



Team: 002 C

ELSA MOOT COURT COMPETITION ON WTO LAW

2008 - 2009

Ecoland–Measures Relating to Biofuels made from Pine Cones

Forestland
(Complainant)

VS

Ecoland
(Respondent)

SUBMISSION FOR THE COMPLAINANT

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II TABLE OF AUTHORITIES

A. WTO AGREEMENTS

1. *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).
2. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), and its Annexes, including:
 - i. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C.
 - ii. *General Agreement on Tariffs and Trade*, Annex 1A.
 - iii. *Agreement on Technical Barriers to Trade*, Annex 1A.
 - iv. *Agreement on Sanitary and Phytosanitary measures*, Annex 1A.
 - v. *Agreement on Subsidies and Countervailing Measures*, Annex 1A.
 - vi. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2.

B. OTHER TREATIES AND CONVENTIONS

3. *Convention on the Grant of European Patents*, opened for signature 5 October 1973, 1065 UNTS 199 (entered into force 7 October 1977).
4. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

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 16. **EC—Bananas (Mexico):** Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 803.
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 21. **EC—Tariff Preferences:** Panel Report, *European Communities—Conditions for the*

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III TABLE OF ABBREVIATIONS

ABR	Appellate Body Report
BC	Biofuel produced in a way that emits carbon
BCN	Biofuel produced in a way that does not emit carbon
BMR	<i>Forestland Biofuelled Machinery Regulation</i>
BVR	<i>Forestland Biofuelled Vehicles Regulation</i>
CTE	Committee on Trade and Environment
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
ECTR	<i>Ecoland Carbon Taxation Regulation</i>
EPC	<i>European Patent Convention</i>
FFC	ForestFuel Converter
GATT	<i>General Agreement on Tariffs and Trade</i>
GEMIT	Group on Environmental Measures and International Trade
GPR	GATT Panel Report
GWA	<i>Global Warming Agreement</i>
ISO	International Organization for Standardization
<i>Marrakesh Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
MFN	Most Favoured Nation
PPM	Process and production method
PR	Panel Report
Patent Regulation	The regulation issued under s 66.6 of the <i>Ecoland Patent Act</i>
Labelling Regulation	The regulation issued under the <i>Ecoland Protection Act</i>
SCM	<i>Agreement on Subsidies and Countervailing Measures</i>
TBT	<i>Agreement on Technical Barriers to Trade</i>
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WTO	World Trade Organization
WTO Agreements	The Marrakesh Agreement and the documents contained in its four Annexes

IV SUMMARY OF FACTS

1. Forestland, a WTO Member, produces 50% of the world's ForestFuel. Ecoland, another WTO Member, produces 80% of the world's RecycloFuel. RecycloFuel and ForestFuel are both monoalkyl ester biofuels that produce 50% less emissions than gasoline when burned. Ten other countries produce ForestFuel, while only one other country (Enviroland) produces RecycloFuel. Forestland and Ecoland reciprocally export their fuels. ForestFuel is cheaper than RecycloFuel in all markets.
2. Ecoland and Forestland are both signatories to the GWA, which mandates a 20% reduction in carbon emissions by 2025. Forestland is on track to meet its GWA obligations: it has introduced the BVR and BMR, which are regulations supporting the use of low emission biofuels; it has built hydroelectric dams to supply power to industry; and it has expansive pine forest to offset any emissions. Ecoland has also introduced regulations pursuant to its GWA commitments: the ECTR, the Patent Regulation, and the Labelling Regulation.
3. The ECTR taxes the sale of fuels according to their carbon footprint: gasoline is subject to a 20% tax; biofuels produced in a carbon-neutral manner ('BCNs') are subject to a 10% tax; and biofuels produced in a non-carbon-neutral manner ('BCs') are subject to a 13% tax. Ecoland classifies RecycloFuel as a BCN, as it is produced using solar power, and ForestFuel as a BC, based on the assertion that ForestFuel production, powered by hydroelectricity, causes carbon emissions. While scientific studies confirm that the substitution of fossil fuels for biofuels reduces emissions, there is no conclusive evidence that the production of RecycloFuel and ForestFuel results in different levels of carbon emissions.
4. The Labelling Regulation mandates the labelling of products according to the fuel used during their production. Category 1 labels are used for BCN fuelled production, Category 2 labels for BC fuelled production, and Category 3 labels for fossil fuelled production. These labels depict furry marmots and Ecolandian Fir trees. Products produced using RecycloFuel are in Category 1, while products produced using ForestFuel are in Category 2. The furry marmot is a large, cute rodent that lives in Ecoland's mountains.
5. Section 66.6 of the Ecoland Patent Act excludes from patentability 'inventions, the prevention of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment'. Under the Patent Regulation, Ecoland has excluded from patentability the FFC, a cheap device allowing conversion of any engine to burn ForestFuel.

V SUMMARY OF ARGUMENTS

Claim 1: The ECTR

The ECTR is inconsistent with Ecoland's obligations under GATT Art III:2

- Domestic RecycloFuel and imported ForestFuel are like products, and ForestFuel is taxed in excess of RecycloFuel. ForestFuel and RecycloFuel are also directly competitive or substitutable products, they are not similarly taxed, and the ECTR is applied so as to afford protection to domestic production of RecycloFuel.

The ECTR is inconsistent with Ecoland's obligations under GATT Art I

- RecycloFuel from Enviroland and ForestFuel from Forestland are like, and the former is advantaged under the ECTR. This advantage is conditional as it is based on factors that are inextricably linked to origin.

The ECTR is not justified under GATT Art XX (g), (b) or (d)

- The only relevant exhaustible natural resource is the furry marmot. However, the ECTR does not relate to their conservation. Moreover, the ECTR is not necessary to protect human, animal or plant life or health, and it is not necessary to secure compliance with a domestic law or regulation.
- Contrary to the *chapeau*, the ECTR is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between RecycloFuel from Ecoland and Enviroland, and ForestFuel from Forestland. Moreover, the ECTR constitutes a disguised restriction on international trade.

The ECTR is inconsistent with SCM Art 3.1(b)

- The ECTR grants a subsidy, defined according to revenue foregone by the Ecolandian government for RecycloFuel that is otherwise due for ForestFuel, which confers a benefit on the producers of RecycloFuel. The subsidy is prohibited as it is granted contingent upon the use or purchase of domestic RecycloFuel over imported ForestFuel.

Claim 2: The Patent Regulation

The Patent Regulation is inconsistent with TRIPS Art 27.1

- The FFC is new, involves an inventive step, and is capable of industrial application. A patent must be available, because the Art 27.2 exclusion does not apply. Preventing its commercial exploitation within Ecoland is not necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.

Claim 3: The Labelling Regulation*The Labelling Regulation is inconsistent with TBT Art 2.1*

- The Labelling Regulation falls within the scope of TBT as it is a technical regulation.
- There is no valid distinction between Category 1 and Category 2 products, thus they are like, and Forestlandian products are treated less favourably.

The Labelling Regulation is inconsistent with TBT Art 2.2

- The Labelling Regulation is more trade-restrictive than necessary to achieve Ecoland's legitimate objective of reducing carbon emissions to protect human, animal or plant life or health.

The Labelling Regulation is inconsistent with TBT Art 2.4

- ISO 14020 is an international standard 'relevant' to the Labelling Regulation. ISO 14020, Principle 5 requires a life-cycle assessment. This was not used as a basis for the Labelling Regulation, even though such an assessment is not ineffective or inappropriate to achieve Ecoland's legitimate objective.

The Labelling Regulation is inconsistent with GATT Art III:4

- Both the labelled products, and RecycloFuel and ForestFuel are 'like products' affected by the Labelling Regulation. Category 2 products from Forestland are treated less favourably, moreover the effect of the Labelling Regulation is to treat ForestFuel less favourably.

The Labelling Regulation is inconsistent with GATT Art I

- The Category 1 labels accord an advantage to imported products manufactured on machinery fuelled with RecycloFuel, which is not accorded unconditionally to like products from Forestland made with ForestFuel.

The Labelling Regulation is not justified under GATT XX (g), (b) or (d)

- The Labelling Regulation does not relate to the conservation of any exhaustible natural resource. Moreover, it is not necessary to protect human, animal or plant life or health, or to secure compliance with a domestic law or regulation.
- Contrary to the *chapeau*, the Labelling Regulation is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between products produced on machinery that run on RecycloFuel from Ecoland and Enviroland, and those that run ForestFuel from Forestland. Moreover, the Labelling Regulation constitutes a disguised restriction on international trade.

VI IDENTIFICATION OF THE WTO MEASURES AT ISSUE

Measure 1: The ECTR, which taxes fuels according to type and production process.

Measure 2: The Patent Regulation under Section 66.6 of the Ecoland Patent Act, under which the FFC has been excluded from patentability.

Measure 3: The Labelling Regulation under the Ecoland Protection Act, which mandates labelling of all products in Ecoland according to the type of fuel used in their production.

VII LEGAL PLEADINGS

INTERPRETATION AND APPLICABLE LAW

1. The Panel has jurisdiction to hear this claim pursuant to DSU Arts 1.1, 7.1 and 7.2, and must accordingly resolve the dispute using the applicable law of the WTO Agreements. The Panel may not hear claims or defences based in other law, such as the GWA, as this dispute cannot be used to ‘determine rights and obligations outside the covered agreements’.¹

2. In any case, the GWA does not alter the obligations of the parties under the WTO Agreements as it is not a permissible *inter se* modification under VCLT Art 41. It does not fall under Art 41(1)(a) as the WTO Agreements do not explicitly allow for such *inter se* modifications. In any case, other parties have not been notified: Art 41(2). Moreover, a modification of Ecoland’s WTO obligations is not allowed under Art 41(1)(b)(i), as it would affect the rights of ForestFuel-producing Members who are not GWA parties.

3. There is also no conflict requiring recourse to VCLT Art 30, as it is possible to interpret both treaties together without conflict,² and Ecoland *can* and *must* comply with both treaties in good faith: VCLT Art 26. The GWA does not ‘contract out’ of prior WTO obligations as it is silent on WTO-consistency, and as such WTO norms ‘fill in’ the GWA on trade issues.³

4. DSU Art 3.2 and VCLT Art 31(3)(c) mandate interpretive recourse to other sources, however, this does not extend to concepts that are yet to be recognised as international *law*. This includes the ‘precautionary approach’: Ecoland is free to act cautiously where scientific evidence is inconclusive, however, it cannot invoke this approach to justify otherwise WTO-inconsistent action.⁴ In any case, this approach would only reverse the burden of proof in showing environmental harm, which Forestland has duly discharged.

CLAIM 1: ECTR

¹ ABR, *Mexico – Soft Drinks*, [56]; DSU, Arts 3.4, 11; Trachtman (2004), 139; Marceau (2001), 1102.

² PR, *Indonesia – Autos*, [14.99]. See also ABR, *Guatemala – Cement*, [65]; ABR, *US – Steel*, [51].

³ Pauwelyn (2003), 201–2; Oppenheim (1992), 1275.

⁴ ABR, *EC – Hormones*, [123]-[124]; PR, *EC – Biotech*, [7.88].

1. The ECTR is inconsistent with GATT Art III:2, first sentence

5. The ECTR imposes a tax of 13% on BCs and 10% on BCNs. All ForestFuel sold in Ecoland is imported and categorised as a BC, while the like product RecycloFuel (the majority of which is domestically produced) is categorised as a BCN. This categorisation is *de facto* origin-specific,⁵ notwithstanding that Enviroland also produces RecycloFuel.⁶

1.1. RecycloFuel and ForestFuel are like products

6. The category of ‘like’ products in Art III:2, first sentence, is determined on a case-by-case basis, according to: physical characteristics, nature and quality, end-uses, consumer tastes and preferences, and tariff classification.⁷ While these criteria are not closed, in the context of Art III:2, ‘likeness’ is to be narrowly construed.⁸ Likeness must emphasise physical characteristics, as only characteristics that affect the inherent character of the product are relevant.⁹ Applying these criteria, ForestFuel and RecycloFuel are ‘like’ products.

7. ForestFuel and RecycloFuel are both monoalkyl ester biofuels. Both emit 50% less carbon than gasoline when burned. Both are used in machines and vehicles. The fuels differ in superficial ‘organoleptic’ characteristics such as colour, but these are not relevant criteria.¹⁰

8. RecycloFuel and ForestFuel have the same tariff classification under the Harmonized System. Unilateral variations in tariff classification ‘may lend themselves to abuse [and] discrimination among like products originating in different contracting parties’.¹¹ Thus, the Harmonized System carries more weight than Ecoland’s unilateral classification when determining likeness. In any case, the tariff classification is only decisive when all else is equal,¹² which is not the case here.

9. Moreover, while consumers prefer biofuels as environmentally friendly alternatives to fossil fuels, they do not distinguish between biofuels. Any difference in consumer preference between the fuels results from an attempt by the Ecolandian government to ‘crystallize’

⁵ ABR, *Canada – Periodicals*, 29; PR, *EC – Bananas (Mexico)*, [7.334].

⁶ Ehring (2002), 971; Fauchald (1998), 219.

⁷ ABR, *Japan – Alcoholic Beverages II*, 20–1.

⁸ ABR, *Japan – Alcoholic Beverages II*, 20.

⁹ GPR, *US – Tuna (Mexico)*, [5.11]; GPR, *US – Tuna (EEC)*, [5.9]; PR, *US – Gasoline*, [6.12].

¹⁰ GPR, *Spain – Coffee*, [3.10]; ABR, *Japan – Alcoholic Beverages II*, 23.

¹¹ GPR, *Japan – SPF Lumber*, [5.9].

¹² ABR, *EC – Asbestos*, [146]; ABR, *Japan – Alcoholic Beverages II*, 22; Fauchald (2003), 462.

consumer taste;¹³ rather than reflect a pre-existing preference.

10. The ECTR distinguishes between RecycloFuel and ForestFuel according to PPMs that are unrelated to the inherent character of the fuels. Rather, it relates to Forestlandian policy, practice and natural resources. This is inconsistent with Art III:2, which concerns only characteristics of *products* and not the characteristics of policies and production practices of countries.¹⁴ The term ‘like products’ in Art III:2 is to be interpreted in light of its context and the object and purpose of GATT: VCLT Art 31(1).¹⁵ The characterisation of ForestFuel according to its PPM conflicts with the purpose of Art III (as reflected in Art III:1) as it is a disguised restriction based on origin.¹⁶ It also conflicts with the objective of the WTO as an *economic* forum, which confers no right on Ecoland to ‘impose their standards’ extra-territorially.¹⁷ Moreover, rejection of PPMs as a criterion of likeness is confirmed, under VCLT Art 32, by the circumstances surrounding negotiation of GATT 1994, in which a PPM-based distinction was explicitly included in TBT and SPS but not GATT 1994.¹⁸ This omission in GATT is clear and meaningful,¹⁹ as it follows the *US – Tuna* cases, in which a PPM-based distinction was explicitly rejected.²⁰ While PPM-based measures have been justified under GATT Art XX, they must be confined and have limited operation therein, as Art XX is specifically designed to evaluate legitimate environmental regulations.²¹

1.2. The ECTR taxes ForestFuel at 13%, ‘in excess’ of the 10% rate for RecycloFuel

11. *Any* amount of taxation of imported products that exceeds like domestic products is inconsistent with Art III:2, first sentence; there is no *de minimis* threshold.²² Accordingly, the 3% additional tax on ForestFuel compared with RecycloFuel violates that sentence.

¹³ PR, *Japan – Alcohol Beverages II*, [5.7]; PR, *EC – Sardines*, [7.127].

¹⁴ GPR, *US – Tuna (EEC)*, [5.8]; Ruggiero (1997); Charnovitz (2002), 105.

¹⁵ DSU, Art 3.2; ABR, *US – Gasoline*, 17; ABR, *US – Gambling*, [291].

¹⁶ Jackson (2000), 304.

¹⁷ *Understanding the WTO* (2008), 66; OECD (1997), 19; Ruggiero (1997).

¹⁸ TBT, Annex 1.1, 1.2; SPS, Art 5(2), Annex A(1).

¹⁹ Gaines (2002), 417-18; Condon (2006), 63; see ABR, *Japan – Alcoholic Beverages II*, 23.

²⁰ GPR, *US – Tuna (Mexico)*, [5.11]; GPR, *US – Tuna (EEC)*, [5.9].

²¹ ABR, *US – Shrimp*, [187]; Charnovitz (2002), 101; Pauwelyn (2004), 586; Condon (2006), 68.

²² ABR, *Japan – Alcoholic Beverages II*, 23.

2. The ECTR is inconsistent with GATT Art III:2, second sentence, clarified in Ad Art III

2.1. ForestFuel and RecycloFuel are directly competitive or substitutable

12. As ForestFuel and RecycloFuel fall within the subset of like products they necessarily fall within the superset of directly competitive or substitutable products.²³ In any case, the fuels satisfy the ‘decisive criterion’: they have ‘common end-uses ... as shown by elasticity of substitution’.²⁴ Although biofuelled machines are normally set to run on a specific biofuel, the fuels are ‘capable of being substituted’, even if imperfectly.²⁵ Given a differential in cost, consumers will, over time, substitute biofuels indirectly via the substitution of engines. Similarly, a differential in fiscal treatment will increase consumption of the favoured fuel. Moreover, RecycloFuel and ForestFuel, as monoalkyl esters, are *directly* substitutable in biodiesel blends, which can be used in any diesel engine.²⁶ Thus, they have, or will have, elasticity of substitution. Low cost biofuel converters, like the FFC, enhance substitutability.

2.2. ForestFuel and RecycloFuel are not similarly taxed

13. The ECTR subjects ForestFuel and RecycloFuel to a dissimilar tax rate. The term ‘not similar’ in *Ad Art III* implies a *de minimis* threshold, which must be determined on a case-by-case basis in light of the context of Art III:2.²⁷ For Art III:2 to provide consistent protection,²⁸ the *de minimis* threshold must be directly related to the level of competition, as differential taxes may alter that relationship to different degrees.²⁹ Given the relationship between RecycloFuel and ForestFuel, the threshold must be relatively low; a difference of only a few cents per litre of fuel may have a large effect on consumer preference, even for imperfectly substitutable products. Thus, a 3% difference affects the competitive relationship between RecycloFuel and ForestFuel; it is not *de minimis*, and is inconsistent with Art III:2.

2.3. The ECTR is applied so as to afford protection to domestic production

14. Art III:2, second sentence, explicitly refers to Art III:1, incorporating the obligation not to apply a measure ‘so as to afford protection to domestic production’. Adherence to this

²³ ABR, *Korea – Alcoholic Beverages*, [114], [118]; ABR, *Canada – Periodicals*, 28.

²⁴ PR, *Japan – Alcoholic Beverages II*, [6.22]; ABR, *Japan – Alcoholic Beverages II*, 25.

²⁵ ABR, *Korea – Alcoholic Beverages*, [114].

²⁶ National Biodiesel Board (2009), Standard ASTM D 6751.

²⁷ ABR, *Japan – Alcoholic Beverages II*, 27; ABR, *EC – Frozen Chicken*, [238]; VCLT, Art 31(1).

²⁸ GPR, *US – Superfund*, [5.1.9]; ABR, *Japan – Alcoholic Beverages II*, 16.

²⁹ Neven (2001), 423.

obligation is tested objectively, according to the ‘design, architecture and revealing structure’ of the measure.³⁰ While the ECTR expressly seeks to reduce carbon emissions pursuant to Ecoland’s GWA commitments, it manifests no such *objective* intention.³¹ In fact, the design of the ECTR reveals an *overwhelming* favouring of domestic production: it categorises biofuels according to a criterion corresponding to geographic distribution; and, crucially, the categorisation of ForestFuel as a BC rather than a BCN makes no contribution to Ecoland’s GWA commitments as it pertains to Forestland’s emissions.

3. The ECTR is also inconsistent with GATT Art I:1

15. The ECTR, being a matter referred to in GATT Art III:2, falls within the scope of GATT Art I:1. It accords an advantage by levying 3% less tax on BCNs; this advantage goes to Envirolandian RecycloFuel but it is not accorded ‘immediately and unconditionally’ to like ForestFuel imported from Forestland.

3.1. RecycloFuel and ForestFuel are ‘like products’

16. The ‘accordion of likeness’ stretches differently between different GATT provisions, and likeness is determined on a case-by-case basis, depending, *inter alia*, on the purpose of the provision concerned.³² One purpose of Art I is to ensure that tariff concessions are not undermined. As such, tariff classifications are ‘often dispositive’ of likeness at Art I.³³ Given the fuels’ identical classifications in the Harmonized System, they are ‘like products’.

3.2. The advantage is only accorded conditionally

17. The advantageous tax rate is not unconditional as it imposes conditions ‘not related to the imported product itself’,³⁴ but rather to Forestland’s ‘situation or conduct’.³⁵ While the ECTR does not explicitly discriminate between countries, fuel refinement is inextricably linked to origin, as demonstrated by Enviroland’s use of solar power against Forestland’s use of hydro-electricity. The ECTR *de facto* discriminates³⁶ between Envirolandian RecycloFuel and Forestlandian ForestFuel, as only Enviroland is able to meet the ECTR’s

³⁰ ABR, *Japan – Alcoholic Beverages II*, 27, 29.

³¹ PR, *Chile – Alcoholic Beverages*, [71].

³² ABR, *Japan – Alcohol II*, 21.

³³ Kennedy (2005), 104; Jackson (1969), 263–4; GPR, *Spain – Coffee*, [4.8]; WPR, *Australia – Ammonium Sulphate*, [8].

³⁴ PR, *Indonesia – Autos*, [14.143].

³⁵ ABR, *Canada – Autos*, [10.23].

³⁶ GPR, *EEC – Imports of Beef*; PR, *Canada – Autos*, [10.23].

conditions.

4. Moreover, the ECTR is not justified under GATT Art XX

18. Ecoland bears the burden of justifying the ECTR under GATT Art XX. It cannot discharge this burden: specifically, it cannot show that the ECTR is provisionally justified under GATT Art XX(g), (b) or (d) or that its application is consistent with the *chapeau*.³⁷

4.1. The ECTR is not provisionally justified under Art XX(g)

4.1.1. The ECTR does not 'relate to' the conservation of Ecolandian furry marmots

19. While Ecolandian furry marmots are 'exhaustible natural resources' within the meaning of Art XX(g), the ECTR does not have a 'substantial relationship' with the goal of their conservation.³⁸ It does not 'clearly and directly' conserve furry marmots,³⁹ as it merely aims to change consumer choice and consequently producer behaviour.⁴⁰ Compared to the import ban in *US – Shrimp* that was directly related to the end sought, a 3% sales tax differential is not directly tailored to achieve a change in producer behaviour. Even if the change does occur, there is no conclusive scientific evidence that it will reinvigorate the furry marmots' breeding cycle, as other populations of the same species have been able to adapt.

4.1.2. There are no other relevant exhaustible natural resources

20. Ecolandian Fir trees are not *exhaustible*, as the introduction of foreign furry marmots will assist their germination. Moreover, no international treaty indicates that they are threatened with extinction.⁴¹ The migratory birds that inhabit the Fir forest are also not exhaustible. There is no evidence that they are threatened with extinction or that they cannot adapt.

21. Unlike in *US – Shrimp*, the climate, while no doubt an environmental problem, has itself not been explicitly recognised as a natural resource.⁴² While 'clean air' has been described as a 'natural resource', as it has 'value',⁴³ this provides little guidance when determining the exhaustible status of the climate, as anything can have value.

4.2. The ECTR is not provisionally justified under Art XX(b)

³⁷ ABR, *US – Gasoline*, 22; ABR, *US – Shrimp*, [118]-[119].

³⁸ ABR, *US – Gasoline*, 19; ABR, *US – Shrimp*, [141].

³⁹ ABR, *US – Shrimp*, [138], [140].

⁴⁰ GPR, *US – Tuna (EEC)*, [5.23]-[5.27].

⁴¹ ABR, *US – Shrimp*, [130].

⁴² Cf ABR, *US – Shrimp*, [130].

⁴³ PR, *US – Gasoline*, [6.37].

22. The ECTR is not ‘necessary to protect human, animal or plant life or health’, weighing and balancing: the importance of the interests protected; the contribution of the measure to the regulatory goal pursued; and the impact on international trade.⁴⁴ Although it is important to protect life and health, a 3% tax differential, which affects competition between RecycloFuel and ForestFuel, is apt to make only a ‘marginal or insignificant’ contribution to emissions reduction. Moreover, there is no conclusive evidence that ForestFuel production is not carbon-neutral. Conversely, the ECTR has a *de facto* restrictive effect on imported goods.

23. Moreover, there is a ‘reasonably available’ alternative that is less GATT-inconsistent.⁴⁵ A measure that categorises fuels according their emissions in refinement, use, and carbon-offset measures would not discriminate in terms of origin, and would achieve the same, if not a higher level of protection than the ECTR. It would also impose no extra cost upon Ecoland as it could simply verify the information supplied by producers.

4.3. The ECTR is not provisionally justified under Art XX(d)

24. The national environmental law is the only relevant ‘law or regulation’, as international treaties such as the GWA fall within the scope of Art XX(d) only to the extent explicitly incorporated into the domestic legal system.⁴⁶ The ECTR does not ‘secure compliance’ with the national environmental law, as the latter merely establishes the objective of preserving furry marmot habitat. It does not create concrete obligations with which compliance could be secured.⁴⁷ *A fortiori* the ECTR is not necessary to secure compliance with it.⁴⁸

4.4. In any case, the ECTR is inconsistent with the Art XX chapeau

4.4.1. Application of the ECTR entails ‘arbitrary or unjustifiable discrimination’

25. Although ‘arbitrary’ or ‘unjustifiable’ discrimination constitute separate standards, they have been determined according to identical factors,⁴⁹ and the ECTR contravenes both. RecycloFuel and ForestFuel are taxed differently even though the ‘same conditions prevail’ in Ecoland and Forestland: both are produced in a manner that ultimately results in no carbon emissions. This discrimination is ‘arbitrary or unjustifiable’ because the classification

⁴⁴ ABR, *Korea – Beef*, [164]; ABR, *Brazil – Tyres*, [141]-[143].

⁴⁵ ABR, *EC – Asbestos*, [170]; ABR, *US – Gambling*, [306]; ABR, *DR – Cigarettes*, [72].

⁴⁶ ABR, *Mexico – Soft Drinks*, [79]; PR, *China – Autos*, [7.288]; PR, *US – Gambling*, [6.538].

⁴⁷ GPR, *EEC – Parts and Components*, [5.14]-[5.18]; PR, *China – Autos*, [7.315].

⁴⁸ ABR, *Mexico – Soft Drinks*, [74].

⁴⁹ PR, *Brazil – Tyres*, [7.225].

of a biofuel does not need to be, nor was it with respect to ForestFuel, based on specific, objective, scientific criteria.⁵⁰ ForestFuel was categorised as a BCN notwithstanding scientific uncertainty and the contrary scientific finding that any carbon emissions are offset and reduced. Only Ecoland has claimed that ForestFuel production emits carbon. This categorisation is '[b]ased on mere opinion or preference'; it is not 'just' or 'reasonable'.⁵¹

26. Moreover, Ecoland has not made serious attempts to negotiate a bilateral or multilateral solution to carbon emissions.⁵² It did attempt to negotiate carbon footprint obligations under the GWA; however, a 'one-off' attempt is not sufficient; negotiations must be a 'continuous process'.⁵³ Pursuing negotiations is not considered a reasonably available alternative under the Art XX paragraphs;⁵⁴ nevertheless, Ecoland's failure to conduct bilateral negotiations with Forestland (despite the latter's clear environmental concern as demonstrated by its GWA negotiations and the BVR and BMR) indicates a lack of good faith.

4.4.2. The ECTR is a 'disguised restriction on international trade'

27. Arbitrary or unjustifiable discrimination can also be a disguised restriction on international trade.⁵⁵ Moreover, the 'design, architecture and revealing structure' of the ECTR reveals an 'intention' to 'conceal the pursuit of trade-restrictive objectives'.⁵⁶ The ECTR does not require classification of fuel on the basis of scientific information. Thus, under the guise of an environmental measure, Ecoland can make trade-restrictive decisions.

5. The ECTR is inconsistent with SCM Art 3.1(b)

5.1. The ECTR awards a 'subsidy' within the meaning of SCM Art 1.1

5.1.1. The Ecoland government makes a 'financial contribution'

28. In connection with RecycloFuel, Ecoland foregoes revenue that is 'otherwise due': SCM Art 1.1(a)(1)(ii). What is 'otherwise due' depends on an appropriate benchmark, determined according to the prevailing rules of taxation in Ecoland,⁵⁷ which are set out in the ECTR. As

⁵⁰ PR, *EC – Tariff Preferences*, [7.232].

⁵¹ PR, *Brazil – Tyres*, [7.257], [7.259].

⁵² ABR, *US – Shrimp*, [166]; PR, *US – Shrimp (21.5)*, [5.66].

⁵³ PR, *US – Shrimp (21.5)*, [5.67], [6.1]; ABR, *US – Shrimp (21.5)*, [152].

⁵⁴ ABR, *US – Gambling*, [317].

⁵⁵ ABR, *US – Gasoline*, 23; PR, *EC – Asbestos*, [8.237].

⁵⁶ PR, *EC – Asbestos*, [8.236]; PR, *US – Shrimp (21.5)*, [5.142]; PR, *Brazil – Tyres*, [7.330].

⁵⁷ ABR, *US – FSC*, [90].

there is no other fiscal measure to provide a 'defined, normative benchmark', it is legitimate to compare the fiscal treatment of RecycloFuel against ForestFuel, given the similarities between the fuels.⁵⁸ Thus, the 3% differential constitutes revenue foregone for RecycloFuel.

5.1.2. The financial contribution confers a 'benefit' on the producers of BCNs

29. A financial contribution amounts to a subsidy if it confers a benefit: Art 1.1(b). However, the recipient of a subsidy is determined according to the recipient of the benefit; the financial contribution need not be made to the same legal entity.⁵⁹ Thus, a benefit need not result directly from the financial contribution; it can be conferred indirectly. Any other interpretation renders SCM liable to circumvention by technical domestic means. The ECTR grants a financial contribution at the point of sale, which indirectly benefits, and thus subsidises, RecycloFuel producers. In any event, since the financial contribution 'manifests a strongly positive relationship' with RecycloFuel, a benefit is conferred regardless of the quantity or proportion of that contribution attributable to RecycloFuel producers.⁶⁰

30. Existence of benefit is determined according to whether a financial contribution directly or indirectly places the recipient in a better position than they would have otherwise been in the marketplace,⁶¹ including where a financial contribution confers a competitive advantage.⁶² This approach is consistent with the purpose of the SCM, which is concerned with the trade-distorting potential of subsidies,⁶³ and confirmed by negotiating history.⁶⁴ As RecycloFuel and ForestFuel have high cross-price elasticity, the financial contribution by the Ecoland government affects their competitive relationship. RecycloFuel producers are placed in a better market position; they may enjoy a relative increase in sales, or an increase in wholesale cost to account for the 3% differential tax, providing a 3% windfall in profit.

5.2. The ECTR subsidy is 'specific' according to SCM Arts 1.2 and 2.3

31. As the ECTR falls under Art 3.1(b), it is 'specific' (Art 2.3), and subject to Part II (Art 1.2).

5.3. The ECTR subsidy is 'prohibited' according to SCM Art 3.1(b)

⁵⁸ ABR, *US – FSC (Article 21.5 – EC)*, [90].

⁵⁹ ABR, *US – CVDs on Certain EC Products*, [161]; ABR, *US – Lead and Bismuth II*, [75].

⁶⁰ PR, *US – Upland Cotton*, [7.1119].

⁶¹ PR, *US – Upland Cotton*, [7.1118]; ABR, *US – Upland Cotton*, [763].

⁶² Grossman and Mavroidis (2003), 198–9; VCLT, Art 31(1).

⁶³ ABR, *Canada – Aircraft*, [157]; ABR, *Japan – DRAMS (Korea)*, [225]; Stewart (1993), 811.

⁶⁴ WTO, *Discussion Paper No 6* (1990), 13; VCLT, Art 32.

32. SCM Art 3.1(b) prohibits subsidies that are either *de jure* or *de facto* contingent ‘upon the use of domestic over imported goods’.⁶⁵ The ECTR subsidy is contingent on consumer substitution of RecycloFuel (predominantly a domestic product) for imported ForestFuel. Thus, the ECTR is *de facto* contingent upon the use of domestic over imported goods.

33. Given the context and purpose of SCM, ‘use’ in Art 3.1(b) includes ‘purchase’.⁶⁶ SCM restricts subsidies that distort trade and affect the competitive relationship between products.⁶⁷ A narrow definition of ‘use’ would not apply to many situations in which a subsidy upsets the market. If purchasers favour RecycloFuel over ForestFuel due to the ECTR, it is their *purchase* that upsets the competitive relationship between the products, not any specific use of the fuel. As the ECTR is contingent upon this purchase, it is prohibited.

34. Subsidies that are granted to producers contingent upon use by a third party fall under Art 3.1(b).⁶⁸ Accordingly, it makes no difference that the ECTR subsidy is contingent on the conduct of the recipient of the financial contribution (the purchaser) rather than the recipient of the benefit (RecycloFuel producers).

CLAIM 2: THE PATENT REGULATION

6. The Patent Regulation is inconsistent with TRIPS Art 27.1

35. A patent must be available to the FFC as it is ‘new’, involves an ‘inventive step’ and is ‘capable of industrial application’ under TRIPS Art 27.1.

6.1. Preventing the commercial exploitation of the FFC does not protect ‘human, animal or plant life or health’ or ‘avoid serious prejudice to the environment’ under TRIPS Art 27.2

36. As indicated by the word ‘including’, the examples in Art 27.2 are ‘specifications’ that clarify the scope of ‘*ordre public* or morality’.⁶⁹ They do not establish discrete bases for patent exclusion. The ordinary meaning of ‘*ordre public* or morality’ is ambiguous in the TRIPS context,⁷⁰ however, its application is informed by the EPC,⁷¹ which requires ‘conclusively-

⁶⁵ ABR, *Canada – Autos*, [143].

⁶⁶ VCLT, Art 31(1); see, eg, ABR, *US – Upland Cotton*, [542].

⁶⁷ Preparatory Committee (1986), 56-7; *Evaluation des L’Uruguay Round – GATT* (1990), 13.

⁶⁸ ABR, *US – Upland Cotton*, [763].

⁶⁹ Van Overwalle (2005), 221; Watal (2001), 97; VCLT, Art 31(1).

⁷⁰ Matsushita *et al* (2006), 726.

⁷¹ Art 53(a). See Negotiating Group (1990), 85; Haugen (2009), 348; VCLT, Art 32.

documented hazards⁷² in order to invoke this exception. This interpretation furthers the ‘effective and adequate protection of intellectual property rights’, recognised in the TRIPS preamble, by limiting the capacity of members to invoke this exclusion excessively.

37. Thus, there must be ‘conclusively-documented hazards’ to human, animal or plant life or health, or a ‘conclusively-documented’ serious prejudice to the environment in order for Ecoland to invoke this exclusion. Here, there is no conclusive scientific evidence that ForestFuel increases carbon emissions, falling far short of the standard required. Even if TRIPS requires a lower standard of proof, the similarly-worded exception in GATT Art XX(b) still requires a clear, scientifically-supported risk,⁷³ which does not exist here.

6.2. Prevention of the commercial exploitation of the FFC is not ‘necessary’

38. Even if Ecoland could meet the above examples, it cannot show the necessity of preventing the FFC’s commercial exploitation, as Ecoland has not in fact banned the FFC. To exclude the FFC from patentability without such a ban precludes the claim of necessity.⁷⁴ In any event, exclusion is not ‘necessary’. TRIPS Art 27.2 is to be interpreted ‘harmoniously’ with the weighing and balancing approach to necessity in GATT Art XX(b),⁷⁵ as the WTO Agreements are ‘an *inseparable package*’.⁷⁶

39. Reducing carbon emissions is important, but preventing the commercial exploitation of the FFC makes no contribution to this end. The FFC reduces carbon emissions by converting gasoline engines to burn ForestFuel, which emits 50% less carbon. Preventing the commercial exploitation of the FFC is clearly trade-restrictive, as it operates upon the *solely* imported FFC, and ForestFuel. Moreover, there is a reasonably available alternative that is TRIPS-consistent: granting a patent to the FFC, subjecting it to a sales tax, and directing the proceeds of that tax to research and development of a RecycloFuel Converter. This achieves the same or a higher level of protection of the environment, because it reduces the use of gasoline, and helps to develop other fuel converters, thus promoting innovation.

CLAIM 3: REGULATION UNDER THE ECOLAND PROTECTION ACT

7. The Labelling Regulation is inconsistent with TBT

⁷² *Plant Genetic Systems* (T 0356/93-334), [18.7].

⁷³ Cf GPR, *Thailand – Cigarettes*, [73]; ABR, *EC – Asbestos*, [162], [166]; PR, *Brazil – Tyres*, [7.77].

⁷⁴ Straus (1996), 182; Weissman (1996), 1100; Correa (1994), 328; (1998), 193; Foster (1998), 290; McCabe (1998), 51; Watal (2001), 97; Gervais (2003), [2.262]; Nowak (2005), 917.

⁷⁵ TRIPS, Preamble; PR, *India – Patents (US)*, [7.19]; PR, *US – Section 110(5)*, [6.185].

⁷⁶ ABR, *Argentina – Footwear Safeguards*, [81].

7.1. The Labelling Regulation is a 'technical regulation' under TBT

40. The Labelling Regulation is mandatory, applies to all manufactured products, and lays down a labelling requirement, which is a 'means of identification' and thus a 'product characteristic'.⁷⁷ Accordingly, it is a technical regulation under TBT.⁷⁸

41. On one interpretation, the Labelling Regulation does not fall under TBT because it is based on a PPM (the choice of fuel) that is not discernible in the end product. Annex 1.1, first sentence, arguably excludes such regulations by referring to 'product characteristics or their related process or production methods'. However, this interpretation is not supported by Annex 1.1 when read as a whole. Annex 1.1, second sentence, states that technical regulations 'also include ... labelling requirements as they apply to a product, process or production method'. This last phrase does not restrict the types of labelling requirements covered; it explains to what the label is affixed or applies.⁷⁹ Thus, all labelling requirements fall under TBT. This is consistent with the French text: 'en matière ... d'étiquetage, pour un produit ou une méthode de production'.⁸⁰

42. Even if the final phrase does limit the category of 'labelling requirements', it does not do so based on those PPMs related and unrelated to the end product. Unlike Annex 1.1, first sentence, the second sentence does not qualify PPM with the term 'their related'. This omission must be given meaning,⁸¹ and indicates that it extends to PPMs not reflected in the end product. The word 'also' confirms that the second sentence supplements the first. Thus, there is no basis for excluding the Labelling Regulation from the coverage of TBT.

7.2. The Labelling Regulation is inconsistent with TBT Art 2.1

43. Article 2.1 reflects National Treatment and MFN principles. While this provision itself has not been examined, GATT Arts I and III case law is pertinent. This conclusion is supported by the TBT Preamble, which states that TBT 'further[s] the objectives of GATT'.

7.2.1. Category 1 and Category 2 products are 'like'

44. The Labelling Regulation differentiates solely according to the fuel used in production. Regardless of the exact products affected, the Labelling Regulation *as such* applies to like

⁷⁷ ABR, *EC – Asbestos*, [67]; PR, *EC – Trademarks*, [7.448]; Marceau and Trachtman (2002), 861.

⁷⁸ TBT, Annex 1.1; ABR, *EC – Asbestos*, [68], [70]; ABR, *EC – Sardines*, [176].

⁷⁹ PR, *EC – Trademarks*, [7.449].

⁸⁰ Emphasis added. *Marrakesh Agreement*, Art XVI:6; VCLT, Art 33(1).

⁸¹ ABR, *Japan – Alcoholic Beverages II*, 18.

products as it depends on extraneous, non-product related factors. The products affected are thus 'like', as they are 'in principle the same'.⁸²

7.2.2. The Labelling Regulation violates the National Treatment and MFN principles

45. The phrase 'no less favourable' requires 'effective equality of opportunities for imported products'.⁸³ The Labelling Regulation has affected the products' competitive opportunities, as a consumer will prefer more attractively labelled products.⁸⁴

46. The Labelling Regulation is *de facto* discriminatory, as the burden of the measure falls 'disproportionately' upon imported goods.⁸⁵ Most Forestland companies use ForestFuel in their biofuelled machinery, thus many of their exports will fall into Category 2. Ecolandian products will fall predominantly into Category 1 as Ecolandian manufacturers are more likely to use locally produced RecycloFuel, particularly given the ECTR. While there is no current data on imports from other countries, Category 2 labelling disadvantages Forestlandian products *vis-a-vis* other imported products as a whole, since more products from other countries may fall under Category 1.⁸⁶

7.3. The Labelling Regulation is inconsistent with TBT Art 2.2

47. While the Labelling Regulation may pursue a legitimate objective of protecting life or health by reducing carbon emissions, it creates 'unnecessary obstacles to international trade'; it is 'more trade-restrictive than necessary' taking into account 'the risks non-fulfilment would create'. TBT Art 2.2 should be interpreted harmoniously with GATT Art XX(b) due to their similar wording and purpose, as confirmed by the drafting history.⁸⁷ Under GATT Art XX(b), necessity is determined by a 'weighing and balancing' process.

48. Although the goal of reducing carbon emissions is important, the Labelling Regulation is only apt to make a 'marginal or insignificant'⁸⁸ contribution to the reduction of carbon emissions. It addresses only the type of fuel used in manufacture, and not whether the machinery, other aspects of the production method, the use of the product itself, transport,

⁸² GPR, *US – Non-Rubber Footwear*, [6.12]; see also PR, *EC – Trademarks*, [7.265].

⁸³ GPR, *US – Section 337*, [5.11]; ABR, *EC – Asbestos*, [97].

⁸⁴ PR, *DR – Cigarettes*, [7.179], [7.194].

⁸⁵ PR, *Japan – Alcoholic Beverages II*, [5.9]; see also Ehring (2002), 924-5.

⁸⁶ GPR, *Spain – Coffee*, [4.10]–[4.11].

⁸⁷ GEMIT (1994) [3], [7]; VCLT, Art 32.

⁸⁸ ABR, *Brazil – Tyres*, [150].

or its disposal produce emissions. Moreover, the Labelling Regulation hinders the trade in products from Forestland, given that Forestland predominantly uses ForestFuel. The marginal contribution does not outweigh this restrictive impact on imported goods.

49. There are reasonably available labelling alternatives that achieve the same or higher level of protection; for example, life-cycle assessments or more informative labelling. These provide consumers with more accurate information, and are less GATT-inconsistent as they are less discriminatory. Life-cycle assessments do not impose 'prohibitive costs or substantial technical difficulties'⁸⁹ as Ecoland can implement a self-assessment mechanism for suppliers, so that it need only verify compliance. This imposes mere administrative difficulties that do not render an alternative not 'reasonably available'.⁹⁰

7.4. The Labelling Regulation is inconsistent with TBT Art 2.4

50. ISO 14020 is a relevant 'international standard' under TBT Annex 1.2, as it provides guidelines for labelling requirements intended 'for common and repeated use', and it was approved by an international body.⁹¹ ISO 14020 is 'relevant as it sets out principles for all environmental labels, which thus includes the Labelling Regulation.'⁹²

51. ISO 14020 was not used 'as a basis for' the Labelling Regulation. ISO 14020, Principle 5, provides that labels shall consider 'all relevant aspects of the life cycle of the product'. The Labelling Regulation contradicts this by focusing on one factor: the carbon emitted in refining the fuel used by the machinery that produced the product.⁹³

52. ISO 14020 is not 'ineffective or inappropriate' to achieve the Regulation's objectives. A life-cycle assessment considers the total carbon footprint of a product, which is a better means to achieve the ultimate goal of reducing carbon emissions. It is also not 'inappropriate' because it is 'specifically suitable for the fulfilment of the legitimate objective[s] pursued.'⁹⁴ 'Fundamental technological problems', under TBT Art 2.4, do not prevent Ecoland from implementing a life-cycle assessment, as claimed under Art 2.2.

8. The Labelling Regulation is inconsistent with GATT Art III:4

⁸⁹ ABR, *US – Gambling*, [308]; ABR, *Brazil – Tyres*, [156].

⁹⁰ PR, *US – Gasoline*, [6.26], [6.28]; ABR, *EC – Asbestos*, [169].

⁹¹ PR, *EC – Sardines*, [7.63].

⁹² ABR, *EC – Sardines*, [229], [231].

⁹³ ABR, *EC – Sardines*, [248].

⁹⁴ ABR, *EC – Sardines*, [285].

8.1. The Labelling Regulation affects the internal sale of products in Ecoland

53. Any regulation that directly or indirectly affects sale is subject to Art III:4 review.⁹⁵ ‘Affecting’ has been interpreted broadly⁹⁶ to include all measures that ‘might adversely modify the conditions of competition between the domestic and imported products’.⁹⁷ The differential labelling of products fulfils this requirement.⁹⁸ Unlike the import ban in *US – Tuna (Mexico)*, labelling affects the sale of products directly,⁹⁹ and thus falls under Art III:4.

8.2. The Labelling Regulation treats like Forestlandian products less favourably

54. Even if the Labelling Regulation is TBT-consistent, it may be GATT-inconsistent as the obligations are cumulative.¹⁰⁰ As claimed under TBT Art 2.1, Ecoland has breached this national treatment provision in relation to Category 1 and Category 2 products.

8.3. The Labelling Regulation also treats ForestFuel less favourably than RecycloFuel

55. Likeness is determined similarly to likeness under GATT Art III:2, however, it is evaluated in light of the competitive relationship of the products.¹⁰¹ RecycloFuel and ForestFuel are physically like, sharing those properties ‘that are likely to influence [their] competitive relationship’.¹⁰² As explained in Claim 1, their end-uses and tariff classification are the same, and consumer preference is shaped by the Labelling Regulation, not reflected in it. This is shown by the use of emotive labels instead of unadorned factual information.

56. The Labelling Regulation accords imported ForestFuel less favourable treatment than the like domestic RecycloFuel. It modifies their conditions of competition¹⁰³ by creating a ‘disincentive’ for manufacturers to use ForestFuel over RecycloFuel,¹⁰⁴ due to the negative labelling afforded to products made with ForestFuel, and its associated effect on sales.

⁹⁵ PR, *India – Autos*, [7.305].

⁹⁶ See, eg, ABR, *EC – Bananas III*, [211], [220]; ABR, *US – FSC (Article 21.5 – EC)*, [210].

⁹⁷ GPR, *Italy – Agricultural Machinery*, [12]; PR, *Canada – Autos*, [10.80].

⁹⁸ ABR, *DR – Cigarettes*, [7.171]; PR, *EC – Trademarks*, [7.227]; CTE (1995), [6].

⁹⁹ GPR, *US – Tuna (Mexico)*, [5.14]; PR, *US – Autos*, [5.45]; Howse and Regan (2000), 256-7.

¹⁰⁰ PR, *EC – Asbestos*, [8.16]; ABR, *EC – Asbestos*, [83]; Koebele (2007), 183.

¹⁰¹ ABR, *EC – Asbestos*, [101], [103], [109].

¹⁰² ABR, *EC – Asbestos*, [114].

¹⁰³ ABR, *Korea – Beef*, [137].

¹⁰⁴ PR, *India – Autos* [7.210]; PR, *China – Autos*, [7.270]; ABR, *China – Autos*, [196].

9. The Labelling Regulation is also inconsistent with GATT Art I

57. The Labelling Regulation falls within the scope of Art I as a matter referred to in GATT Art III:4. It accords the advantage of a Category 1 label to some imported products, but not to any of the like products imported from Forestland and made on ForestFuelled machinery. As explained in Claim 1, Art I emphasises tariff classification when evaluating likeness, and this, in addition to the claims made under TBT Art 2.1 shows that the products are like.

58. This advantage imposes the same origin-linked conditionality as the ECTR, which, as claimed under TBT Art 2.1, is ‘discriminatory *vis-à-vis*’ products originating in Forestland.¹⁰⁵

10. Moreover, the Labelling Regulation is not justified under Art XX

10.1. The Labelling Regulation is not provisionally justified under Article XX(g), (b) or (d)

59. The Labelling Regulation is not provisionally justified under Art XX(g) for the same reasons as the ECTR. Additionally, the Labelling Regulation does not have a ‘substantial’ relationship to the conservation of furry marmots or the climate as it does not take into account a product’s carbon emissions throughout its life-cycle.

60. Moreover, it is not provisionally justified under Art XX(d) for the same reasons as the ECTR, nor under Art XX(b) for the reasons claimed under Claim 1 and TBT Art 2.2.

10.2. The Labelling Regulation is inconsistent with the *chapeau*

61. The discrimination between Categories is ‘arbitrary or unjustifiable’, as certification is not based on sufficient scientific or other objective, specific information.¹⁰⁶ Moreover, similar to the measure found to be arbitrary and unjustifiable in *US – Shrimp*, the Labelling Regulation does not accord ‘basic fairness and due process’. There is no ‘formal opportunity’ to respond; no ‘formal written, reasoned decision’; no specific notification of decisions beyond publication on a website, even though producers may submit evidence and request on-site inspections. It also makes decisions with ‘little or no flexibility’ without consideration of the conditions prevailing’ in Forestland, particularly the offsetting schemes.¹⁰⁷ Judicial review is remedial and does not address the underlying deficiencies of the Labelling Regulation.

62. Like the ECTR, the Labelling Regulation is a ‘disguised restriction on international trade’. While it is ostensibly designed to reduce carbon emissions, it does not adopt a scientifically-supported approach and instead uses criteria that disfavors foreign industry.

¹⁰⁵ GPR, *Spain – Coffee*, [4.10]–[4.11].

¹⁰⁶ PR, *EC – Tariff Preferences*, [7.232].

¹⁰⁷ ABR, *US – Shrimp*, [177] – [181], [165].

VIII REQUEST FOR FINDINGS

Forestland requests that the Panel find that:

1. The ECTR is inconsistent with GATT Arts I and III:2 and cannot be justified under the GATT Art XX exceptions. It is also inconsistent with SCM Arts 3.1(b) and 3.2.
2. The Patent Regulation is inconsistent with TRIPS Art 27.1, as exclusion of the FFC from patentability cannot be justified under Art 27.2.
3. The Labelling Regulation is inconsistent with TBT Arts 2.1, 2.2, and 2.4, and GATT Arts I and III:4, and it cannot be justified under the GATT Art XX exceptions.

Therefore, Forestland requests that the Panel recommend to the DSB that Ecoland bring the ECTR, the Patent Regulation and the Labelling Regulation into conformity with its obligations under the WTO Agreements.