, in *EC – Asbestos*, there was a direct link between products and their health effects.
[132] See para. 2.50. above.
[133] See para. 2.53. above.

it will be difficult for Rutenia to persuasively argue, in light of the actual tax burdens on Burlandian and Rutenian flat glass, that the products are not "not similarly taxed". Some teams may prefer to concede on this point. Moreover, it may be hard for Rutenia to sustain the argument that the tax differential is less than *de minimis* in light of the panel's findings in *Chile – Alcoholic Beverages*,[134] given the difference of USD 1400 in the amount of carbon charge paid per 100 tonnes of flat glass from Burlandia and Rutenia. Nevertheless, Rutenia could note that in most previous disputes in which the "not similarly taxed" condition was satisfied, the differences in taxation were more significant than in the present dispute.[135]

- **So as to afford protection to domestic production**:

- Rutenia could first argue that the amount of the tax differential in this case is not sufficiently large to support a finding that the contested measures afforded protection to domestic production (as per *Japan – Alcoholic Beverages II*).[136]

- In addition, Rutenia could refer to the measure's purpose and its objective manifestation in the measure's design, architecture, and structure to demonstrate that the measure is not applied so as to afford protection to domestic production.[137] Pursuant to Article 1 of Section 10 of the NZF Act, the carbon charge is adopted to reduce emissions at the global level, with a view to furthering the goals of the Paris Agreement and addressing the climate crisis. Rutenia could point out that the equal application of the carbon charge to domestic and imported goods based on an objective criterion (amount of CO2 emitted) demonstrates the absence of a protective application.

- It would be difficult for Rutenia to counter a possible argument regarding verification methods as evidence of protective application of the carbon charge, particularly given that the recognition of third-party verification systems comparable in effectiveness is contemplated during the transition period.[138] With respect to a possible argument regarding default values, Rutenia could note that their use is only permitted when there is no reliable data on carbon emissions embedded in imports of the covered products and thus does not constitute evidence of protective application.[139]

- In response to a possible argument by Burlandia regarding the changes in the volume of sales of flat glass in Rutenia following the adoption of the measure, Rutenia could point out that such evidence is not determinative of the question of whether the measure affords protection to domestic production.[140] In addition, Annex IV of the Case demonstrates that the sales of the *group* of imported products (from Burlandia, Korsania, and Artania collectively) have, in fact, increased since the imposition of the carbon charge.[141]

[134] See para. 2.54. above.
[135] See para. 2.54. and footnote 96 thereto.
[136] See para. 2.56. above.
[137] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 71. See para. 2.58. above.
[138] See Annex III to the Case.
[139] Case, para. 3.2.
[140] Appellate Body Report, *Philippines – Distilled Spirits*, para. 256.
[141] See para. 2.53. above.

- In response to a possible argument by Burlandia regarding statements of Ms. Rada Strong, Rutenia could submit that limited importance has been accorded to the subjective legislative intent under Article III:2 GATT in previous WTO disputes (as per *Japan – Alcoholic Beverages II*)[142] and that, in any event, her statements demonstrate Rutenia's concern about "the catastrophic course of global warming" and desire to "protect vulnerable Rutenians from its severe impacts on human health and life".[143] Rutenia could further argue that Ms Strong's statement do not reflect a protectionist intent behind the adoption of the carbon charge – unlike the statements examined by the AB in *Canada – Periodicals*.[144] She never stated that domestic producers would be treated more advantageously than foreign ones. Rather, she said that the carbon charge "will not disadvantage [domestic producers] vis-à-vis foreign competitors".[145]

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
Does your claim of violation under Article III:2 concern the first or the second sentence, or both? Is your panel request "sufficient to present the problem clearly"?	In the present case, although on its face domestic flat glass and imported flat glass are both subject to a *nominal* rate of USD 50 per tonne of CO2 released, the *actual* amount of the charge paid will be higher for carbon-intensive products. For the purpose of Article III:2 analysis, and the "taxed in excess" and "not similarly taxed" elements therein, should we be comparing nominal tax rates or actual tax burdens? Could you please reason your answer in light of the purpose of Article III:2 GATT?
On what basis do you claim that imported flat glass is subject to a carbon charge "in excess of" that applied to domestic flat glass if Article 2 of Section 10 of the NZF Act establishes a *nominal* rate of USD 50 per tonne of CO2 released that equally applies to imported and domestic covered products?	Does the design of the verification methods and default values demonstrate that the measure is designed to afford protection to the domestic producers?
The data in Annex IV of the Case appears to suggest that the sales of the *group* of imported products (from Burlandia, Korsania, and Artania collectively) have, in fact, increased since the imposition of the carbon charge.	In *Chile – Alcoholic Beverages*, the panel found that even the incremental 4 percentage point difference between each of the tax sub-categories of the New Chilean System, ranging from the 27 per cent and 47 per cent ad valorem rates, was considered per se as

[142] See paras. 2.57. - 2.58. above.
[143] Case, para. 11.
[144] See para. 2.58. above.
[145] Case, para. 11.

On what basis do you claim that the carbon charge was applied "so as to afford protection to domestic production"? What is the relevant "group" of products we should be examining in this case?	more than *de minimis*. In light of this finding, could a finding that the tax differential is less than *de minimis* be possibly made in the present case?
To what extent should the Panel take into account the subjective intent of the legislator when assessing "so as to afford protection to domestic production"? Has WTO jurisprudence been consistent on this point?	To what extent should the Panel take into account the subjective intent of the legislator when assessing "so as to afford protection to domestic production"? Has WTO jurisprudence been consistent on this point?
Should the PPMs be a separate criterion in the determination of likeness/direct competition or substitutability or can it be subsumed into the four traditional criteria? Who should be considered the 'consumer' in the particular circumstances of this case?	Should the PPMs be a separate criterion in the determination of likeness/direct competition or substitutability, or can it be subsumed into the existing the criteria? Who should be considered the 'consumer' in the particular circumstances of this case?

2.4 ARTICLE XXI of the GATT

2.4.1 Relationship between Article XXI and XX GATT

2.61. Rutenia raises both a defence under Article XXI(b)(iii) and an alternative defence under Article XX GATT (subparagraph (b) and/or (g)). The issue of the relationship between these provisions has not been settled in WTO jurisprudence. It was briefly dealt with by the panel in *US – Origin Marking (Hong Kong, China)*, which noted that:

> […] Article XX and Article XXI(b) each have their own structure and logic. Notably, Article XX does not include the phrase "which it considers" in qualifying the type of action that a Member could take to pursue certain policy objectives. In turn, Article XXI(b) does not include a limitation requiring that a measure not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[146]

2.62. This structural difference between Article XX and Article XXI GATT is, indeed, important. The lack of onerous chapeau-equivalent requirements in Article XXI GATT raises concerns that it may be abused as a fall-back defence to justify protectionist measures under the guise of national or international security interests. Furthermore, as explained below, whether certain interests constitute "essential security interests" under Article XXI(b) GATT is subject to "limited"[147] judicial review. Hence, Rutenia will seek to prioritize its defence under Article XXI(b)(iii) GATT, which may be easier to establish.

[146] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.111.
[147] Panel Report, *Saudi Arabia – IPRs*, para. 7.281.

2.63. There nothing in the text of the GATT, nor in other WTO agreements, to suggest that there is a hierarchy between these two provisions, nor that they are mutually exclusive as legal defences. It is thus the prerogative of the respondent WTO Member to determine which legal defences to raise in a particular dispute, and in which order. The key challenge for Rutenia will be to sustain a coherent argumentation under both legal defences when it comes to what is the objective of the measure at issue – and panellists are encouraged to probe respondent teams with questions on this point.

2.64. At the same time, Article XX(g) GATT is a specific environmental exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". Complainant teams could therefore argue that a WTO panel should begin its analysis with this provision which is designed specifically to deal with measures like the carbon charge at issue (i.e. constitutes *lex specialis*).[148] But leaving the order of analysis aside, it is enough for Rutenia that its allegedly GATT-inconsistent carbon charge is successfully justified under at least one of these legal defences.

2.4.2 Legal claim and key issues

2.65. In response to Burlandia's claims, Rutenia argues that any potential inconsistency with the GATT is justified under Article XXI(b)(iii) "Security Exceptions" because the measure at issue was taken by Rutenia to protect its "essential security interests" in time of a climate emergency, which constitutes an "other emergency in international relations" within the meaning of that provision.[149]

2.66. The key question teams are expected to address is whether the global climate crisis constitutes an "other emergency in international relations" within the meaning of Article XXI(b)(iii) GATT, as argued by Rutenia. In addition, teams will discuss whether Rutenia has sufficiently articulated its "essential security interests" said to arise from the alleged emergency in international relations.

2.67. No WTO panel has yet been faced with the question of whether trade-related climate measures may fall within the scope of Article XXI(b)(iii) GATT. However, this issue has been discussed in the academic literature, and scholarly opinions remain divided on this point inviting interesting arguments from participants on both sides. Some commentators have expressed the view that trade-related climate measures similar to the carbon charge at issue here may fall within the scope of Article XXI(b)(iii) GATT. For example, Meyer and Tucker have argued that although a carbon border measure "is most naturally justified under article XX, it also squarely fits within article XXI, as that article has been interpreted in recent [WTO] disputes".[150] In a similar vein, Van

[148] Complainant teams could make this *lex specialis* argument on the basis of WTO jurisprudence concerning claims under both the GATT and TBT Agreement, with panels considering the latter first as a "specialized regime": Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.2-7.6; *US – Tuna II (Article 21.5 – Mexico)*, paras 7.3-7.8; *EC – Seal Products*, paras 7.57-7.69; *US – Clove Cigarettes*, paras 7.7-7.19; *EC – Sardines*, paras 7.14-7.19.
[149] Case, para. 24.
[150] Timothy Meyer and Todd N. Tucker, "A Pragmatic Approach to Carbon Border Measures" (2022) 21 *World Trade Review* 109, p. 120. See also, George-Dian Balan, 'On Fissionable Cows and the Limits to the WTO Security Exceptions' (2019) 14 *Global Trade and Customs Journal* 2, p. 6 arguing that "[…] climate change and environmental issues, while normally covered by general exceptions, may under certain circumstance become a matter related to the very existence of a nation, which is a matter of essential security interests".

Vaerenbergh and Hazarika consider that "the notion of 'security interests' has left behind its strict military meaning, and developed into a great array of issues including, importantly inter alia, climate change. However, reconciling such a new conception with the wording of the old GATT Article XXI clause proves difficult, yet not impossible, since the Panel in *Russia – Traffic in Transit* has not closed the door for such interpretation of 'emergencies in international relations' and the good faith test permits self-judging the chapeau requirements."[151] They further note that "[w]hile an economic or political situation related to climate change may also in exceptional cases be an emergency, it would be crucial that it has some link to 'defence and military interests, or maintenance of law and public order interests'"[152] based on the panel's findings in *Russia – Traffic in Transit*. On the other hand, some other commentators have raised concerns about the potential abuses and sweeping implications of treating climate change as a security threat. For instance, it has been argued that the WTO dispute settlement bodies would be overstepping their mandate in expanding the scope of Article XXI(b)(iii) GATT, which makes no reference to climate change, to trade-related climate measures.[153] Fears have also been expressed that such an expansive reading of Article XXI(b)(iii) GATT may further fuel economic nationalism, and open the door for protectionist measures being justified under Article XXI(b)(iii) GATT under the guise of 'climate security', given the more limited judicial oversight compared to Article XX GATT.[154] Other potential implications could include States "invoking emergency powers, perhaps as a basis for imposing economic sanctions on polluting nations or private entities", using force abroad against "climate rogue [S]tates" if they do not comply with environmental commitments, and disrupting trade.[155]

2.68. Similar discussions have taken place in the UN, as reproduced in the facts of the Case with the meeting of the Security Council on sea-level rise and its implications for international peace and security.[156] Participants can therefore be expected to debate whether the threat of climate change is *just* an environmental (or public health) issue falling under Article XX GATT, or also a security issue. And even then, whether an understanding of the notion of security going beyond traditional military situations can be reconciled with the wording of Article XXI GATT and the implications thereof.

2.4.3 Relevant WTO provision

2.69. Article XXI(b)(iii) GATT provides, in relevant part:

> Nothing in this Agreement shall be construed […]
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […]

[151] Pieter Van Vaerenbergh and Angshuman Hazarika, "Climate Change as a Security Risk: Too Hot to Handle?" (2020) 54 *Journal of World Trade* 417, p. 437.
[152] Ibid., p. 424.
[153] Daniel Kang Wei-En, 'Adapting GATT Article XXI(b)(iii) to Climate Change Threats: An Overdue Rethinking of Security Blues for an Urgent Green Way Forward?' (2020) 27 *Australian International Law Journal* 103, p. 109.
[154] Daria Boklan and Amrita Bahri, 'The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?' (2020) 19 *World Trade Review* 123.
[155] See J. Benton Heath, 'Making Sense of Security' (2022) 116 *American Journal of International Law* 289.
[156] Case, para. 13.

(iii) taken in time of war or other emergency in international relations […]

2.70. The Panel in *Russia – Traffic in Transit* developed an analytical framework to assess whether a respondent has properly invoked Article XXI(b)(iii) GATT, which has been followed in subsequent WTO cases and involves addressing four questions:

i. whether the existence of a "war or other emergency in international relations" has been established in the sense of subparagraph (iii);
ii. whether the relevant actions were "taken in time of" that war or other emergency in international relations;
iii. whether the invoking Member has articulated its relevant "essential security interests" sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and
iv. whether the relevant actions are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.[157]

2.71. As explained below, the first two elements of the analytical framework are objective facts subject to an objective determination and full review by a WTO panel,[158] whereas the latter two elements are subject to a limited review by a WTO panel.[159] With respect to the order of examination, WTO panels have proceeded to examining the requirements of the chapeau of Article XXI(b) (the last two elements) if they were satisfied that the requirements of the subparagraph (iii) were met (the first two elements).[160]

2.4.4 Relevant jurisprudence

2.72. WTO panels have interpreted Article XXI(b)(iii) GATT in several recent disputes – *Russia – Traffic in Transit*, *US — Steel and Aluminium Products,*[161] and *US – Origin Marking (Hong Kong, China)*. In all these disputes, panels rejected the respondents' arguments that Article XXI is entirely self-judging and not subject to review by a WTO panel.[162] In addition, Article 73(b)(iii) of the TRIPS Agreement, which is worded identically to Article XXI(b)(iii) GATT, was interpreted by the panel in *Saudi Arabia – IPRs*.[163]

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[157] The analytical framework developed by the panel in *Russia – Traffic in Transit* was summarized by the panel in *Saudi Arabia – IPRs*. (See Panel Report, *Saudi – Arabia IPRs*, para. 7.242).
[158] Panel Reports, *Russia – Traffic in Transit*, para. 7.77.
[159] Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.168.
[160] See e.g. Panel Reports, *US – Origin Marking (Hong Kong, China)*, para. 7.361; *US – Steel and Aluminium Products (Norway),* para. 7.137.
[161] *US – Steel and Aluminium Products (Switzerland), US – Steel and Aluminium Products (Turkey)*, *US – Steel and Aluminium Products (Norway)*, and *US – Steel and Aluminium Products (China)*.
[162] Panel Reports, *Russia – Traffic in Transit*, para. 7.82; *US – Origin Marking (Hong Kong, China), para. 7.160; US – Steel and Aluminium Products (Türkiye)*, para. 7.143; Panel Report, *US – Steel and Aluminium Products (Switzerland)*, para. 7.146; Panel Report, *US – Steel and Aluminium Products (Norway)*, para. 7.116; and *US – Steel and Aluminium Products (China)*, para. 7.128.
[163] In that dispute, the respondent did not argue that Article 73(b)(iii) of the TRIPS Agreement, and both parties agreed with the general interpretation and analytical framework enunciated by the panel in *Russia – Traffic in Transit*. (See Panel Report, *Saudi Arabia – IPRs*, para. 7.243)

2.73. In *Russia – Traffic in Transit*, the panel found that:

> [T]he ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT and the WTO Agreement more generally, is that the adjectival clause 'which it considers' in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[164]

2.74. In other words, the provision is self-judging insofar as it would be for a Member to determine for itself what action is "necessary" for the protection of its security interests, but the requirements of the subparagraphs are intended to limit the exception to certain circumstances and are subject to an objective review by WTO panels.[165] In particular, a determination of whether the measure at issue is taken "in time of … emergency in international relations" under paragraph (iii) is an objective fact, which is not in the sole discretion of the WTO Member invoking this provision.[166] Furthermore, whether certain interests constitute "essential security interests" is subject to "limited"[167] review by a panel in light of the principle of "good faith".[168]

2.75. With respect to the various elements under paragraph (iii), the panel in *US – Origin Marking (Hong Kong, China)* noted that the term "**emergency**" describes "a serious state of affairs requiring urgent action".[169]

2.76. As to the term "**international relations**", the panel in *US – Origin Marking (Hong Kong, China)* observed that "the relations relevant for this inquiry are those between [S]tates and other participants in international relations, including Members of the WTO, and may involve diverse matters, such as political, economic, social, or cultural exchanges."[170] Moreover, it noted that the reference to "international relations" is "open" and contrasted it with "a narrower formulation that might have sought to limit it to some specific types of international relations, for example the exclusively bilateral relations between the invoking Member and the Member affected by the action."[171] Therefore, the panel concluded that "the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations".[172]

2.77. In relation to the phrase "**other emergency in international relations**", the panel in *Russia – Traffic in Transit* explained that it "must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b)".[173] It also noted that the reference to "war" in conjunction with "or other emergency in

[164] Panel Report, *Russia – Traffic in Transit*, para. 7.82. Subsequent panels agreed with this finding of the panel in *Russia – Traffic in Transit* (see Panel Reports, *US – Origin Marking (Hong Kong, China),* para. 7.160*; US – Steel and Aluminium Products (Norway),* para. 7.116).
[165] Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.168.
[166] Panel Report, *Russia – Traffic in Transit*, para. 7.77.
[167] Panel Report, *Saudi Arabia – IPRs*, para. 7.281.
[168] Panel Report, *Russia – Traffic in Transit*, para. 7.132.
[169] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.279.
[170] Ibid., para. 7.280.
[171] Ibid., para. 7.280.
[172] Ibid., para. 7.297.
[173] Panel Report, *Russia – Traffic in Transit*, para. 7.74.

international relations" suggests that "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations […] unless they give rise to defence or military interests or maintenance of law and public order interests" .[174] The panel further opined that:

> An emergency in international relations would […] appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a [S]tate. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests. Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was "taken in time of" an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.[175]

2.78. In that case, the panel concluded that the situation in Russia – Ukraine relations constituted an "emergency in international relations" within the meaning of Article XXI(b)(iii) GATT. In reaching this conclusion, the panel gave weight to international recognition of the situation:

> There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.[176]

2.79. The panel in *US – Steel and Aluminium Products (Norway)* found that "the reference to 'war' informs the meaning of 'emergency in international relations' as part of the circumstances 'in time of' which a Member may act under Article XXI(b) for the protection of its essential security interests."[177] In particular, the panel considered that "an 'emergency in international relations' within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a 'war' in terms of its impact on international relations".[178] In that dispute, the panel rejected the United States' argument that the global excess capacity in steel and aluminium, in connection with the impact of imports on domestic producers of steel and aluminium, constituted an "emergency in international relations".[179]

2.80. The panel in *US – Origin Marking (Hong Kong, China)* concluded that "an emergency in international relations refers to a state of affairs that occurs in relations between [S]tates or participants in international relations that is of the utmost gravity, in effect, a situation representing

[174] Ibid., para. 7.75.
[175] Ibid., 7.76 – 7.77.
[176] Ibid., para. 7.122.
[177] Panel Report, *US – Steel and Aluminium Products (Norway),* para. 7.127.
[178] Ibid., para. 7.127.
[179] Ibid., paras. 7.117-7.137.

a breakdown or near-breakdown in those relations."[180] It noted that a war is an example of an ultimate emergency in international relations.[181] In that dispute, the panel considered that although there was evidence of the US and other Members being highly concerned about the human rights situation in Hong Kong, the situation had not escalated to the required level of gravity to constitute an emergency in international relations.[182]

2.81. In *Saudi Arabia – IPRs*, the panel considered that that "one Member's severance of 'all diplomatic and economic ties' with another Member could be regarded as 'the ultimate State expression of the existence of an emergency in international relations'".[183]

2.82. With respect to the phrase "**taken in time of**" used in subparagraph (iii) of Article XXI(b) GATT, WTO panels have considered that it describes the temporal link between the action and the events of war or other emergency in international relations in that subparagraph. This phrase requires that the action be taken *during* the war or other emergency in international relations.[184]

2.83. Turning to the chapeau of Article XXI(b) GATT, in *Russia – Traffic in Transit*, the panel defined "**essential security interests**" as "those interests relating to the quintessential functions of the [S]tate, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[185] Although it is for each WTO Member to decide what constitutes its essential security interests, this does not mean that a Member is free to elevate any concern to that of an "essential security interest".[186] Instead, an invoking Member's discretion in this regard is limited by an obligation of good faith and requires the invoking Member to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".[187]

2.84. According to the panel in *Russia – Traffic in Transit*, what would qualify as a sufficient level of articulation would "depend on the emergency in international relations at issue". In particular, the further the alleged "emergency in international relations" is removed from armed conflict, or a situation of breakdown of law and public order, the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise.[188] The panel found that because the situation in that case was "very close to the 'hard core' of war or armed conflict … Russia's articulation of its essential security interests [wa]s minimally satisfactory" even though Russia did not articulate them explicitly.[189]

2.85. In *Saudi Arabia – IPRs*, the panel concluded that "[t]he requirement that an invoking Member articulate its 'essential security interests' sufficiently to enable an assessment of whether the

[180] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.290.
[181] Ibid., para. 7.296.
[182] Ibid., para. 7.357-7.358.
[183] Panel Report, *Saudia Arabia – IPRs*, para. 7.259.
[184] Panel Reports, *Russia – Traffic in Transit*, para. 7.70; *US – Steel and Aluminium Products (Norway),* para. 7.128.
[185] Panel Report, *Russia – Traffic in Transit*, para. 7.130.
[186] Ibid., para. 7.130. See also *US – Steel and Aluminium Products (Norway),* para. 7.98.
[187] Panel Report, *Russia – Traffic in Transit*, para. 7.134.
[188] Ibid., para. 7.135.
[189] Panel Report, *Russia – Traffic in Transit*, para. 7.136-7.137.

challenged measures are related to those interests is not a particularly onerous one, and is appropriately subject to limited review by a panel."[190]

2.86. Furthermore, the panel in *Russia – Traffic in Transit* observed that the obligation of good faith "applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also to their connection with the measures at issue."[191] Thus, the measures at issue must "meet a **minimum requirement of plausibility** in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests."[192]

2.4.5 Arguments for Rutenia

- **Justiciability**: Rutenia is not expected to argue that Article XXI(b) GATT is entirely self-judging and non-justiciable, since WTO panels have consistently rejected this argument. Instead, Rutenia is expected to focus on demonstrating that the relevant criteria of Article XXI(b)(iii) are met. Should teams seek to argue that Article XXI(b) is self-judging, panellists are encouraged to ask questions about the systemic implications of this approach (e.g., whether this would this give a 'carte blanche' to WTO Members to simply circumvent their WTO obligations) and invite teams representing Rutenia to focus on the substantive requirements of Article XXI(b)(iii).

- **Existence of a war or other emergency in international relations**: Rutenia should rely on the relevant facts of the Case to demonstrate the existence of a global climate crisis which qualifies as an "other emergency in international relations" within the meaning of Article XXI(b)(iii) GATT. Rutenia should argue that the global climate crisis fits squarely within the scope Article XXI(b)(iii) in accordance with the interpretations developed by WTO panels. Rutenia should also assert that the global climate crisis is comparable in its gravity or severity to a "war" in terms of its impact on international relations" and reaches the required threshold under Article XXI(b)(iii).[193] In making this argument, Rutenia could point to the following facts:

- The 6th IPCC Assessment Report asserts that "human-caused climate change is unequivocally happening as a consequence of more than a century of net GHG emissions" into the atmosphere – and hence, climate change is by its very nature "international".[194] The fact that climate change affects physical and mental health of people "globally" also demonstrates the international nature of the climate crisis.[195]

- Evidence in the Case also demonstrates that climate change is of grave concern to the international community (as per *Russia – Traffic in Transit*).[196] Notably, the preamble to the

[190] Panel Report, *Saudi Arabia – IPRs*, para. 7.281.
[191] Panel Report, *Russia – Traffic in Transit*, para. 7.138.
[192] Ibid., 7.138.
[193] Panel Report, *US – Steel and Aluminium Products (Norway),* para. 7.127.
[194] Case, para. 12.
[195] Case, para. 12.
[196] See para. 2.78. above.

Paris Agreement acknowledges the "urgent threat of climate change" as a "common concern of humankind".[197]

- The UN Secretary-General has stated that "tensions are deepening as coastlines vanish, territories are lost, resources become scarce, and masses are displaced"; that "the world will witness a mass exodus of entire populations on a biblical scale"; and that "the displacement of hundreds of millions of people is a security risk".[198]

- The UN General Assembly unanimously adopted a resolution requesting the International Court of Justice to deliver an advisory opinion on the obligations of States under international law in respect of climate change.[199]

- There have already been some tensions between Rutenians and Artanians who have emigrated to Rutenia as a result of climate-related extreme weather events.[200]

- **Taken in time of**: Rutenia should argue that although it may be difficult to identify the moment when climate change began, the climate emergency is ongoing and was certainly in place when the carbon charge was adopted on 1 July 2022. In support of its position, Rutenia could refer to the preamble to the Paris Agreement, which refers to the "urgent threat of climate change"[201] and 6th IPCC Assessment Report from February 2022 which asserts that "human-caused climate change is unequivocally happening".[202]

- **Essential security interests**: Rutenia should argue that protecting its territory and population from the threat of climate change is an essential security interest for Rutenia within the meaning of Article XXI(b) GATT 1994 (as per *Russia – Traffic in Transit*).[203] In support of its position, Rutenia could point out to the facts of the Case demonstrating the "existential risks" posed by climate change and sea-level rise to Rutenia and its people.[204] Given that the requirement to articulate "essential security interests" sufficiently is not a particularly onerous one (as per *Saudi Arabia – IPRs*),[205] it should not be difficult for Rutenia to meet this requirement.

- **Plausibility**: Rutenia should also argue that the adoption of the carbon charge meets a minimum requirement of plausibility in relation to the protection of Rutenia's essential security interests (as per *Russia – Traffic in Transit*).[206] In this regard, Rutenia could refer to Article 1 of Section 10 of the NZF Act, which establishes a causal link between the carbon charge and the reduction of emissions at the global level, thereby reducing climate-related risks for the Rutenian territory and population. In addition, Rutenia could refer to the

[197] See para. 2.78. above.
[198] Case, para. 13.
[199] Case, para. 16.
[200] Clarification Questions (Q30 and Q31).
[201] Case, Annex I.
[202] Case, para. 12.
[203] See para. 2.77. above.
[204] Case, paras. 11,12, and 14.
[205] See para. 2.83. above.
[206] See para. 2.86. above.

impact assessment on the projected emission-reduction following the introduction of the carbon charge (in Rutenia by 8% and in the other countries of the Intermarium region by 3% by 2030)[207] and, more generally, to the International Monetary Fund (IMF) and other economic studies recognizing that "[c]arbon pricing is a powerful and cost-effective tool to mitigate climate change".[208]

2.4.6 Arguments for Burlandia

- During the oral pleadings, Burlandia's rebuttal of Rutenia's invocation of Article XXI would by and large depend on how Rutenia formulates its defence. In particular, depending on Rutenia's argumentation, Burlandia could argue that the requirements of subparagraph (iii) of Article XXI(b) GATT are not met and/or that Rutenia has not sufficiently articulated the essential security interests said to arise from the emergency in international relations to demonstrate their veracity.

- **Existence of a war or other emergency in international relations**: Burlandia could argue that the alleged climate emergency referred to by Rutenia is not an "emergency in international relations" within the meaning of Article XXI(b)(iii). In particular, Burlandia could seek to argue that the level of gravity of the alleged climate emergency does not reach the threshold articulated by previous WTO panels that examined defences under Article XXI.[209]

- Burlandia could note that the climate emergency is not comparable in its gravity or severity to a war in terms of its impact on international relations because it has not led to "a breakdown or near-breakdown in international relations" between Rutenia and other WTO Members (as per *US – Origin Marking (Hong Kong, China)*).[210] Burlandia could compare the present case with *US – Origin Marking (Hong Kong, China)*, where the panel considered that although there was evidence of US and other Members being highly concerned about the human rights situation in Hong Kong, the situation had not escalated to the required level of gravity to constitute an emergency in international relations.[211] Burlandia could also point out that, unlike in *Russia – Traffic in Transit*,[212] in the present case there is no situation of armed conflict, and that unlike in *Saudi Arabia – IPRs*, there has been no severance of diplomatic relations between Rutenia and other WTO Members.[213]

- Burlandia could further point out that several UN members have 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", and argued that it is "primarily a sustainable development issue".[214]

[207] Clarification Questions (Q41).
[208] Clarification Questions (Q68).
[209] See paras. 2.77. - 2.80. above.
[210] See para. 2.80. above.
[211] See para. 2.80. above.
[212] See para. 2.78. above.
[213] See para. 2.81. above.
[214] Case, para. 13.

- Burlandia could seek to make a systemic argument that equating climate change with an "emergency in international relations" would result in a too broad expansion of the scope of Article XXI(b)(iii) and open it for abuse. Burlandia could argue that this would have dangerous implications for the WTO system, giving a 'carte blanche' to WTO members to adopt trade-restrictive discriminatory measures without having to undergo judicial scrutiny under the more rigorous requirement of the chapeau of Article XX GATT.[215]

- **Taken in time of**: Rutenia is likely to meet this element, because it would be hard to deny the chronological concurrence of the adoption of the carbon charge and the global climate crisis (assuming it may qualify as an "other emergency in international relations", as discussed above). However, Burlandia could make a systemic argument that because climate change is a permanent situation with no foreseeable end, any measure would be "taken in time of" the climate emergency, which would render the relevant requirement in Article XXI(b)(iii) meaningless.

- **Essential security interests**: Burlandia could agree with the Panel in *Saudi Arabia – IPRs* that the requirement for the invoking Member to sufficiently articulate its essential security interests is not a particularly onerous one[216] and concede on this point if Rutenia argues that protecting its territory and population from the threat of climate change is its essential security interest. Alternatively, Burlandia could argue, in accordance with the panel's observations in *Russia – Traffic in Transit*, that because there is no situation of an armed conflict in the present case, Rutenia should be more elaborate in the articulation of its essential security interests (this argument could be raised if Rutenia does not articulate its security interests explicitly or articulates them only very minimally).[217]

- **Plausibility**: Provided this element is well-reasoned by Rutenia, it would be difficult for Burlandia to establish that the adoption of the carbon charge does not meet a minimum requirement of plausibility (as per *Russia – Traffic in Transit*),[218] in relation to Rutenia's alleged essential security interests. Burlandia may therefore concede on this point, unless there are weaknesses in Rutenia's argumentation it may exploit.

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
Where do you think the Panel should draw the line between what does and does not amount to an "other emergency in international relations" within the meaning of Article XXI(b)(iii) GATT? Please give concrete examples in your answer.	*If Rutenia argues that Article XXI is self-judging*: If the Panel were to depart from the decisions of previous WTO panels which have decided that Article XXI is not self-judging, would this give a 'carte blanche' to WTO Members to simply circumvent their WTO obligations?
What is the relationship between Article XXI and XX defences?	What is the relationship between Article XXI and XX defences?

[215] See para. 2.67. above.
[216] See para. 2.83. above.
[217] See paras. 2.84. -2.85. above.
[218] See para. 2.84. 2.86. above.

Does the respondent have full discretion as to the order in which it raises defences under WTO law? Does the Panel have to follow that order? What would happen if the Panel was to find that the measure is justified under one defence and not the other?	Why are you raising Article XXI GATT in first instance? Doesn't Article XX GATT more specifically govern the current factual situation (i.e., more directly relevant to environmental measures)? If it does, should the Panel examine first your defence under Article XX GATT (as *lex specialis*)?
Could you please clarify whether your position is that: (i) the effects of climate change cannot be considered a security threat in general policy terms; or that (ii) such an understanding of security, while acceptable in principle, cannot be reconciled with the wording of Article XXI GATT? If your answer is (ii), what should the WTO do about this?	Given your alternative defence under Article XX GATT, could you please explain how the carbon charge is aimed at once at addressing climate change as a 'security threat' issue and as 'environmental conservation' issue?
Should it be necessary to demonstrate a "breakdown or near-breakdown in international relations" to establish that the global climate crisis constitutes an "other emergency in international relations"? Could the demonstration of a "breakdown or near-breakdown in international relations" be relevant for cases of bilateral/regional tensions and armed conflict but not for cases involving global threats (e.g., climate change or a pandemic)? Would it be sufficient for a Member to demonstrate a breakdown or near-breakdown in relations between other WTO Members due to climate change, or should such a breakdown necessarily involve the Member that invokes an Article XXI defence?	As per para 13 of the Case, UN members/organs are clearly divided on the question of whether climate change is a security issue or a sustainable development issue – is it for the WTO dispute settlement bodies to pass a judgement on this contentious matter?
Does the term "emergency" in subparagraph (iii) of Article XX(b) GATT necessarily implies a situation – and hence, a regulatory response to it– that is temporary?	Please explain how the alleged climate crisis is comparable in its gravity or severity to a "war" in terms of its impact on international relations? In which ways does the climate crisis amount a "breakdown or near-breakdown" in international relations? Please refer to the relevant facts of the Case.
Shouldn't it ultimately be for each WTO Member to decide whether climate change affects its "essential security interests", as long as it "sufficiently articulates" how it	Assuming *arguendo* that the ongoing climate crisis is an "emergency in international relations", how does its lasting nature affect the temporal requirement in Article

poses a threat to its territory and/or population? More specifically, the facts of the Case point to the "existential threat" of climate change-induced sea-level rise to coastal communities (paras. 11-12) – why wouldn't this be a sufficiently articulated essential security interest for countries like Rutenia?	XXI(b)(iii) GATT? Since there is no discernible start or end of the climate crisis, would this render the "in time of" element of Article XXI(b)(iii) GATT redundant in the context of trade-related climate measures?

2.5 ARTICLE XX of the GATT

2.5.1 Legal claim and key issues

2.87. As an alternative to its defence under Article XXI(b)(iii) GATT, Rutenia submits that the measure at issue is justified under either Article XX(b) or Article XX(g) of GATT, or both. As in most 'real-life' WTO cases, the most contentious issues here are likely to arise under the introductory clause (commonly referred to as the 'chapeau') of Article XX GATT, which sets out an horizontal requirement that the measure at issue is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" – and which must be met in all instances regardless of whether such a measure is provisionally justified under paragraph (b) or (g). Three main issues should be addressed by participating teams under the chapeau of Article XX GATT:

- Whether the differential treatment between flat glass imported from Burlandia (subject to the carbon charge) and flat glass imported from Artania (exempted from the carbon charge) amounts to "discrimination between countries where the same conditions prevail";

- Whether the differential treatment between flat glass imported from Burlandia (not benefitting from the carbon charge deduction) and flat glass imported from Korsania (benefitting from the carbon charge deduction) amounts to "arbitrary and unjustifiable discrimination";

- Whether the verification methods laid down in Annex III to Section 10 of the NZF Act, and further elaborated in Implementing Regulation 7/2023, as applied to flat glass produced in Rutenia and flat glass imported from other countries results in "arbitrary and unjustifiable discrimination".

2.88. **Note to panellists**: As stated in footnote 6 in the Case, responding teams may choose to argue a defence under *either* Article XX(b) or XX(g), or *both*. As long as their choices and arguments are well-reasoned, teams should not be unduly penalised for raising just one of these exceptions, rather than both – this may make sense given the page-limit in written submissions and the time constraints in oral pleadings which differ significantly from a 'real-life' WTO dispute scenario. The choice between paragraph (b) and paragraph (g) may be driven by a number of strategic considerations. Some teams will invoke paragraph (g) alone, as the most directly relevant to environmental measures in light of the stated objective in Article 1 of Section 10 of the NZF Act,

but also to avoid the more stringent 'necessity' test under paragraph (b). Other teams may invoke paragraph (b) jointly with paragraph (g), as they may feel it makes their argumentation more consistent with the defence under Article XXI GATT (i.e., protecting Rutenia's territory and people from the threat of climate change as a national security and public health issue). However, some teams may choose paragraph (b) alone to bypass the question of extra-territoriality in the application of Article XX GATT if they perceive this as a concern. Panellists are welcome to question teams on the choices they have made.

2.5.2 Relevant WTO provision

2.89. Article XX GATT states, in relevant part:

General Exceptions

> 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 [Member] of measures:
>
> […]
> (b) necessary to protect human, animal, plant health or life;
> […]
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> […]

2.90. A measure, otherwise inconsistent with GATT obligations, can be justified under Article XX GATT if it meets: (i) the specific requirements of (at least) one of the exceptions listed in paragraphs (a)-(j) and (ii) the horizontal requirements of the chapeau.[219]

2.5.3 Relevant jurisprudence on paragraph (g)

2.91. For a GATT-inconsistent measure to be provisionally justified under paragraph (g) of Article XX GATT, two elements must be shown: (i) it is "related to" the conservation of "exhaustible natural resources"; and (ii) it is "made effective in conjunction with restrictions on domestic production or consumption".

2.92. In relation to the first element, the term "**related to**" has not been interpreted as a particularly demanding requirement in WTO jurisprudence: it demands "a close and genuine relationship between means and ends".[220] That is, the measure at issue must be reasonably related to the objective of conserving exhaustible natural resources, and a measure that is "merely incidentally or inadvertently aimed at a conservation objective"[221] would not satisfy this

[219] Appellate Body Reports, *US – Gasoline*, p. 22; *EC – Seal Products*, para. 5.169.
[220] Appellate Body Report, *US – Shrimp*, paras. 136 and 141.
[221] Appellate Body Report, *China – Rare Earths*, para. 5.90.

requirement under Article XX(g) GATT. As to the concept of "**exhaustible natural resources**", the AB favoured a broad, evolutive interpretation in *US – Shrimp*:

> The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment […] The preamble of the WTO Agreement –which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges "the objective of *sustainable development*" […] From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources […].[222]

2.93. In addition, in *US – Gasoline*, clean air was found to be an exhaustible natural resource within the meaning of Article XX(g) GATT.[223]

2.94. With regard to the second element, the phrase "**made effective in conjunction with restrictions on domestic production or consumption**" has been interpreted as imposing a requirement of "even-handedness" in the imposition of restrictions on domestic and imported products in the name of conservation.[224] While it does not demand identical treatment of domestic and imported products, the regulating WTO Member must impose "real and effective restrictions on domestic production or consumption that reinforce and complement the restriction on international trade".[225]

2.95. While there is no *explicit* **jurisdictional limitation** in the text of Article XX GATT, it is much debated whether there is an *implicit* jurisdictional limitation so that it could not be invoked to justify measures with 'extra-territorial' effects – e.g., to protect an exhaustible natural resource that is located *outside* the territorial jurisdiction of the regulating WTO Member. With regard to paragraph (g) of Article XX GATT, the AB held in *US – Shrimp*:

> The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the

[222] Appellate Body Report, *US – Shrimp*, paras. 129-130 (emphasis original).
[223] Panel Report, *US – Gasoline*, para. 6.37.
[224] Appellate Body Report, *US – Gasoline*, p. 20.
[225] Appellate Body Report, *China – Rare Earths*, para. 5.132.

> migratory and endangered marine populations involved and the United States for purposes of Article XX(g).[226]

2.96. In *EC – Seal Products*, the AB accepted that Article XX(a) GATT (public morals exception) could be invoked to justify a measure addressing seal hunting activities within and outside the regulating WTO Member, and noted:

> The EU Seal Regime is designed to address seal hunting activities occurring "within and outside the [EU]" and the seal welfare concerns of "consumers and citizens" in EU member States. The participants did not address this issue in their submission on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a) [...] we have decided in this case not to examine the question further.[227]

2.5.4 Relevant jurisprudence on paragraph (b)

2.97. For a GATT-inconsistent measure to be provisionally justified under paragraph (b) of Article XX GATT, two elements must be shown: (i) it is "designed to" protect the life or health of humans, animals or plants (generally referred to as 'public health'); and (ii) it is "necessary to" protect public health.[228]

2.98. The first element, unlike the second, of the analysis under Article XX(b) GATT is relatively easy to meet. To assess whether a measure is **designed to protect public health**, a panel must first determine what the policy objective pursued by the measure is. In doing so, a panel should take account of the invoking Member's own articulation of the policy objective but is not bound by it. Instead, the panel should consider all relevant evidence, including the text and structure of the measure and its legislative history.[229] To establish that the objective pursued by the measure is within the scope of Article XX(b) GATT, the invoking Member must show the existence of a *specific* risk to the life or health of humans, animals or plants, "not just of risks to the environment generally".[230]

2.99. Past panels have found a wide range of measures to be aimed at the protection of public health within the meaning of Article XX(b) GATT.[231] Most significantly for the purposes of this Case, in *Brazil – Taxation*, the panel found that "the reduction of CO2 emissions [from vehicle transportation] is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health".[232]

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[226] Appellate Body Report, *US – Shrimp*, para. 133.
[227] Appellate Body Report, *EC – Seal Products*, para. 5.173.
[228] See e.g., Panel Reports, *China – Raw Materials*, paras. 7.479-7.480; *Brazil – Taxation*, para. 7.869.
[229] Panel Reports, *Brazil – Taxation*, para. 7.884; *EC – Tariff Preferences*, paras. 7.201-7.202.
[230] Panel Report, *Brazil – Retreaded Tyres*, para. 7.46.
[231] E.g., Panel Reports, *US – Gasoline*, para. 6.21 (measures to reduce air pollution from gasoline consumption); *EC – Asbestos*, para. 8.194 (measures banning chrysotile asbestos due to its carcinogenic nature); *US – Brazil Retreaded Tyres*, para. 7.102 (measures to reduce the risks of mosquito-borne diseases from the cumulation of waste tyres); *Brazil – Taxation*, para. 7.877 (measures to improve vehicle safety).
[232] Panel Report, *Brazil – Taxation*, para. 7.880.

2.100. For a measure to be designed to protect public health, it suffices that there is a relationship between the measure and the protection of life or health of humans, animals or plants. The required relationship exists when the measure is "not incapable" of protecting human, animal or plant life or health – otherwise said, when "it is conceivable […] that measure could potentially contribute" to this objective.[233] This illustrates that it is relatively easy to meet the "not incapable" standard, unless there is no connection at all between the challenged measure and the protection of public health.[234]

2.101. As to the second element, the AB in *Brazil – Retreaded Tyres* explained that the **necessity** assessment under Article XX(b) involves a "holistic" process of "weighing and balancing" all the relevant factors,[235] and in particular:

> [T]he extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in light of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complainant to identify possible alternatives to the measure at issue that the responding Member could have taken.[236]

2.102. With respect to the interests or values at stake, the AB observed in *EC – Asbestos* that the preservation of human life or health is "both vital and important in the highest degree".[237] As to the contribution of the measure to the objective pursued, the AB held in *Brazil – Retreaded Tyres* that a panel may conduct such an analysis in "quantitative or qualitative" terms, depending on "the nature of the risk, the objective pursued and the level of protection sought", as well as on "the nature, quantity and quality of the evidence at the time the analysis is made".[238] In addition, the AB ruled that a measure must bring about a "material contribution" to the public health objective (rather than one that is merely marginal or insignificant). This can be demonstrated either by evidence that the measure: (i) has *already* resulted in a material contribution (e.g., on the basis of past or present data); or (ii) is *apt to* produce such a material contribution (e.g., based on quantitative projections in the future or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence).[239] In this context, the AB recognised that:

> [C]ertain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions —for instance, measures adopted in order to attenuate

[233] Ibid., paras. 7.903-7.905. See also Appellate Body Report, *Colombia – Textiles*, para. 5.68.
[234] Panel Report, *Indonesia – Import Licensing*, para. 7.632.
[235] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.
[236] Ibid., para. 156.
[237] Appellate Body Reports, *EC – Asbestos*, para. 172; *Brazil – Retreaded Tyres*, para. 179.
[238] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-146.
[239] Ibid., para. 151.

> global warming and climate change [..] — can only be evaluated with the benefit of time.[240]

2.103. Possible **alternative measures** identified by the complainant under Article XX(b) GATT must not only be less trade-restrictive, but also "reasonably available" to the responding Member,[241] which must be assessed considering several criteria. In particular, a less trade-restrictive alternative measure would *not* be deemed reasonably available when: (i) it fails to make an equivalent contribution to the public health objective pursued;[242] (ii) it is merely theoretical in nature (for instance, where the responding Member is not capable of taking it);[243] (iii) it is already implemented by the responding Member and is complementary to the challenged measure as part of a comprehensive strategy;[244] (iv) it imposes an undue burden on the responding Member, such as prohibitive costs or substantial technical difficulties.[245]

2.104. It follows, therefore, that each WTO Member has a right to determine the level of public health or environmental protection it considers appropriate.[246] Other WTO Members cannot challenge the level of protection chosen by the respondent; they can only argue that the measure at issue is not necessary to achieve *that* level of protection.

2.5.5 Arguments for Rutenia (paragraph (g))

2.105. Rutenia may argue:

- **Related to**: The carbon charge is closely and reasonably related to the objective of preserving a stable Earth climate.[247] By imposing a price on carbon emissions embedded in the covered products, it incentivises sustainable low-carbon patterns of production and consumption and emission-reduction action at the global level.[248] In fact, IMF studies have found that "[c]arbon pricing is a powerful and cost-effective tool to mitigate climate change, because it discourages producers from using carbon-emitting fossil fuels and obliges them to internalise the social costs of carbon emissions".[249]

- **Conservation of exhaustible natural resources**: A stable Earth climate is an "exhaustible natural resource" within the meaning of Article XX(g) GATT, considering the evolutive interpretation in *US – Shrimp* and the fact that clean air has already been recognised as such in *US – Gasoline*.[250] A wealth of scientific evidence and international

[240] Ibid. and 154; see also in the context of Article 2.2 TBT Agreement, Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.506.
[241] Appellate Body Report, *EC – Asbestos*, paras. 170-171.
[242] Ibid., para. 174; Appellate Body Report, *Brazil – Retreated Tyres*, para. 156.
[243] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
[244] Ibid., para. 172.
[245] Ibid., para. 156.
[246] Appellate Body Reports, *EC – Asbestos*, para. 168; *Brazil – Retreaded Tyres*, para. 156.
[247] "Stable climate" is generally understood as a global atmosphere with a 'safe' level of GHG concentrations, pursuant to Article 2 UNFCCC: "[t]he ultimate objective of this Convention and of any related legal instrument that the Conference of the Parties may adopt is to achieve […] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".
[248] NZF Act, Section 10, Article 1.
[249] Clarification Questions (Q68).
[250] See para. 2.93. above.

instruments have acknowledged the urgent need of tackling the climate crisis. Notably, the Paris Agreement recognises the "need for an effective and progressive response to the urgent threat of climate change".[251] The 6th IPCC Assessment Report asserts that "human-caused climate change is unequivocally happening" and that meeting the Paris temperature goals requires "rapid and deep and, in most cases, immediate GHG emissions reductions in all sectors this decade".[252]

Note to panellists: while this seems quite a straightforward argument on the basis of WTO jurisprudence, evolutive (or dynamic) treaty interpretation is not itself uncontroversial in public international law, and panellists may wish to probe respondent teams on this point.

- **Even-handedness**: The measure is even-handed,[253] because it imposes the same carbon charge – and hence, restriction – on domestic and foreign products.

- **Jurisdictional limitation (if raised by complainant, rebuttal arguments)**: There is a sufficient nexus between Rutenia and the Earth's climate – even more so than between the US and sea turtles in *US – Shrimp*.[254] The Paris Agreement provides that climate change is a "common concern of humankind"[255] and, hence, all States have a common responsibility to protect the Earth's climate. Further, global warming has substantial territorial effects in Rutenia: greenhouse gases remain in the atmosphere for a long time and migrate globally, so carbon emissions by any State contribute to this 'flow' problem and affect all States. Moreover, the 2019 IPCC Special Report on the *Ocean and Cryosphere in a Changing Climate* highlighted the "existential threat" of climate change-induced sea-level rise for coastal communities, including in Rutenia.[256] In fact, the 2022 report on *Sea-Level Rising: Assessing and Tackling the Risks for Rutenian People* forecasts that, by 2050, rising sea levels will submerge around 17% of Rutenia's land and displace around 2 million people.[257]

2.5.6 Arguments for Burlandia (paragraph (g))

- In light of WTO jurisprudence and the facts of the Case, it would be difficult for Burlandia to contest Rutenia's arguments under the various elements of Article XX(g) GATT, *provided* that these are well reasoned and developed. When this is the case during the oral pleadings, Burlandia may concede on the relevant points – and move directly to its argumentation under the chapeau. When this is not the case, Burlandia should certainly exploit shortcomings in Rutenia's argumentation under Article XX(g) GATT during the rebuttal.

[251] Case, Annex I.
[252] Case, para. 12.
[253] See para. 2.94. above.
[254] See para. 2.95. above.
[255] Case, Annex I.
[256] Case, para. 11.
[257] Case, para. 14.

2.5.7 Arguments for Rutenia (paragraph (b))

2.106. Rutenia may argue:

- **Designed to**: The panel in *Brazil – Taxation* accepted that measures aimed at reducing CO2 emissions are among the range of policies covered by the public health exception in paragraph (b) of Article XX GATT.[258] overarching objective of the NZF Act is to "incentivise 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".[259] By extension, this objective also serves to protect human life and health in Rutenia from the risks of climate change. Scientific evidence on the existence of such risks is found in the IPCC 6th Assessment Report, which warns that "climate change is affecting the physical and mental health of people globally through increasing occurrence of climate-related food-borne, water-borne and vector-borne diseases".[260] The report further finds that "extreme heat and flooding events have resulted in human mortality and morbidity in all assessed regions".[261] The measure is designed to protect human life and health because the carbon charge is "not incapable"[262] of potentially contributing to reduce carbon emissions globally and, thereby, to reduce the risks posed by climate change to human life and health in Rutenia.

- **Necessary to**:

- Interests/values at stake: As the AB held in *EC – Asbestos*, the protection of human life and health is vital and important in the highest degree.[263]

- Contribution: As per *Brazil – Retreaded Tyres*, the measure is apt to produce a material contribution to the public health objective pursued.[264] Evidence of this is provided by the impact assessment conducted by the Government of Rutenia, which projected that the carbon charge will reduce the level of CO2 emissions in the covered sectors in Rutenia by 8% by 2030, and in the other countries of the Intermarium region by 3% by 2030.[265] This contribution cannot be considered insignificant, given the urgency of tackling the climate crisis with "immediate GHG reduction emissions in all sectors this decade" needed according to the IPCC.[266] Rutenia may further draw on the AB's reasoning in *Brazil – Retreaded Tyres* and argue that the carbon charge is part of Rutenia's comprehensive strategy to tackle climate change, comprising a multiplicity of interacting measures (including renewable energy subsidies),[267] and it may prove difficult to isolate the contribution of the carbon charge to public health or environmental objectives from that attributable to the other measures that are part of the comprehensive climate policy. Moreover, the results

[258] See para. 2.99. above.
[259] NZF Act, Section 10, Article 1.
[260] Case, para. 12.
[261] Ibid.
[262] See para. 2.100. above.
[263] See para. 2.102. above.
[264] See para. 2.102. above.
[265] Clarification Questions (Q41).
[266] Case, para. 12.
[267] Case, para. 3.

obtained from measures adopted in order to attenuate global warming can only be evaluated with the benefit of time.[268]

- Trade restrictiveness: The measure is not more trade-restrictive than necessary to mitigate climate change and associated risks to human life and health. The rate of the carbon charge (USD 50 per tonne of CO2 emissions) was determined on the basis of objective criteria, and notably the finding by the Organization for Economic Co-operation and Development (OECD) that "carbon prices would need to be at least USD 40-80 per tonne of CO2 emissions by 2020 and USD 50-100 per tonne of CO2 emissions by 2030 in order for emissions to decrease in line with the temperature goals of the Paris Agreement".[269] Hence, USD 50 per tonne of CO2 emissions is rather at the lower-end of this benchmark.

2.5.8 Arguments for Burlandia (paragraph (b))

2.107. Burlandia may argue:

- **Designed to**: In light of WTO jurisprudence and the facts of the Case, it may be difficult for Burlandia to contest that the measure at issue is designed to protect human life or health and complainant teams may concede on this first element of the analysis under Article XX(b) GATT. However, during the oral pleadings, Burlandia should address any weakness in Rutenia's arguments in relation to the relevant legal test and/or use of evidence.

- **Necessary to**: If Rutenia's arguments are well-grounded on the relevant legal test and facts of the Case (as laid out above), Burlandia would have little to rebut. In this case, Burlandia is likely to focus its argumentation on the alternative measure element of the necessity test (which it needs to identify as complainant).

- Alternative measures: A less trade-restrictive alternative for Rutenia would have been to pursue coordinated and cooperative approaches to industrial decarbonisation called for by Burlandia at the high-level regional dialogue in June 2022. These may include the "development of a common understanding on emission monitoring, reporting and verification systems and on comparability of (price-based and non-price-based) mitigation policies" (both allegedly discriminatory aspects of the challenged measure), as well as the "forging of a genuine partnership for climate finance and technology transfer to developing countries".[270] This list is purposely left non-exhaustive in the facts of the Case to encourage complainant teams to be creative here, insofar as they explain how the alternative measures proposed are not only less trade-restrictive but also reasonably available to Rutenia based on the criteria set out in WTO jurisprudence.[271]

[268] See para. 2.102. above.
[269] Clarification Questions (Q69).
[270] Case, para. 15.
[271] See para. 2.103. above.

2.5.9 Rebuttal arguments for Rutenia (paragraph (b))

- In its rebuttal, Rutenia could argue that the alternative measures proposed by Burlandia are not reasonably available to it based on the criteria established in WTO jurisprudence.[272] For example, if Burlandia raises dialogue or negotiation on common cooperative approaches (as per above), Rutenia could argue that these are merely hypothetical possibilities the implementation of which does not depend on Rutenia alone and, hence, it is not certain they would achieve an equivalent level of protection of public health/climate system. It could draw on the AB's finding in *US – Gambling* that "[e]ngaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case".[273]

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
Which party has the burden of proof under paragraphs (b)/(g)?	Could you explain your choice with regards to the provisional justification of the measure (i.e., paragraph (b) or (g), or both, as applicable)? How is this consistent with your previous argumentation under Article XXI GATT? What is the actual objective of the carbon charge?
If Burlandia raises the issue of a jurisdictional limitation to the application of Article XX(g) GATT: Has this question been settled in WTO case law? If we assume Article XX(g) GATT can only be invoked to protect natural resources *within* the territorial jurisdiction of the regulating Member, what would this mean for the protection of global natural resources, such as the Earth's climate?	What is the "natural resource" at issue and in which way may it be considered "exhaustible"? And what is the relevance, if any, of the Paris Agreement to that determination?[274]
In applying a carbon charge, isn't Rutenia just incentivising "sustainable patterns of consumption and production" and taking the	WTO covered agreements should be interpreted in accordance with the customary rules of interpretation under public

[272] See para. 2.103. above.
[273] Appellate Body Report, *US – Gambling*, para. 317.
[274] Note that the AB has relied on multilateral environmental agreements (MEAs) as factual evidence in determining whether a natural resource was exhaustible under Article XX(g) GATT: Appellate Body Report, *US – Shrimp*, para. 132, referring to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. It has also used MEAs as factual evidence in the application of the chapeau requirements: Appellate Body Report, *US – Shrimp*, paras. 169-171.

"lead in addressing climate change" (as recognised in the preamble of the Paris Agreement)? How could Rutenia ensure sustainable *consumption* without extending the carbon charge to imports?	international law (Article 3.2 DSU)[275] – how does an evolutive interpretation of exhaustible natural resources fit within those rules?
Which conditions must alternative measures meet to be considered "reasonably available" under Article XX(b) GATT? How do your proposed alternatives meet such conditions?	How should one establish there is a "sufficient nexus" between the exhaustible natural resource at issue and the regulating WTO Member under Article XX(g) GATT? Does it require a physical territorial connection between the two? How would this apply in the context of climate change being a "common concern of humankind" (as per preamble of Paris Agreement)?
Can an alternative measure be deemed "reasonably available" to the responding Member if its implementation also depends on action by other WTO Members? What if they refuse to undertake such a joint/cooperative action?	How should a panel determine the policy objective pursued by the measure at issue? Is it possible for the NZF Act to fall within the scope of Article XX(b) GATT when its text makes no reference to the protection of human life or health?
	How should a "material contribution" to the objective pursued be demonstrated under Article XX(b) GATT? The carbon charge is expected to reduce carbon emissions by about 11% in the Intermarium region as a whole by 2030 – can this be considered a "*material*" contribution to tackling climate change?

2.5.10 Relevant jurisprudence on chapeau

2.108. The requirements of the chapeau have been interpreted in a number of WTO cases, and often been the most contentious part of the Article XX analysis. This is the case, in particular, for the requirement that the measure at issue is not applied in a manner that "would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", on which we focus here.[276] In *EC – Seal Products*, the AB clarified that this requirement entails a two-step assessment: (i) whether the differential treatment occurs between countries in which the

[275] Customary rules of treaty interpretation have been codified in Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT): see Annex II to Bench Memorandum.
[276] There has been limited WTO jurisprudence on the other element of the chapeau ("disguised restriction on international trade") and not particularly relevant here.

"same conditions prevail"; and if so, (ii) whether the resulting discrimination is "arbitrary or unjustifiable".[277]

2.109. In assessing whether the countries between which the measure allegedly discriminates are in the **same conditions**, the AB provided further guidance on which conditions are relevant:

> We note that the term "condition" has a number of meanings […] [It] could thus potentially encompass a number of circumstances facing a country. In order further to define and circumscribe the meaning of the term "conditions", the treaty interpreter should therefore seek guidance from the specific context in which that term appears in the chapeau […] We consider that, in determining which "conditions" prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. In other words, "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau […] If a respondent considers that the conditions prevailing in different countries are not "the same" in relevant respects, it bears the burden of proving that claim.[278]

2.110. With respect to the second step, a number of factors have been identified to determine whether discrimination is **arbitrary or unjustifiable**. The first pertains to the rational relationship between the discrimination and the measure's objective, and was articulated by the AB in *Brazil – Retreaded Tyres*, concerning discrimination resulting from an exemption for certain countries from an import ban on remoulded tyres:

> […] there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure […] In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal […] In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree.[279]

2.111. In *EC – Seal Products*, similarly concerning discrimination arising from an exception from the sale ban for seal products derived from hunts conducted by Inuit communities (IC), the AB confirmed the rational relationship standard as "one of the most important factors" in assessing arbitrary or unjustifiable discrimination, but was more nuanced in its application:

[277] Appellate Body Report, *EC – Seal Products*, para. 5.303.
[278] Appellate Body Report, *EC – Seal Products (2014)*, paras. 5.299-5.301.
[279] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 227-228.

> The European Union has failed to demonstrate, in our view, how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. In this connection, we note that the European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous people necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts […].[280]

2.112. A second factor that has been considered in the determination of arbitrary or unjustifiable discrimination under the chapeau relates to the regulatory flexibility of the measure at issue. In *US – Shrimp*, which concerned an import prohibition on shrimp products from non-certified countries because they had not used a certain fishing net prescribed by the US (i.e., approved Turtle Excluding Devices), the AB found that the measure discriminated unjustifiably because:

> [It] requires other WTO Members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination […] it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without […] any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.[281]

2.113. While this statement could be open to various interpretations, in the subsequent compliance proceedings *US-Shrimp (Article 21.5 – Malaysia)*, the AB clarified that the chapeau imposes an effects-based equivalence requirement. This does not require the regulating WTO Member to lower its level of protection to accommodate the specific conditions prevailing in each and every exporting country:

> [T]here is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the [p]anel correctly reasoned and concluded that

[280] Appellate Body Reports, *EC – Seal Products*, paras. 5.306 and 5.320.
[281] Appellate Body Report, *US – Shrimp*, paras. 163-165.

conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination".[282]

2.114. Another aspect that has been considered in assessing arbitrary or unjustifiable discrimination under the chapeau are due process requirements. In *US – Shrimp*, the AB faulted the certification process applicable to third countries under the challenged measure for being "casual" and "informal", and not "transparent" and "predictable".[283] In *EC – Seal Products*, the AB similarly condemned the "significant ambiguities" and "broad discretion" in the application of the requirements under the IC exception.[284]

2.115. **Note to panellists**: The following section is developed considering that paragraph (g) will be raised by the respondent teams possibly in most cases, either alone or jointly with paragraph (b). Hence, 'climate conservation' is the measure's policy objective (as per Article 1 of Section 10 of the NZF Act). If instead a respondent team raises paragraph (b) alone, the chapeau standards discussed above[285] would need be assessed in light of protection of human life or health from climate change risks as the measure's policy objective.

2.5.11 Arguments for Rutenia

2.116. Rutenia may argue:

- **On LDCs/SIDS exception**:

- The differential treatment between flat glass imported from Artania (exempted from carbon charge) and flat glass imported from Burlandia (subject to carbon charge) does not amount to discrimination "between countries where the same conditions prevail". The conditions prevailing in these countries are relevantly different in light of the climate conservation objective of the measure. Developing countries, such as Burlandia, are expected to undertake emission-reduction commitments under the Paris Agreement (Article 4.4) and the carbon charge incentivises them to do this.[286] Conversely, LDCs/SIDS are not required to undertake emission-reduction commitments under the Paris Agreement in light of their special circumstances (Article 4.6) and, hence, should be exempted from the carbon charge. This reflects a multilateral recognition that these countries "bear the least historical and current responsibility for climate change and have the least capacity to adapt to new climate conditions, thus being the most vulnerable countries to the adverse effects of climate change".[287] Contextual support for this is found in the preamble of the WTO Agreement, which provides that members should seek "to protect and preserve the environment … in a manner consistent with their respective needs and concerns at different levels of economic development".

[282] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144.
[283] Appellate Body Report, *US – Shrimp*, paras. 180-181.
[284] Appellate Body Reports, *EC – Seal Products*, para. 5.326.
[285] See paras. 2.108. above.
[286] NZF Act, Section 10, Article 1.
[287] NZF Act, Section 10, Article 5; Clarification Questions (Q2).

- Even if conditions prevailing in these countries are considered the same, the measure pursues its climate conservation objective in a calibrated manner,[288] given that production capacity and associated carbon emission risks are much lower in LDCs/SIDS (such as Artania) than in larger developing countries (such as Burlandia and Korsania). Hence, unlike in the *Brazil – Retreaded Tyres/EC – Seal Products* cases,[289] the discrimination resulting from the LDCs/SIDS exception can be reconciled with the climate conservation goal of the measure.

- In contrast with the EU in *EC – Seal Products*,[290] Rutenia has explained in this case why the need to respect the special status of LDCs/SIDS under the Paris Agreement (Article 4.6) "necessarily implies" that Rutenia "cannot do anything further to ensure that" these countries reduce carbon emissions.

- **On carbon charge deduction**:

- The differential treatment between flat glass imported from Korsania (benefitting from carbon charge deduction) and flat glass imported from Burlandia (not benefitting from the carbon charge deduction) does not amount to "arbitrary or unjustifiable discrimination". The rationale for the deduction from the carbon charge of explicit carbon prices paid in the country of origin is to "avoid double charging for carbon emissions embedded in imports of the covered products".[291] If such a deduction was not applied, Rutenia would be penalising exporters in third countries with ambitious carbon pricing policies in place, which would be contrary to the climate conservation objective of the measure. The deduction ensures that domestic and foreign producers are effectively subject to the same carbon price and have an equal incentive to reduce carbon emissions, which is rationally related with the climate conservation goal of the measure (as per *Brazil – Retreaded Tyres*).[292]

- Unlike in the *US – Shrimp (Article 21.5 – Malaysia)* scenario, Article 4 of Section 10 of the NZF Act does not condition the deduction from the carbon charge upon the adoption of essentially the same regulatory programme by exporting countries – it gives them a choice between carbon taxes and carbon emission trading schemes, as well as sufficient latitude to design these in a manner that is suitable to the specific conditions prevailing in their respective territories.[293]

- There are also good reasons why other climate policies cannot be credited in the same manner. This would, first, require a decision as to *which* policies to include and exclude for both third countries and Rutenia, and second, involve complex calculations of the *implicit* carbon costs of such policies. This would not only be very difficult administratively, but also increase the risk of arbitrariness in decision-making – and hence, of arbitrary discrimination and WTO-incompatibility.

[288] Appellate Body Report, *US – Tuna II (Article 21.5) (2019)*, paras. 6.280-6.281.
[289] See paras. 2.110. - 2.111. above.
[290] See para. 2.111. above.
[291] NZF Act, Section 10, Article 4.
[292] See para. 2.110. above.
[293] See para. 2.113. above.

- **On verification methods**: It would be difficult for Rutenia to argue that the verification methods (laid down in Annex III to Section 10 of the NZF Act, and further elaborated in Implementing Regulation 7/2023) as applied to flat glass produced in Rutenia and flat glass imported from other countries do not result in "arbitrary or unjustifiable discrimination". Most notably, there seems to be no rational relationship (as per *Brazil – Retreaded Tyres*)[294] between the requirement that verifying entities be based in Rutenia and the climate conservation objective of the measure, particularly when recognition of third-party verification systems comparable in effectiveness is contemplated during the transition period.[295] However, creative arguments by teams should not be excluded – and panellists should probe these on the basis of the chapeau standards discussed above.

2.5.12 Arguments for Burlandia

2.117. Burlandia may argue:

- **On LDCs/SIDS exception**:

- The differential treatment between flat glass imported from Artania (exempted from carbon charge) and flat glass imported from Burlandia (subject to carbon charge) amounts to discrimination "between countries where the same conditions prevail". The relevant conditions prevailing in these countries are the same in light of the climate conservation objective of the measure, since a tonne of carbon emitted in Artania and a tonne of carbon emitted in Burlandia are equally harmful from a climate change perspective.

- The special status of LDCs/SIDS under the Paris Agreement is not motivated by the goal of mitigating climate change *per se*, but rather fairness considerations stemming from the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC). Hence, the rationale for the discrimination arising from the LDCs/SIDS exception is not rationally related to the climate conservation objective of the measure. To the contrary, exempting these countries from the carbon charge goes against the NZF Act's stated goals of "incentivising urgently needed emission-reduction action globally".[296]

- Even assuming production capacity and associated carbon emission risks are lower in LDCs/SIDS, the AB made clear in *Brazil – Retreaded Tyres* that any degree ("to however small a degree") of rational disconnect between the discrimination and the measure's objective is sufficient for a finding of arbitrary or unjustifiable discrimination under the chapeau.[297]

- **On carbon charge deduction**:

[294] See para. 2.110. above.
[295] NZF Act, Annex III to Section 10.
[296] NZF Act, Section 10, Article 1.
[297] See para. 2.110. above.

- The differential treatment between flat glass imported from Korsania (benefitting from carbon charge deduction) and flat glass imported from Burlandia (not benefitting from the carbon charge deduction) amounts to "arbitrary or unjustifiable discrimination". As per *US – Shrimp*, the deduction from the carbon charge is conditioned upon the adoption of essentially the same regulatory programme by exporting countries – i.e., *explicit* (or direct) carbon pricing.[298] This imposes a rigid and unbending standard for reducing carbon emissions and meeting the Paris temperature targets, without any inquiry into the appropriateness of explicit carbon pricing for the conditions prevailing in exporting countries.[299]

- To avoid arbitrary or unjustifiable discrimination, other climate policies that an exporting country may have adopted should be taken into account, provided these are comparable in effectiveness at reducing carbon emissions (as per *US – Shrimp (Article 21.5 – Malaysia)*).[300] Burlandia has introduced in July 2022 an energy excise tax on all fossil fuels used in the manufacturing and transportation sectors, which is a form of *implicit* carbon pricing since it increases the costs of burning fossil fuels – and, hence, of emitting GHGs into the atmosphere. In fact, a recent IMF report has estimated that Burlandia's energy excise tax in the manufacturing sector is "equivalent to emission-weighted average of USD 15 per tonne of CO2"[301] – and it should therefore qualify for the carbon charge deduction under Article 4 of Section 10 of the NZF Act.

- Following *US – Shrimp (Article 21.5 – Malaysia)*, the NZF Act should, at the very least, provide for a transparent procedure for assessing the comparability of explicit and implicit carbon policies.[302]

- **Note to panellists**: some complainant teams may also point to the fact that Burlandia is "home to one of the largest tropical rainforests on Earth, which is widely considered a critical pillar in maintaining global climate stability" and has adopted "a programme for the progressive phasing-out of all remaining fossil fuel subsidies by 2030".[303] However, how to compare these measures and explicit carbon pricing in terms of their effectiveness at reducing carbon emissions is less straightforward on the facts of the Case. Yet, creative arguments by teams are encouraged (e.g., that fossil fuels subsidies in Korsania erode the impact of its domestic carbon tax and amount to a form of compensation for energy-intensive industries).[304]

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[298] NZF Act, Section 10, Articles 4 and 3.1(iii); Clarification Questions (Q53, Q112).
[299] See para. 2.112. above.
[300] See para. 2.113. above.
[301] Clarification Questions (Q61). It is a 'real' fact that both the IMF and OCED recognise energy/fuel taxes as a form of implicit carbon pricing: see e.g., OECD, *Effective Carbon Rates 2023* (OECD Publishing, 2023), available at: https://www.oecd.org/tax/tax-policy/effective-carbon-rates-2023.htm.
[302] See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 146, where the AB noted the existence in the revised US measure of a procedure for a harvesting nation to demonstrate that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles.
[303] Case, paras. 5-6.
[304] Case, para. 8, referring to "Korsania spends twice as much on subsidising fossil fuels than renewable energy" and "attempts to phase out fossil fuel subsidies have been blocked in the national parliament amid fierce lobbying by the Korsanian business sector".

- **On verification methods**:

- The verification methods (laid down in Annex III to Section 10 of the NZF Act and further elaborated in Implementing Regulation 7/2023) as applied to flat glass produced in Rutenia and flat glass imported from other countries results in "arbitrary or unjustifiable discrimination". Most notably, the requirement that verifying entities be based in Rutenia bears no relationship with the climate conservation objective of the measure (as per *Brazil – Retreaded Tyres/EC – Seal Products*),[305] particularly when recognition of third-party verification systems comparable in effectiveness is contemplated during the transition period.[306]

- In addition, the verification process established in the Implementing Regulation 7/2023 does not respect due process requirements under the chapeau (as per *US – Shrimp/EC-Seal Products*).[307] In particular, the notions of "material misstatements" and "material non-conformities" are not clearly defined, and the exception from the obligation to conduct installation visits is ambiguous (Article 2), leaving broad discretion to verifying entities and making the process unpredictable for producers.

Suggested Questions to the Parties	
Burlandia (complainant)	**Rutenia (respondent)**
Is the special status of LDCs/SIDS a relevant "condition" for the purpose of the chapeau analysis?	Which "conditions" are relevant for comparing countries under the chapeau in the specific circumstances of this case?
Should Rutenia apply the carbon charge to imports from Artania and other LDCs/SIDS, ignoring their multilaterally-recognised special status under the Paris Agreement (Article 4.6)?	The rationale for the LDCs/SIDS exception in Article 5 of Section 10 of the NZF Act is their special status under the Paris Agreement (Article 4.6) – to what extent is this different from the status of developing countries under the Paris Agreement?
Should climate policies other than explicit carbon pricing benefit from the carbon charge deduction (under Article 4 of Section 10 of the NZF Act)? If your answer is yes, which policies and why?	Why is there a deduction from the carbon charge (under Article 4 of Section 10 of the NZF Act) only for explicit carbon prices paid in third countries exporting the covered goods to Rutenia? Should other policies to tackle climate change be taken into account?
What difference does the requirement that verifying entities be established in Rutenia (Annex III to Section 10 of the NZF Act) make to Burlandia, since it does not have the technical and administrative capacity to	What is the rationale for the requirement (in Annex III to Section 10 of the NZF Act) that verifying entities be established in Rutenia? How is it "rationally related" to the objective to the measure?

[305] See paras. 2.110. - 2.111. above.
[306] NZF Act, Annex III to Section 10.
[307] See para. 2.114. above.

monitor and verify carbon emissions within its territory (para. 6 of the Case)?	
	Why is recognition of third-country monitoring and verification systems that are comparable in effectiveness only contemplated until 31 December 2025 (as per Annex III to Section 10 of the NZF Act)?

ANNEX I

Whether the carbon charge is covered by Rutenia's WTO Schedule of Concessions

Note to panellists: As noted above, if Rutenia succeeds in establishing that the measure at issue falls under Article II:1(b) and not Article III:2 GATT, there is unlikely to be a finding of violation because Burlandia did not make any claim under Article II:1(b) GATT in its panel request. Nevertheless, we briefly address below the question of whether the carbon charge is consistent with Article II:1(b) GATT, which involves potentially interesting legal arguments. However, neither a 'real-life' WTO panel, nor the present Panel, should reach this stage of analysis for the reason described above.

Relevant WTO provision

Article II:1(b) GATT, second sentence, reads:

> […] Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.
>
> See also Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.[308]

Relevant jurisprudence

The second sentence of Article II:1(b) GATT provides that the products described in Part I of the Schedule relating to any WTO Member, which are the products of territories of other contracting parties shall be "exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

Pursuant Understanding on Interpretation of Article II:1(b) GATT 1994 (Understanding), the nature and level of any "other duties or charges" levied on bound tariff items shall be recorded in the Schedules of Concessions annexed to the GATT against the tariff item to which they apply.[309] For original WTO members, ODCs are recorded in the Schedules at the levels applying on 15 April 1994.[310] The recording of ODCs in the Schedules is without prejudice to their consistency with rights and obligations under the GATT.[311]

There is no definition of ODCs in the GATT and the jurisprudence on Article II:1(b), second sentence, is limited. Previous panels have determined what constitutes an ODC by exclusion. In particular, the Panel in *Dominican Republic – Import and Sale of Cigarettes* explained that any fee or

[308] We do not reproduce the full text of the Understanding in the bench memo for brevity purposes.
[309] Para. 1 the Understanding on Interpretation of Article II:1(b) of the GATT 1994.
[310] Para. 2 the Understanding on Interpretation of Article II:1(b) of the GATT 1994.
[311] Para. 5 the Understanding on Interpretation of Article II:1(b) of the GATT 1994.

charge that is in connection with importation, and that is not an ordinary customs duty, nor a tax or duty as listed under Article II:2 (internal tax, anti-dumping duty, countervailing duty, fees or charges commensurate with the cost of services rendered) would qualify for a measure as an ODC under Article II:1(b) GATT.[312]

Arguments for Burlandia

- Burlandia could argue that even if the carbon charge constitutes an ODC within the meaning of the second sentence of Article II:1(b) GATT, such an ODC is not covered by Rutenia's Schedule of Concessions. Burlandia could point out that paragraph 1 of the Understanding, which mandates that "any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply".

- In addition, Burlandia should argue that the language of Note 2 to Rutenia's Schedule of Concessions[313] cannot be interpreted to include the carbon charge. Pursuant to paragraph 2 of the Understanding, ODCs must be recorded in the Schedules at the level applying on 15 April 1994. The carbon charge was adopted only in July 2022, therefore it could not have been recorded in Rutenia's Schedule of Concessions.

- Moreover, Burlandia could argue that Note 2 covers a specific type of "environmental charges", i.e. those adopted "to prevent and control the release, discharge or emission of pollutants or environmental contaminants, including those taken to implement the Montreal Protocol on Substances that Deplete the Ozon Layer".

Arguments for Rutenia

- Rutenia should argue that the carbon charge is an ODC that has been properly recorded in Rutenia's Schedule of Concessions pursuant to paragraph 1 of the Understanding. Additionally, Rutenia could note that it is not inconsistent with the second sentence of Article II:1(b) GATT, since there is no dispute between the parties that the application of the carbon charge does not result in Rutenia's exceeding the bound rate for "other duties and charges" for glass and glassware under Rutenia's WTO Schedule of Concessions.[314]

- Rutenia should argue that the carbon charge is covered by Note 2 in the excerpt from Rutenia's Schedule of Concessions in Annex II of the Case. In particular, Rutenia should maintain that the carbon charge is an environmental charge, and that CO2 is a "pollutant" and/or an "environmental contaminant".[315] Moreover, Rutenia should point out the

[312] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.113-114. See also Appellate Body Report, *India – Additional Import Duties*, para. 151.
[313] Note 2 reads: "20% environmental charges, to prevent and control the release, discharge or emission of pollutants or environmental contaminants, including those taken to implement the Montreal Protocol on Substances that Deplete the Ozone Layer" (Case, Annex II).
[314] Case, para. 19.
[315] For example, the U.S. Clean Air Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and

reference to the Montreal Protocol in Note 2 is illustrative due to the use of the word "including". Finally, Rutenia could also point out that even though the carbon charge did not exist as of April 15, 1994 (as per para. 2 of the Understanding), the language of Note 2 is sufficiently broad to encompass it.

byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." (Title III, Section 7602(g)) This definition appears sufficiently broad to encompass CO2.

ANNEX II

Vienna Convention on the Law of Treaties

Article 31 GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) Leaves the meaning ambiguous or obscure; or
   (b) Leads to a result which is manifestly absurd or unreasonable.

RUTENIA – CARBON CHARGE

22ND EDITION OF THE JOHN H. JACKSON MOOT COURT COMPETITION

Addendum to the Bench Memorandum

1.1. In this document, we provide an update to the bench memo based on the recent panel report in *EU and Certain Member States – Palm Oil (Malaysia)*, which was adopted on 26 April 2024.

1.2. Of direct relevance to the moot case, the report confirms that trade-related measures aimed at reducing greenhouse gas (GHG) emissions, no matter where these are generated (i.e., at home or abroad), may fall within the scope of Article XX(b) and (g) GATT. Top-performing teams in the competition are expected to be familiar with the case and may rely on the panel's reasoning and findings in developing their argumentation (particularly for Rutenia).

1.1 Objective of the measure and Articles XX(b) and (g) GATT

1.3. In *EU and Certain Member States – Palm Oil (Malaysia),* the measures at issue concerned certain restrictions on the use of crop-based biofuels adopted by the EU (and two of its Member States) as part of its Biofuels Regime (i.e., 7% maximum share for food and feed crop-based biofuels to meet EU renewable energy target, criteria for determining high Indirect Land Use Change (ILUC)-risk feedstock, and the sustainability and GHG emission savings criteria).

1.4. In defining the objective of the challenged measures, the panel made the following observations:

> The Panel notes that the objective of any challenged measure in WTO dispute settlement proceedings could in principle be formulated and understood either in terms of its relatively narrow and direct objective, or in terms of one or more higher level objectives which are one or more steps removed from that relatively narrow and direct objective. For instance, in this case the objective of the specific measures at issue could in principle be formulated and understood in terms of the relatively narrow and direct objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. However, that relatively narrow and direct formulation of the objective of the specific measures at issue can be understood not as an end in and of itself, but as a means towards fulfilling the higher-level objective of mitigating climate change, which may in turn be understood as a means to fulfilling further higher-level objectives relating to the consequences of climate change on the planet and human, animal or plant life or health.[1]

1.5. In relation to 'related to the conservation of exhaustible natural resources' requirement under Article XX(g) GATT, the Panel considered that the objective of the measures at issue is:

> [T]o limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and

[1] Ibid., para. 7.220.

peatland. The objective of the 7% maximum share and the high ILUC-risk cap and phase-out therefore *prima facie* relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests, wetlands and peatland). Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considers that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.[2]

1.6. In relation to the 'necessary to protect human, animal or plant life or health' requirement under Article XX(b) GATT, the panel agreed with previous WTO reports[3] suggesting that measures addressing global warming and climate change may fall within the scope of Article XX(b) GATT, considering that:

> [G]lobal warming and climate change pose one of the greatest threats to life and health on the planet. The objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health.[4]

1.7. The panel thus found that the objective of the measures at issue fall within the scope of the objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g), as well as the objective of protecting human, animal or plant life or health within the meaning of Article XX(b).[5]

1.2 Connection between the objective and the Member's territory

1.8. With respect to the fact that (some) agricultural activities and associated ILUC-related GHG emissions occur outside the territory of the regulating WTO member (i.e., the EU), the Panel noted that:

> [T]he wording of Article 2.2 and Article XX do not speak to any territorial or jurisdictional limitation on the scope of the measures that may be examined thereunder, and Malaysia did not initially raise any issue in this regard in the context of presenting its arguments under Article 2.2 (or elsewhere) … Malaysia (then) stated that it would "draw the Panel's attention to the well-considered and helpful comments on this issue made by Colombia in its Third Party Submission", where Colombia argues that there is an implied jurisdictional limitation of Article XX of the GATT 1994. In these circumstances, the panel considered that its appraisal of the legitimacy of the objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels should take account of the fact that the agricultural activities and associated ILUC and ILUC-related GHG emissions in question are mostly expected to occur outside of the territory of the European Union.[6]

1.9. The panel further observed in this regard:

> Past rulings by panels and the Appellate Body under the TBT Agreement and the GATT 1994 have addressed situations in which the challenged measure distinguished between products on the basis of fishing and harvesting methods occurring outside of its own jurisdiction and territory. These cases include *US*

[2] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.276
[3] Appellate Body Report, *Brazil Retreaded Tyres*, para. 151; Panel Reports, *Brazil – Taxation*, para 7.880.
[4] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para 7.281.
[5] Ibid., paras. 7.277, 7.282.
[6] Ibid., para. 7.310.

> – *Shrimp*, *US – Tuna II (Mexico)*, and *EC – Seal Products*. These prior cases suggest that the fact that the interest being protected is situated outside the territory of the Member having adopted the measure is not, in itself, an obstacle to the possible justification of a measure under Article XX of the GATT 1994, or even under the TBT Agreement.
>
> At the same time, the Panel is mindful that in prior cases, panels and the Appellate Body have refrained from making any broad interpretative rulings on the existence of any implied jurisdictional or territorial limitation under Article 2.2 and Article XX. In *US – Shrimp* and *EC – Seal Products*, the Appellate Body assessed whether there was a "sufficient nexus" between the regulating Member and the activities being regulated.[7]

1.10. The panel recognized the global nature of climate change and a 'sufficient nexus' between the GHG emissions being regulated under the challenged measures and the EU's territory:

> [T]he measures at issue in this dispute are concerned with land use change as an issue related to GHG emissions, which are linked to climate change. Climate change is inherently global in nature. Therefore, there is a nexus between EU territory and the objective of limiting the risk of ILUC-related GHG emissions.[8]

1.11. The panel did not consider that the EU measures could be characterized as regulating GHG emissions outside the EU. Instead, it considered that:

> The measures seek to regulate whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets, and to address the adverse ILUC impacts that *EU demand* for crop-based biofuels could have. In this respect, the objective of RED II is to promote the use of renewable green energy in the EU transportation sector for environmental reasons and in particular to lower GHG emissions and to combat climate change; the European Union has assessed that the resulting increase in EU demand for crop-based biofuel could undermine that objective; and the measures therefore regulate EU demand for those products. Finally, the Panel observes that the ILUC-related GHG emissions from crop-based biofuels that the European Union is seeking to limit do not exclusively arise outside the European Union's borders and may very well occur also within the European Union's own territory.[9]

1.3 Contribution of the measure to its objective

1.12. In *EU and Certain Member States – Palm Oil (Malaysia)*, Malaysia argued that the EU overstated the contribution of the measures because the EU itself recognized that the measures "will affect only 'a drop in the ocean of palm oil world production and consumption, and the EU measures challenged by Malaysia are not capable of significantly affecting global trade in palm oil and palm oil biofuels'".[10] In rejecting Malaysia's argument, the panel stated the following:

> The Panel does not consider that the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make to their objective (i.e. limiting ILUC-related GHG emissions associated with crop-based biofuels)

[7] Ibid., paras. 7.312-7.313 (referring to Appellate Body Reports, *US – Shrimp*, para. 133; *EC – Seal Products*, para. 5.173).
[8] Ibid., paras. 7.314 and 7.316.
[9] Ibid., para. 7.315.
[10] Ibid., para. 7.356 (quoting European Union's first written submission, para. 838).

is undermined by the fact that the measures focus only on a relatively narrow aspect of the problem of GHG emissions, and directed only at the European Union's own demand and consumption of biofuels. It is often the case that a given measure will "only address [] a specific component of the overall risk" it pertains to. A fortiori, in the context of [] global issues like climate change and GHG emissions the assessment of whether a single measure taken by a single Member is apt to make a material contribution to its objective cannot be directed at the global impact of the measure in quantitative terms.

Rather, a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue". That is the case here. The measures seek to address certain negative externalities of the European Union's policy promoting the use of renewable energy sources in the transport sector. Therefore, insofar as the measures aim at correcting a specific aspect of that policy, it is to be expected that the measures' contribution will be limited to that specific element.[11]

1.4 Arguments for Rutenia

- The panel's findings in *EU and Certain Member States – Palm Oil (Malaysia)* mostly support the respondent's position in the present dispute. Teams representing Rutenia can therefore be expected to rely on these findings to support their arguments under Articles XX(g) or/and XX(b).

- In particular, relying on the panel's reasoning,[12] Rutenia could argue that the narrow objective of the carbon charge is to limit carbon emissions embedded in flat glass (and other covered products) through incentivizing "sustainable patterns of production and consumption in Rutenia", whereas the broader objective is to "further the goals of the Paris Agreement and address the climate crisis" (as reflected in the preamble to the NZF Act). Furthermore, as per the panel's findings,[13] Rutenia could argue that the measure at issue does not seek to regulate *production* activities occurring *outside* of Rutenia's territory. Instead, it is aimed at regulating Rutenia's demand for carbon-intensive flat glass and, thereby, limiting associated *global* GHG emissions (i.e., occurring inside and outside Rutenia), with the ultimate aim of combatting climate change.

- Rutenia could also rely on the panel's findings[14] to argue that the objective of reducing carbon emissions and addressing climate change falls squarely within the scope of objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g) and of protecting human, animal or plant life or health within the meaning of Article XX(b).

- Finally, Rutenia could rely on the panel's findings on contribution[15] to support its argument that although the expected global impact of the measure may be modest in quantitative terms (according to the impact assessment, the carbon charge is projected to reduce the level of CO2 emissions in the covered sectors in Rutenia by 8% by 2030, and in the other countries of the Intermarium region by 3% by 2030),[16] the measure is still apt to produce a material contribution to the objective pursued. Rutenia could argue that the measure's contribution is not undermined

[11] Ibid., para. 7.357 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.214; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210).
[12] See para. 1.4. above.
[13] See para. 1.11. above.
[14] See paras. 1.5. above.
[15] See para. 1.12. above.
[16] Clarification Questions (Q41).

by the fact that it seeks to limit demand for flat glass with high carbon intensity in Rutenia, because the measure is aimed at addressing a specific element of the overall risks associated with climate change.

1.5 Arguments for Burlandia

- In light of WTO jurisprudence and the facts of the Case, it would be difficult for Burlandia to contest Rutenia's arguments under the various elements of Articles XX(b) and XX(g) GATT, provided that these are well-reasoned and developed. When this is the case, Burlandia may concede on the relevant points (e.g. design and contribution) – and move directly to its argumentation under the chapeau of Article XX. At the same time, Burlandia should seek to exploit shortcomings in Rutenia's argumentation and use them to its own advantage.