



Team: 002 R

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 RESPONDENT

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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:
 - i. *General Agreement on Tariffs and Trade*, Annex 1A.
 - ii. *Agreement on Technical Barriers to Trade*, Annex 1A.
 - iii. *Agreement on Subsidies and Countervailing Measures*, Annex 1A.
 - iv. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C.
 - v. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2.

B. OTHER INTERNATIONAL AGREEMENTS

3. *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983).
4. *Convention on the Grant of European Patents*, opened for signature 5 October 1973, 1065 UNTS 199 (entered into force 7 October 1977).
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 18. **Canada—Periodicals:** Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449.
 19. **Canada—Pharmaceutical Patents:** Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, 2289.
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 21. **DR—Cigarettes:** Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005.
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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
GPR	GATT Panel Report
CTBT	Committee on Technical Barriers to Trade
CTE	Committee on Trade and Environment
ECTR	<i>Ecoland Carbon Taxation Regulation</i>
EPC	<i>Convention on the Grant of European Patents</i>
GAPTS	<i>Global Agreement for the Protection of Threatened Species</i>
GATT	<i>General Agreement on Tariffs and Trade 1947</i>
GEMIT	Group on Environmental Measures and International Trade
GWA	<i>Global Warming Agreement</i>
Marrakesh Agreement	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
OECD	Organisation for Economic Cooperation and Development
PPM	Process and production methods
PR	Panel Report
Patent Regulation	The regulation issued under s 66.6 of the Ecoland Patent Act
Labelling Regulation	The regulation issued under the Ecoland Protection Act
SCM	<i>Agreement on Subsidies and Countervailing Measures</i>
SPS	<i>Agreement on Sanitary and Phytosanitary Measures</i>
TBT	<i>Agreement on Technical Barriers to Trade</i>
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
USTR	United States Trade Representative
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WTO Agreements	The <i>Marrakesh Agreement</i> and the documents contained in its four Annexes

IV SUMMARY OF FACTS

1. Over the past 5 years, climate change has had a significant impact on the environment and economy of Ecoland, a developing-country WTO Member. The warmer weather has disrupted the breeding cycle of the Ecolandian furry marmot. Moreover, Ecolandian Fir forests, which are reliant on the furry marmot population for germination, are diminishing in number. The fir forest is also an important habitat for migratory birds. The reduced snowfall has affected alpine tourism, which is an important source of jobs and revenue.
2. Ecoland is party to the GWA, which mandates 20% reduction in carbon emissions by 2025. Despite the lack of agreement on specific rules relating to biofuel footprints, Ecoland remains concerned about the impact of biofuel use. Ecoland, and another WTO Member, Enviroland, produce RecycloFuel, a biofuel made from recycled vegetable-based cooking oil. Forestland, a developed country WTO Member, produces ForestFuel, a biofuel made from pine cones. Forestland and Ecoland export their biofuels to each other.
3. When burned, both RecycloFuel and ForestFuel produce 50% less emissions than gasoline. RecycloFuel is refined using emission-free solar power. In contrast, ForestFuel is refined using hydroelectricity from dams that have flooded large areas of wilderness. This is responsible for an increase in carbon emissions through deforestation and as decomposing plant material in flooded areas releases carbon dioxide.
4. The GWA allows parties regulatory autonomy in determining how to reduce these emissions, and Ecoland has accordingly introduced a range of measures.
5. The ECTR taxes fuels according to their carbon footprint. Conventional gasoline is subject to a 20% sales tax; emission-halving biofuels are subject to a 10% sales tax; and fuels produced in a manner that creates carbon emissions are subject to an additional 3% sales tax. ForestFuel, but not RecycloFuel, is subject to the extra tax.
6. The Labelling Regulation mandates ecolabeling of products according to the fuel used in their production. Products manufactured using biofuels produced without emissions fall under Category 1, and are labelled as 'Furry Marmot Friendly'; products manufactured using other biofuels fall under Category 2, and are 'Unhappy Furry Marmot'; products produced using fossil fuels fall under Category 3, and are 'Furry Marmot Unfriendly'.
7. The Patent Regulation 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 this Regulation, Ecoland refused a patent for the FFC, which is a cheap device allowing conversion of any engine to burn ForestFuel.

V SUMMARY OF ARGUMENTS

Claim 1: The ECTR

The ECTR is consistent with GATT Art III:2

- The ECTR does not accord National Treatment, either in law or in fact. RecycloFuel and ForestFuel are not 'like' products nor are not 'directly competitive or substitutable' products. Moreover, they are similarly taxed and the ECTR is not applied 'so as to afford protection to domestic production'.

The ECTR is consistent with GATT Art I:1

- While the ECTR accords an advantage, it is accorded immediately and unconditionally to all like products. Moreover, ForestFuel and RecycloFuel specifically are not like.

In the alternative, the ECTR falls within the GATT Art XX exceptions

- The ECTR relates to the conservation of exhaustible natural resources: furry marmots and a liveable climate. Moreover, the ECTR is made effective in conjunction with restrictions on domestic production or consumption.

- The ECTR is necessary to protect human, animal or plant life or health by reducing carbon emissions and thus, mitigating the risk posed by global warming.

- The ECTR is not applied in a manner constituting arbitrary or unjustifiable discrimination between RecycloFuel from Ecoland and Enviroland and ForestFuel from Forestland. Moreover, the ECTR is not a 'disguised restriction on international trade'.

The ECTR is not inconsistent with SCM Art 3.1(b)

- The ECTR does not grant a subsidy to RecycloFuel producers as there is no financial contribution and no benefit to conferred. Moreover, the ECTR does not operate contingent upon the use of domestic over imported goods.

Claim 2: The Patent Regulation

The FFC is excluded from patentability under TRIPS Art 27.2

- The FFC is new, involves and inventive step, and is capable of industrial application. However, preventing its commercial exploitation within Ecoland is necessary to protect *ordre public* or morality, specifically, to protect human, animal or plant life or health, and to avoid serious prejudice to the environment. Thus, Ecoland may exclude the FFC from patentability

The Patent Regulation is consistent with TRIPS Art 27.1, second sentence

- By excluding the FFC from patentability, Ecoland has not discriminated as to the place of invention, the field of technology, and whether products are imported or locally produced.

Claim 3: The Labelling Regulation*The Labelling Regulation falls outside of the scope of the TBT*

- The Labelling Regulation is not a technical regulation, standard, or conformity assessment procedure.

In the alternative, the Labelling Regulation is consistent with TBT Art 2.1, 2.2 and 2.4

- The Labelling Regulation upholds the MFN and National Treatment required by TBT Art 2.1, as it does not distinguish between like products, and it does not treat products of one country any less favourably than those of another.

- The Labelling Regulation pursues the legitimate objective of protecting human, animal or plant life or health by reducing carbon emissions. It achieves this in a manner no more trade-restrictive than necessary.

- Ecoland is not obliged to use ISO 14020 as a basis for the Labelling Regulation. A life-cycle assessment, as required in Principle 5, is inappropriate to achieve Ecoland's objective.

The Labelling Regulation is consistent with GATT Art III:4

- This is not a 'regulation affecting the internal sale' of ForestFuel and RecycloFuel, thus no claim can be brought in respect of their treatment. In any case, they are not like.

- With respect to the labelled products, they are also unlike because of their different PPMs, and the effects of the labelling regulation are not felt specifically by any country.

The Labelling Regulation is consistent with GATT Art I:1

- There is no advantage accorded to RecycloFuel, as it is too far removed from the measure, and the advantage accorded to Category 1 products is attributable solely to consumer choice, not to the Ecoland. If there is any advantage, it is unconditional, as it makes no distinction based in origin.

In the alternative, the Labelling Regulation falls within the GATT Art XX exceptions

- The Labelling Regulation relates to the conservation of exhaustible natural resources: furry marmots and a liveable climate. Moreover, the Labelling Regulation is made effective in conjunction with restrictions on domestic production or consumption.

- The Labelling Regulation is necessary to protect human, animal or plant life or health by reducing carbon emissions and thus mitigating the risk posed by global warming.

- The Labelling Regulation is not applied in a manner constituting arbitrary or unjustifiable discrimination between RecycloFuel from Ecoland and Enviroland and ForestFuel from Forestland. Moreover, the Labelling Regulation is not a 'disguised restriction on international trade'.

VI IDENTIFICATION OF WTO MEASURES AT ISSUE

Measure 1: The ECTR, which taxes fuels according to their carbon emissions and the carbon emitted in their refinement.

Measure 2: The Patent Regulation under the Ecoland Patent Act, which excludes the FFC from patentability.

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

VII LEGAL PLEADINGS

CLAIM 1: THE ECTR

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

1.1: RecycloFuel and ForestFuel are not 'like' products per Art III:2

8. Art III:2, first sentence, prohibits *any* excess taxation of imported over like domestic products. Consequently the category of 'likeness' is *very* narrowly construed.¹ Likeness is determined case-by-case, considering: physical characteristics, nature and quality; consumer tastes and preferences; end-use; and tariff classification. However, this list is not closed.²

9. While RecycloFuel and ForestFuel have the same end-use, they have different physical characteristics: they have different chemical compositions and different organic origins. RecycloFuel is of a higher quality: it is more volatile, yet burns less rapidly, thus providing more power from less fuel; it is also more easily compressed and thus cheaper to transport.

10. RecycloFuel and ForestFuel have different tariff classification numbers under Ecoland's 8-digit system. As the importing country, Ecoland's tariff classification is more appropriate to determine 'likeness'; this expansion beyond the Harmonized System is acceptable, as it accords to objective criteria, and is for a legitimate purpose.³ Ecoland is 'free to use [its] own definitions according to [its] individual requirements'.⁴

11. RecycloFuel and ForestFuel differ according to the level of carbon emitted in relation to their PPMs. This is a relevant, independent criterion for determining likeness, even when PPMs do not affect the inherent character of the final product. First, this interpretation is consistent with the text and context of GATT: VCLT Art 31(1). This does not preclude PPMs

¹ ABR, *Japan – Alcoholic Beverages II*, 21, 26.

² ABR, *Japan – Alcoholic Beverages II*, 20–2, 25.

³ GPR, *Japan – SPF Lumber*, [5.13]; ABR, *EC–Tariff Preferences*, [183]; Mavroidis (2007), 128.

⁴ WTO, *Understanding the WTO* (2008).

at likeness:⁵ Second, the ostensible rejection of PPMs relies only on the authority of unadopted GATT Panel Reports, which provide ‘useful guidance’ only and are not binding.⁶ Third, since those cases, *Marrakesh Agreement Preamble* and WTO case law⁷ have recognised the need to accommodate goals of environmental protection and sustainable development in the multilateral trading system, and thus, interpret likeness in light of these concerns.

12. The Panel should also interpret the WTO Agreements consistently with international law, including applicable treaties: VCLT Art 31(1).⁸ The GWA evinces a global concern with carbon emissions, which are not only confined to a product’s current physical characteristics, but rather its production, use and disposal.⁹ Thus, this recognised threat of climate change necessitates a broader interpretation of likeness, in light of these contemporary environmental concerns.¹⁰ Finally, PPMs should not be isolated to Art XX; this reverses the burden of proof and limits exceptions to a narrow and exhaustive list.¹¹

13. In any case, consumers distinguish between RecycloFuel and ForestFuel according to their PPMs. Consumer tastes and preferences are shaped by known product risks.¹² Ecolandians are particularly sensitive to these issues, as evinced by their national environmental law, national flag, and reliance on alpine tourism. Whether PPMs are considered explicitly, or through consumer preferences, the fuels are not like.

2: The ECTR is consistent with GATT Art III:2, second sentence, as clarified in Ad Art III 2.1: RecycloFuel and ForestFuel are not directly competitive or substitutable

14. RecycloFuel and ForestFuel are not directly substitutable since they cannot be used interchangeably in the same engine. Thus they are not directly competitive as an increase in the price of one would not *directly* increase demand for the other.¹³ Any competition or

⁵ Howse and Regan (2000), 262; Snape and Lefkovitz (1994), 796.

⁶ ABR, *Japan–Alcoholic Beverages II*, 14-15; see GPR, *US – Tuna (Mexico)*; GPR, *US-Tuna (EEC)*.

⁷ ABR, *US – Gasoline*, 29-30; ABR, *US–Shrimp*, [129], [131], [185]; PR, *US – Shrimp (21.5)*, [7.2].

⁸ PR, *Korea – Government Procurement*, [7.96]; ABR, *EC – Biotech*, [7.69]; Pauwelyn (2003), 203; Trachtman (2005), 136; *Case Concerning Namibia*, [53]; *Fragmentation Report* (2006), [423].

⁹ OECD (1997), 9; Charnovitz (2002), 76–8.

¹⁰ Condon (2006), 22–5; Marceau (2001), 1096.

¹¹ Horn and Mavroidis (2004), 55.

¹² ABR, *EC – Asbestos*, [122].

¹³ ABR, *Japan – Alcoholic Beverages II*, 25; Goco (2006), 331.

substitutability between fuels can only occur *indirectly* through the substitution of engines.

2.2: RecycloFuel and ForestFuel are similarly taxed

15. Products are similarly taxed if a tax differential falls below a *de minimis* threshold, which must be determined on a case-by-case basis.¹⁴ ‘*De minimis*’ means that something is ‘of little or no importance’.¹⁵ Thus, a *de minimis* tax differential is one that will have little or no trade effect, which will depend upon the competitive relationship between products. A weaker relationship requires a higher threshold. Since RecycloFuel and ForestFuel are, if at all, only very broadly and indirectly competitive, the threshold must be correspondingly high. A 3% tax will not cause immediate change in consumer habits, and is thus below *de minimis*.

2.3: The ECTR is not applied so as to afford protection to domestic production

16. The ECTR’s ‘design, architecture and revealing structure’¹⁶ objectively shows that it is not applied so as to afford protection. The ECTR taxes fuels proportionately to their carbon footprint, which is consistent with its express purpose to reduce carbon emissions. Its enactment pursuant to Ecoland’s GWA undertakings manifests Ecoland’s good faith,¹⁷ and also objectively confirms its stated purpose, which is ‘intensely pertinent’ to the determination that it is not applied so as to afford protection.¹⁸

3: The ECTR advantages ‘like products’ unconditionally, consistent with GATT Art I

3.1: RecycloFuel from Enviroland and ForestFuel are not ‘like products’

17. The term ‘like products’ has different meanings in different GATT provisions.¹⁹ Tariff classification, particularly the importing country’s, is significant in Art I.²⁰ As above, Ecoland’s classification system legitimately classifies RecycloFuel and ForestFuel as unlike.

3.2: The advantage is accorded to all countries unconditionally

18. That the 10% tax rate requires fuels to meet a condition does not mean that it violates Art I:1: this provision merely prohibits differential treatment of countries.²¹ Conditions only

¹⁴ ABR, *Japan – Alcoholic Beverages II*, 27.

¹⁵ Goode (2007), 121.

¹⁶ ABR, *Japan – Alcoholic Beverages II*, 29.

¹⁷ VCLT, Art 26; Marceau (2001), 1098.

¹⁸ ABR, *Chile – Alcoholic Beverages*, [71]; ABR, *Canada – Periodicals*, 30, 32; Regan (2002), 476.

¹⁹ ABR, *Japan – Alcoholic Beverages II*, 21.

²⁰ GPR, *EEC – Animal Feed Proteins*, [4.20]; WPR, *Australia – Ammonium Sulphate*, [8].

²¹ GPR, *EEC – Minimum Import Prices*, [4.19].

violate this requirement if they were ‘not based on any characteristic of the product but depended exclusively on the origin of the product’.²² The ECTR applies to all countries and fuels equally; it only differentiates based on the product’s carbon footprint, and not origin.

4: In any case, the ECTR is justified under GATT Art XX

19. The ECTR is justified under Art XX, as it satisfies the two-tier analysis: it is provisionally justified under Art XX(g) or (b) and it is consistent with the Art XX *chapeau*.²³ It is not precluded from justification solely because it is a measure that differentiates between products according to their PPM.²⁴

4.1: The ECTR relates to the conservation of an exhaustible natural resource: Art XX(g)

20. The ECTR is clearly ‘made effective in conjunction with restrictions on domestic production or consumption’ as it applies even-handedly to all fuels.²⁵

21. Natural resources with a ‘sufficient nexus’ to Ecoland include ‘living species’ such as furry marmots.²⁶ This species is clearly ‘exhaustible’: it is not reproducing, and is listed in GAPTS as threatened with extinction. GAPTS can ‘provide evidence of the ordinary meaning’ of exhaustible, notwithstanding that Forestland is not a party to it.²⁷ While *other* furry marmots can reproduce, it is not necessary for the entire species to be capable of depletion to find that a subgroup is exhaustible.²⁸ The ECTR ‘relates to’ furry marmot conservation as it seeks to reduce carbon emissions to halt global warming, which has a ‘substantial relationship’ to the marmot’s breeding cycle.²⁹

22. The ECTR thus also ‘relates clearly and directly’³⁰ to climate conservation. The current climate, like ‘clean air’,³¹ is an exhaustible natural resource. The meaning of ‘natural

²² PR, *US – EC Products*, [6.54]; PR, *Canada – Autos*, [10.29]; PR, *Indonesia – Autos*, [14.147].

²³ ABR, *US – Gasoline*, 22; ABR, *US – Shrimp*, [118]-[119].

²⁴ ABR, *US – Shrimp*, [121]; ABR, *US – Shrimp (21.5)*, [138].

²⁵ ABR, *US – Gasoline*, 19-20; ABR, *US – Shrimp*, [144].

²⁶ ABR, *US – Shrimp*, [128], [133].

²⁷ PR, *EC – Biotech*, [7.94]; ABR, *US – Shrimp*, [132].

²⁸ GPR, *US – Canadian Tuna*, [4.9]; GPR, *Canada – Herring and Salmon*, [4.4].

²⁹ ABR, *US – Gasoline*, 19; ABR, *US – Shrimp*, [141].

³⁰ ABR, *US – Shrimp*, [138], [140].

³¹ PR, *US – Gasoline*, [6.37].

resource' is 'evolutionary'; it may thus be interpreted in light of current international law,³² as it varies with 'contemporary concerns of the community of nations about the protection and conservation of the environment.'³³ The GWA shows that exhaustibility of the current climate is one such concern. Whether or not there is an implied 'jurisdictional limitation' to Art XX(g),³⁴ the climate has a 'legal nexus' to Ecoland as it forms the subject matter of the GWA, to which Ecoland is a party.³⁵ Moreover, any impact on the climate directly affects Ecoland, as evidenced by the effect on the furry marmots.

4.2: Alternatively, the ECTR is provisionally justified under Art XX(b)

23. The ECTR protects 'human, animal or plant life or health' as it is designed to reduce carbon emissions, in order to mitigate the actual risk³⁶ posed by global warming.³⁷ While not 'indispensable', the ECTR is 'necessary' for that protection, given: the importance of the interests protected; the contribution to its goal; and its minimal impact on trade.³⁸ Forestland must show that there is a reasonably available, less trade restrictive, alternative that achieves the Ecoland's desired level of protection;³⁹ it cannot do so.

24. First, the ECTR protects fundamental interests: the protection of human life and health from the life-threatening consequences of global warming is 'vital and important in the highest degree', and environmental protection is 'important'.⁴⁰ As protection against global warming is of great importance, Ecoland has a broader margin of appreciation in designing its measure.⁴¹ Second, as it encourages the purchase of BCN engines, the ECTR makes a 'material, not merely marginal or insignificant' contribution to the reduction of carbon

³² *Gabcíkovo—Nagyomoros Case*, [140]; Pauwelyn (2003), 203; Gardiner (2008), 252.

³³ ABR, *US – Shrimp*, [129]-[130].

³⁴ GPR, *US – Tuna (Mexico)*, [5.32]; GPR, *US – Tuna (EEC)*, [5.20]; ABR, *US – Shrimp*, [134].

³⁵ Condon (2006), 195, 197.

³⁶ PR, *EC – Asbestos* [8.170]; PR, *Brazil – Tyres*, [7.42]-[7.43].

³⁷ Stern Review (2006), Pt II.

³⁸ ABR, *Korea – Beef*, [164]; ABR, *Brazil – Tyres*, [141]-[143].

³⁹ ABR, *US – Gambling*, [311]; ABR, *Brazil – Tyres*, [156], [178].

⁴⁰ ABR, *EC – Asbestos*, [172]; ABR, *Brazil – Tyres* [144], [179].

⁴¹ ABR, *Korea – Beef*, [162]; ABR, *EC – Asbestos*, [172].

emissions, even if that is not ‘immediately observable’.⁴² Third, the ECTR does not have ‘restrictive effects on imported goods’,⁴³ as it is origin-neutral and its impact is spread amongst fuels from different origins. Moreover, it is far less restrictive than other measures, such as an import ban, which have been justified in other cases.⁴⁴

25. Any prevailing measure in Ecoland, such as a labelling scheme, is not an *alternative*, but is merely ‘complementary’ to or ‘cumulative’ upon the ECTR.⁴⁵ Moreover, schemes similar to those in Forestland would not achieve the same level of protection as the ECTR: they regulate only the emissions produced during burning, not in refinement.

4.3: The ECTR is applied in a manner consistent with the *chapeau*

26. The ECTR does not entail ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. Although separate standards, identical factors apply to determine ‘arbitrary’ or ‘unjustifiable’ discrimination.⁴⁶ Given the grounds provisionally justifying the ECTR, this discrimination is unavoidable,⁴⁷ and directly related to Ecoland’s environmental goals.⁴⁸ No discrimination under the ECTR is arbitrary or unjustifiable. Moreover, Ecoland has legitimately classified ForestFuel as a BC in the absence of scientific certainty: ‘responsible, representative governments commonly act from perspectives of prudence and precaution’ where there is the prospect of ‘irreversible’ damage.⁴⁹ Given the risk of global warming, and ForestFuel’s potential contribution to that risk, Ecoland has not acted in an arbitrary or unjustifiable fashion. Finally, Ecoland has acted in good faith by attempting to negotiate international obligations on carbon footprints under the GWA, even though no agreement was in fact concluded.⁵⁰

27. The ECTR is not a ‘disguised restriction on international trade’, *prima facie* as it was not

⁴² ABR, *Brazil – Tyres*, [146], [150], [151], [210].

⁴³ ABR, *Korea – Beef*, [163] (emphasis added).

⁴⁴ ABR, *US – Shrimp*, [171]; ABR, *Brazil – Tyres*, [150].

⁴⁵ ABR, *Brazil–Tyres*, [57], [158]-[159], [172].

⁴⁶ PR, *Brazil – Tyres*, [7.225].

⁴⁷ ABR, *US–Gasoline*, 28.

⁴⁸ ABR, *Brazil – Tyres*, [225].

⁴⁹ ABR, *EC – Hormones*, [123].

⁵⁰ ABR, *US – Shrimp*, [122]; ABR, *US – Shrimp (21.5)*, [123], [134].

unannounced.⁵¹ Moreover, as claimed under GATT Art III:2, the ‘design, architecture and revealing structure’ of the ECTR, in the context of the GWA, do not reveal an intention to ‘conceal the pursuit of trade-restrictive objectives.’⁵²⁵³

5: The ECTR is not inconsistent with SCM Art 3.1(b)

5.1: The ECTR does not confer a ‘subsidy’ within the meaning of SCM Art 1.1

5.1.1: The Ecoland government makes no ‘financial contribution’

28. Since the ECTR is a fiscal regulation, only Art 1.1(a)(1)(ii) is broadly germane; yet it does not apply. A financial contribution is therein defined as foregone revenue that is ‘otherwise due’. There is no revenue foregone for RecycloFuel that is otherwise due for ForestFuel. First, there is no prevailing benchmark; but for the ECTR neither fuel would be taxed.⁵⁴ Second, there is no ‘legitimately comparable’ measure in Ecoland; other ECTR rates are not comparable as a legitimate comparison can only occur *between* fiscal regulations, not *within*.⁵⁵

29. In any case, Ecoland has the sovereign right to determine the structure of the ECTR.⁵⁶ Thus, a determination of what is ‘otherwise due’ must defer to the structure and purpose of the ECTR. The ECTR sets the standard biofuel rate at 10%, and imposes an *additional* 3% tax for biofuels that do not meet the BCN standard. Thus, the Ecolandian government does not forego revenue at the 10% rate, but rather accumulates additional revenue at the 13% rate.

5.1.2: The ECTR confers no ‘benefit’ within the meaning of SCM Art 1.1(b)

30. The conferral of a benefit is determined comparatively against some market benchmark⁵⁷ or alternatively against a ‘cost of production’ benchmark.⁵⁸ Neither test can account for a government sales tax as there is no ‘market rate’ for taxation, and a sales tax does not alter a good’s wholesale or production cost. While government taxation conferred a benefit in *US – FSC*, the financial contribution went *directly* to the recipient of the subsidy, such that a

⁵¹ GPR, *US – Spring Assemblies*, [56]; ABR, *US – Gasoline*, 25.

⁵² PR, *EC – Asbestos*, [8.236]; PR, *US – Shrimp (21.5)*, [5.142]; PR, *Brazil – Tyres*, [7.330].

⁵³ PR *Korea – Beef*, [658]; PR, *Brazil – Tyres*, [7.332].

⁵⁴ ABR, *US – FSC*, [90]-[91]; PR, *US – FSC*, [7.45].

⁵⁵ ABR, *US – FSC (Article 21.5 – EC)*, [90]-[91].

⁵⁶ ABR, *US – FSC*, [90].

⁵⁷ ABR, *Canada – Aircraft*, [154], [157].

⁵⁸ ABR, *Canada – Dairy (Article 21.5)*, [73]-[74]; ABR, *EC – Sugar*, [267].

benefit was necessarily *implied*.⁵⁹ The ECTR does not directly contribute to producers. Without an appropriate benchmark, no experience of benefit can be determined.

31. Moreover, the AB has held that a benefit cannot be conferred generally on a product.⁶⁰ The ECTR regulates taxation at the point of sale, such that a financial contribution can only be awarded to the general consumer. Thus, any associated benefit is enjoyed broadly, by the consumer, and is not conferred on the producers of RecycloFuel.

5.2: Any subsidy under the ECTR is not ‘prohibited’ under SCM Art 3.1(b)

32. Article 3.1(b) prohibits domestic subsidies ‘contingent ... upon the use of domestic over imported goods’. The ECTR does not distinguish between domestic and imported goods *in law*, and Art 3.1(b) does not extend to prohibit discrimination *in fact*. Article 3.1(a), which provides interpretive context, explicitly covers contingency ‘in law’ and ‘in fact’ for export subsidies. The absence of ‘in fact’ in Art 3.1(b) ‘means simply that it is not there’.⁶¹ The AB has held that GATT Art III:4 is better context to interpret ‘contingent’ in SCM Art 3.1(b), as it also addresses national treatment.⁶² However there are ‘cogent reasons’⁶³ to depart from this interpretation. Whereas GATT-inconsistent measures are subject to general exceptions under GATT Art XX, SCM operates strictly. Thus, *de facto* contingency under Art 3.1(b) would prohibit *all* legitimate origin-neutral subsidies.⁶⁴ Moreover, negotiating history confirms that *de facto* contingency is to be limited to *export* subsidies, which were considered *prima facie* trade distorting.⁶⁵ In contrast, it confirms that *strict* prohibition does not extend to domestic subsidies, which were identified as important for *legitimate* policy objectives.⁶⁶ Thus, ‘contingent’ in Art 3.1(b) should be limited to *de jure* operation.⁶⁷ In any case, the ECTR is not contingent, as makes no distinction between imported and domestic fuels.

⁵⁹ ABR, *US – FSC*, [140].

⁶⁰ ABR, *US – Lead and Bismuth II*, [58], [56].

⁶¹ ABR, *Canada – Patent Term*, [78]; ABR, *EC – Hormones*, [181].

⁶² ABR, *Canada – Autos*, [140].

⁶³ ABR, *US – Stainless Steel (Mexico)*, [158]; PR, *US – Continued Zeroing*, [7.179].

⁶⁴ ABR, *US – FSC*, [90].

⁶⁵ Note by the Secretariat (1991), 2; *Framework (EC)* (1989), 2; VCLT, Art 32.

⁶⁶ *Framework (India)* (1989), 1; *USTR Assessment* (1990), S-5; Stewart (1993), 810.

⁶⁷ PR, *Canada – Autos*, [10.221].

33. Moreover, since the SCM operates strictly, any extension to *de facto* operation should coincide with a narrow interpretation of the term ‘use’ in Art 3.1(b). ‘Contingent ... in fact’ in Art 3.1(a) has been interpreted to require a ‘specific link’ between the grant of a subsidy and the use of imported goods.⁶⁸ No such link exists between the ECTR and any actual *use* of RecycloFuel. Any subsidy is granted at the point of sale, with no obligation to ‘use’ the fuel. Further, it can only be contingent upon the action of unrelated third parties, not *producers*.

CLAIM 2: ECOLAND PATENT REGULATION

6: The Patent Regulation is consistent with TRIPS Art 27.1

6.1: The FFC is properly excluded from patentability under TRIPS Art 27.2

34. The FFC’s exclusion from patentability is justified under Art 27.2. Preventing its commercial exploitation 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’.

35. These listed environmental examples of ‘*ordre public* or morality’ are discrete examples deemed to satisfy ‘*ordre public* or morality’. An overarching term ‘*must cover*’ the listed examples.⁶⁹ Thus, it is sufficient to satisfy the ordinary meaning of one of the examples.⁷⁰ In any event, ‘*ordre public* or morality’ is qualified by the term ‘within their territory’, which suggests that it has no universal meaning. Rather, Ecoland must have a broad margin of appreciation, as it is best placed to determine which inventions fall within the exclusion.⁷¹

36. While the EPC Art 53(a) provides an interpretation of ‘*ordre public* or morality’,⁷² this cannot be directly transplanted into the TRIPS context. The EPC requires a high standard of proof before exclusion, which is inconsistent with the object and purpose of TRIPS⁷³ to provide a ‘balance of rights and obligations’. Article 53(a) is read strictly⁷⁴ to prevent excessive use of the ‘*ordre public*’ exception, in the absence of any other limiting requirement. However, TRIPS Art 27.2 additionally requires the prevention of commercial exploitation to

⁶⁸ PR, *Australia – Automotive Leather II*, [9.75].

⁶⁹ ABR, *EC – Sardines*, [286].

⁷⁰ Doane (1994), 478; Haugen (2009), 348-9.

⁷¹ Correa (2007), 287; Flitner and Leskien (1997), 17; Watal (2001), 98; Torremans (2007), 50.

⁷² Negotiating Group (1990), 85; Haugen (2009), 348; VCLT, Arts 31(1), 32.

⁷³ WTO (2001), [5(a)]; PR, *Canada – Pharmaceutical Patents*, [7.26]; VCLT, 31(1).

⁷⁴ *Plant Genetic Systems* (Board of Appeal of the European Patent Office), [18.7].

be 'necessary', and thus there is no reason to read '*ordre public* or morality' in TRIPS in an artificially strict manner.

6.1.2: The listed examples apply to allow exclusion of the FFC from patentability

37. As explained in Claim 1, global warming poses a grave risk to 'human, animal or plant life or health'. This example should be interpreted 'harmoniously' with GATT Art XX(b) as WTO Agreements are 'an *inseparable package*',⁷⁵ and TRIPS specifically 'builds upon the experience of ... GATT'.⁷⁶ Under Art XX(b), a risk does not have to be 'quantified', and Members can act without certain scientific evidence.⁷⁷ As ForestFuel increases carbon emissions, prevention of the commercial exploitation of the FFC would discourage the use of ForestFuel in place of other biofuels, and thus protect life and health.

38. Global warming constitutes 'serious prejudice to the environment' that has impacted Ecoland's ecosystem. The term 'serious prejudice to the environment' does not distinguish between actual or potential prejudice.⁷⁸ International instruments and international environmental law⁷⁹ mandate precaution in the face of 'serious' environmental harm and scientific uncertainty. This clarifies that 'serious prejudice' includes potential harm, and is relevant interpretive context regardless of whether Ecoland and Forestland subscribe to this principle.⁸⁰ Although scientific evidence is inconclusive, it is sufficient that ForestFuel *potentially* adds to global warming by increasing carbon emissions.

39. Commentators have suggested that the term 'avoid' qualifies serious prejudice *in its entirety*.⁸¹ This interpretation has no textual basis. The ordinary meaning of 'avoid' suggests that prevention of an invention's commercial exploitation must avoid the *additional* prejudice associated with the product, and not the *entire* threat constituted by global warming. In the context of serious transboundary environmental harm, it is widely recognised that one measure alone cannot address an entire problem.⁸² Global warming

⁷⁵ ABR, *Argentina – Footwear*, [81].

⁷⁶ TRIPS, Preamble; PR, *India – Patents (US)*, [7.19]; PR, *US – Section 110(5)*, [6.185].

⁷⁷ PR, *EC – Asbestos*, [8.221]; ABR, *EC – Asbestos*, [167]-[168], [178].

⁷⁸ Correa (2007), 290; Derclaye (2008), 272, 275.

⁷⁹ Rio Declaration (1992) Principle 15; UNFCCC, Art 3(3); ABR, *EC–Hormones*, [123].

⁸⁰ PR, *EC–Biotech*, [7.94].

⁸¹ Correa (2007), 290; Derclaye (2008), 272.

⁸² See *Convention on Long-Range Transboundary Air Pollution*, Arts 3-4; *Kyoto Protocol*, Art 2.

specifically is a problem that may only ever be ‘attenuate[d]’, not completely avoided.⁸³ Since the commercial exploitation of the FFC adds to global warming, it is sufficient to prevent this exploitation.

6.1.3: Preventing the FFC’s commercial exploitation is ‘necessary’

40. One interpretation of Art 27.2 is that a Member must first prohibit the sale and distribution of an invention within its territory before it can exclude it from patentability.⁸⁴ This interpretation has no textual basis; rather, the last phrase of Art 27.2 indicates that domestic laws are irrelevant.⁸⁵ It would also be unreasonable, as completely novel and unregulated inventions would never be excluded under Art 27.2.⁸⁶ Article 27.2 only requires consideration of the *necessity* of preventing commercial exploitation and not the existence of an *actual* ban. Ecoland has not banned the FFC, but it can still satisfy Art 27.2.

41. ‘Necessary’ in TRIPS Art 27.2 should be interpreted ‘harmoniously’ with the same term in GATT Art XX(b), under which certain factors must be weighed, and reasonably available alternatives considered. However, unlike GATT Art XX, TRIPS Art 27.2 is not an exception authorising measures *otherwise inconsistent*, as this provision itself constitutes a ‘core’ element of ‘patentable subject matter’. Thus, the weighing and balancing process should not be applied as strictly in Art 27.2 as in GATT Art XX.⁸⁷

42. Applying this less strict balancing process, the goal of reducing carbon emissions is vital. Prevention of the commercial exploitation of the FFC is apt to make a material contribution to this end as it ensures more consumers will purchase BCN burning engines. It also discourages the invention of suboptimal environmental measures. While prevention of the FFC’s commercial exploitation may be trade restrictive, it is outweighed by the other factors. Moreover, there is no reasonably available alternative that is less trade restrictive. Any scheme requiring the grant of a patent does not achieve the same level of protection, as it will not discourage suboptimal inventions. Thus, it is ‘necessary’.

6.2: The Patent Regulation is not inconsistent with TRIPS Art 27.1, second sentence

⁸³ ABR, *Brazil – Tyres*, [151].

⁸⁴ See, eg, Straus (1996), 182; Correa (2007), 291.

⁸⁵ Haugen (2009), 352.

⁸⁶ Leskien and Flitner (1997), fn 5; VCLT, Art 31(1); Oppenheim (1992) §632, fn 7.

⁸⁷ Weissman (1996), 1107; Cann (2004), 812-13; Haugen (2009), 352.

43. Ecoland must patent inventions ‘without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced’. Even assuming the interpretation most favourable to Forestland, that the FFC is a field of technology and Forestland the place of invention, there is no discrimination. The Patent Regulation is not limited on its face or in effect to the FFC or other Forestland inventions, and its ‘objective characteristics’ do not reveal ‘discriminatory objectives’.⁸⁸ The Patent Regulation gives effect to Section 66.6, which has a goal consistent with Ecoland’s other measures and the GWA.

CLAIM 3: ECOLAND LABELLING REGULATION

7: The Labelling Regulation is consistent with TBT Art 2.1, 2.2 and 2.4

44. The Labelling Regulation is not a ‘standard’ or a ‘conformity assessment procedure’; it falls within the TBT’s scope only if it is a ‘technical regulation’: TBT, Annex 1.1, 1.2, 1.3.

7.1: The Labelling Regulation is not a ‘technical regulation’ under TBT

45. TBT Annex 1.1, first sentence, defines ‘technical regulation’ as a ‘document’ that lays down ‘product characteristics or their related processes and production methods ... with which compliance is necessary’. The term ‘their related’ limits its reach to those PPMs that affect the characteristics of the end product, as confirmed by negotiating history.⁸⁹ The Labelling Regulation does not meet this definition as it mandates labelling based on the fuel used in producing the product. This does not affect its ‘objectively definable’ properties.⁹⁰

46. TBT, Annex 1.1, second sentence, clarifies the above definition: it ‘may also include ... labelling requirements as they apply to a product, process or production method’. This reference to PPMs must be read in the context of the first sentence, which clearly limits PPMs to those affecting the end product characteristics.⁹¹ It also gives effect to the words ‘*may also include*’, which indicates that some labelling requirements are excluded. As such, the Labelling Regulation also does not fall within the terms of the second sentence.

47. This is supported by the CTBT decision that a labelling requirement, ‘whether it is in the nature of a technical [regulation] or not’, must be notified under TBT Art 2.9.⁹² By its terms this decision envisages labels beyond the scope of the TBT.

⁸⁸ PR, *Canada–Pharmaceutical Patents*, [7.92], [7.95], [7.102]-[7.104].

⁸⁹ CTE, ‘Negotiating History’ (1995), [146]-[147]; VCLT, Art 32.

⁹⁰ ABR, *EC–Asbestos*, [67].

⁹¹ Appleton (1997), 125.

⁹² CTBT, ‘Decisions and Recommendations’ (2002), 18; *contra* PR, *EC–Trademarks*, [7.451].

7.2: In any case, the Labelling Regulation is consistent with TBT Art 2.1

48. This provision should be interpreted harmoniously with GATT provisions; the TBT preamble itself expressly states that it ‘further[s] the objectives of GATT’.

7.2.1: The products are not like

49. The accordion of ‘likeness’ stretches differently between TBT and GATT, due to their different structure. The GATT general exceptions permit legitimate measures that inadvertently discriminate,⁹³ whereas TBT Art 2.1 is not subject to any such review. ‘Likeness’ is the only stage at which this can be done in TBT, thus the ultimate determinant should be whether there is a legitimate basis to distinguish between products.⁹⁴

50. The basis for distinction in this case is PPMs, for which there is a ‘solid environmental rationale’.⁹⁵ As such, we adopt all our claims above in relation to Ecoland’s legitimate purpose, and the effect of PPMs on likeness. Despite their physical similarities, the labelled products are legitimately distinguished by their different PPMs, and thus not like.

7.2.2: There is no less favourable treatment

51. As TBT Art 2.1 contains MFN and National Treatment obligations, GATT Arts I and III:4 provide interpretive context.⁹⁶ These provisions are violated where there is ‘less favourable treatment explained by the foreign origin’ of goods.⁹⁷ The Labelling Regulation is *de jure* and *de facto* origin-neutral, as it distinguishes between products, not countries. Moreover, it does not apply disproportionately to any single country. Both RecycloFuel and ForestFuel are exported to a number of different countries, any of which may produce products.

7.3: The Labelling Regulation is consistent with TBT Art 2.2

52. Technical regulations must fulfil a ‘legitimate objective’ in a manner no ‘more trade-restrictive than necessary’ taking into account ‘the risks non-fulfilment would create’. Like the ECTR, the Labelling Regulation protects human, animal or plant life or health by seeking to reduce carbon emissions. This is explicitly a legitimate objective under Art 2.2.

53. GATT Art XX provides interpretive context given the provisions’ similar language and

⁹³ Marceau and Trachtman (2002), 822–3; Tamiotti (2007), 217.

⁹⁴ Howse and Regan (2000); Hudec (2000), 198; Hudec (1998), 635.

⁹⁵ Charnovitz (2002), 74.

⁹⁶ ABR, *EC–Bananas III*, [233]; ABR, *Canada–Autos*, [140]; VCLT, Art 31(1).

⁹⁷ PR, *Canada – Autos*, [10.23].PR, *EC – Biotech*, [7.2514]; ABR, *DR – Cigarettes*, [96].

purpose,⁹⁸ as drafting history confirms.⁹⁹ Specifically, ‘necessary’ at GATT Art XX(b) involves a process of balancing factors, described above.

54. Applying this approach, the Labelling Regulation is ‘necessary’. It protects vital interests, as global warming poses grave risks to human health and the environment. Moreover, it is apt to make a ‘material, not merely marginal or insignificant’ contribution to reducing carbon emissions.¹⁰⁰ The labels have already affected purchasing patterns, which manufacturers cannot ignore,¹⁰¹ thus effecting a change to BCNs in production, particularly in the ‘broader context’ of Ecoland’s other measures.¹⁰² Moreover, labelling increases consumer awareness of the ecological effects of their actions. On the other hand, mandatory labelling schemes are considered to be minimally trade-restrictive as they do not *prevent* the sale or import of goods.¹⁰³ Moreover, while the Labelling Regulation seeks to reduce carbon emissions, it does not specifically mandate *how* compliance is to be achieved.¹⁰⁴ It allows broad scope for compliance, and is thus not *prima facie* trade restrictive.

55. There is no reasonably available alternative that is less trade restrictive. A tax incentive scheme is not an *alternative* as it already exists in the ECTR, and is cumulative upon the Labelling Regulation. Moreover, a voluntary scheme does not achieve the same level of protection as consumers would have incomplete information where products are unlabelled.

7.4: The Labelling Regulation is consistent with TBT Art 2.4

56. No international standard exists for the estimation of carbon emissions. The only potentially relevant standard is ISO 14020, which is applicable to all environmental labels. Specifically, ISO 14020, Principle 5, provides that labels shall consider ‘all relevant aspects of the life cycle of the product’. Ecoland is not obliged to use Principle 5 ‘as a basis for’ the Labelling Regulation, because it is an inappropriate means to achieve the legitimate objective of protecting human, animal or plant life or health. It is not ‘specifically suitable’¹⁰⁵

⁹⁸ ABR, *US – Gambling*, [291]; ABR, *EC – Bananas III*, [233]; ABR, *Canada – Autos*, [140].

⁹⁹ GEMIT, ‘Unnecessary Obstacles’, [3], [7], VCLT, Art 32.

¹⁰⁰ ABR, *Brazil – Tyres*, [150], [151], [210].

¹⁰¹ ABR, *EC – Asbestos*, [122].

¹⁰² ABR, *Brazil – Tyres*, [154].

¹⁰³ PR, *EC – Asbestos*, [8.51]; GPR, *Thailand – Cigarettes*, [77].

¹⁰⁴ OECD (1997), 46.

¹⁰⁵ ABR, *EC – Sardines*, [285].

for Ecoland, as a developing country. Ecoland would face ‘fundamental technical problems’ in implementing a life-cycle assessment scheme: TBT Art 2.4. Such assessments require empirical and scientific information not ‘readily available on a large scale’¹⁰⁶ If producers were to self-assess, it would discriminate against those that could not afford to do so.

8: The Labelling Regulation is consistent with GATT Art III:4

8.1: The Labelling Regulation does not ‘affect’ the sale of ForestFuel

57. The Labelling Regulation is not a law ‘affecting the internal sale’ of RecycloFuel and ForestFuel, as it does not ‘directly regulate [their] sale’,¹⁰⁷ rather, it affects labelled products. Any consequential impact upon the fuels is ‘too tenuous’ to fall within Art III:4.¹⁰⁸

8.2: In any case, RecycloFuel and ForestFuel are not like products

58. Similar criteria, weighted differently, determine likeness in Arts III:4 and III:2. Here, the competitive relationship of the products is determinative.¹⁰⁹ As RecycloFuel and ForestFuel are not directly competitive or substitutable, and as likeness at Art III:4 is narrower than at Art III:2, second sentence,¹¹⁰ *a fortiori* RecycloFuel and ForestFuel are not like.

8.3: Category 1 and 2 products are not like due to their PPMs

59. The Panel must consider ‘all of the pertinent evidence’ to the market relationship of the products¹¹¹ in Art III:4 as in Art III:2. At present, determination of the legitimacy of environmental measures rests solely upon consumer tastes and preferences. This is arbitrary, depends upon public awareness of risk, and may overlook legitimate measures.¹¹² Moreover, PPMs are not precluded by the text, nor the purpose of Art III:4,¹¹³ which, as revealed in Art III:1, is to prohibit origin-specific regulations, or those otherwise applied so as to afford protection.¹¹⁴ As such, PPMs are relevant factors in determining likeness. As under TBT, the Labelling Regulation is non-protectionist, the products are legitimately and

¹⁰⁶ ABR, *Brazil – Tyres*, [175]; Bonsi, Hammett and Smith (2008), 417.

¹⁰⁷ PR, *US – Tuna (Mexico)*, [5.11]–[5.15]; Gaines (2002), 415-17; Hudec (2000), 191.

¹⁰⁸ Gaines (2002), 415; Condon (2006), 62.

¹⁰⁹ ABR, *EC – Asbestos*, [114].

¹¹⁰ ABR, *EC – Asbestos*, [100].

¹¹¹ ABR, *EC – Asbestos*, [99], [102]; Hudec (2002).

¹¹² ABR, *EC – Asbestos*, [154]; Horn and Weiler (2003), 39.

¹¹³ Howse and Regan (2000), 252, 262.

¹¹⁴ GPR, *US – Section 337*, [5.10]; ABR, *EC – Asbestos*, [98].

necessarily distinguished, and they are not like.

8.4: There is no less favourable treatment

60. As in TBT Art 2.1, there is no less favourable treatment to imported goods.

9: The Labelling Regulation is consistent with GATT Art I:1

61. The fuels and products are not like for all the reasons espoused above.

9.1: The Labelling Regulation does not accord an advantage

62. The Labelling Regulation is consistent with Art I:1 as it does not advantage RecycloFuel: Article I only extends to *products* directly,¹¹⁵ not to indirect consequences. Moreover, Category 1 labelling is not an advantage ‘granted by any contracting party’. The Category 1 label *itself* does not advantage a product, and Ecoland does not otherwise restrict the sale of products. The only advantage that might result from access to the Category 1 label depends upon consumer preference for those products, not upon government action.¹¹⁶

9.2: There is no conditionality

63. If Category 1 labelling is an advantage, it is not conditional. As in Claim 1, it is available equally to all countries, producers and products.¹¹⁷ It is unconditional both in law, and in practice, as the EEPA will visit all countries to assess refinement processes upon request.¹¹⁸

10: In any case, the Labelling Regulation is justified under GATT Art XX

64. The Labelling Regulation is provisionally justified under Art XX(g) for the same reasons as the ECTR, and under Art XX(b) for the same reasons as for the ECTR and TBT Art 2.2.

65. Certification of ForestFuel and RecycloFuel is not ‘arbitrary’ or ‘unjustifiable’. It depends on available scientific evidence, which is an objective criterion.¹¹⁹ Scientific evidence regarding ForestFuel refinement is inconclusive, however as under Claim 1, Ecoland may act with caution. Finally, producers can seek judicial review of certification decisions, thereby ensuring ‘basic fairness and due process’.¹²⁰ Further, as per the ECTR, the Labelling Regulation is not a ‘disguised restriction on international trade’, especially as it is based on available scientific evidence and producers’ submissions.

¹¹⁵ Davey and Pauwelyn (2002), 18; citing PR, *EC – Bananas III (Guatemala)*, [7.252].

¹¹⁶ GPR, *US – Tuna (Mexico)*, 5.42.

¹¹⁷ PR, *Canada – Autos*, [10.22]-[10.25]; GPR, *EEC – Minimum Import Prices*, [4.19].

¹¹⁸ GPR, *EEC – Imports of Beef*, [4.2]-[4.3].

¹¹⁹ PR, *EC – Tariff Preferences*, [7.232].

¹²⁰ ABR, *US – Shrimp*, [181].

VIII REQUEST FOR FINDINGS

Ecoland requests that the Panel find that:

1. The ECTR is consistent with GATT Arts I and III:2, or alternatively is justified under the Art XX exceptions, and is also consistent with SCM Arts 3.1(b) and 3.2.
2. The Patent Regulation issued under Section 66.6 of the Ecoland Patent Act is consistent with TRIPS Art 27.1, as exclusion of the FFC from patentability is justified under Art 27.2.
3. The Labelling Regulation is consistent with TBT Arts 2.1, 2.2, and 2.4. It is also consistent with GATT Arts I and III:4, or alternatively is justified under the Art XX exceptions.

Therefore, Ecoland requests that the Panel should make no recommendation to the DSB, as Ecoland is in full conformity with its obligations under the WTO Agreements.