



Team: 026C

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 Complainant

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List of Abbreviations

AB	Appellate Body
Art.	Article
Arts.	Articles
BMR	Biofueled Machinery Regulation
BVR	Biofueled Vehicles Regulation
Converter	ForestFuel Converter
Doc.	Document
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECTR	Ecoland Carbon Tax Regulation
EEPA	Ecoland Ecosystem Protection Agency
EPA	Ecoland Patent Act
EPA 2005	Ecosystem Protection Act
GAPTS	Global Agreement for the Protection of Threatened Species
GATT, GATT Agreement	General Agreement on Tariffs and Trade 1994
GWA	Global Warming Agreement
ISO	International Organization for Standardization
Id.	Idem
p.	Page
pp.	Pages
Para., ¶	Paragraph
Paras., ¶¶	Paragraphs
PPM	Process or Production Method
Sec., §	Section
SCM, SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIPS, TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TBT, TBT Agreement	Agreement on Technical Barriers to Trade
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Summary of Arguments

1. THE ECTR

The ECTR is inconsistent with Ecoland's obligations under GATT Arts. III:2 and I:1, and under SCM Art. 3.1(b).

- The ECTR taxes RecycloFuel and ForestFuel at significantly different rates. Because the two biofuels are like products, the fact that the ECTR taxes ForestFuel in excess of Recyclofuel violates GATT Art. III:2, first sentence. Likewise, because the two biofuels are directly competitive or substitutable and the substantially higher tax imposed on ForestFuel operates so as to afford protection to Ecoland's domestic production of Recyclofuel, the ECTR violates GATT Art. III:2, second sentence.
- The ECTR confers an advantage to biofuels produced by some WTO Members that is not unconditionally extended to all WTO Members producing like products. Because the ECTR taxes like biofuels at significantly different rates, a WTO Member that exports RecycloFuel to Ecoland receives an advantage that is not extended to a WTO Member that exports ForestFuel. This conditional advantage violates GATT Art. I:1.
- The ECTR's differential taxation of like products subsidizes the use of domestically-produced RecycloFuel over the use of imported ForestFuel. The ECTR's tax regime effectively creates a 30% tax subsidy for the use of RecycloFuel over ForestFuel, despite the fact that the two biofuels are like products. As Ecoland produces 80% of the world's RecycloFuel, and only one other WTO Member produces RecycloFuel, the ECTR thus operates as a subsidy contingent in fact on the use of domestic over imported goods, in violation of SCM Art. 3.1(b).

2. THE REGULATION UNDER THE EPA

The regulation issued under Sec. 66.6 of the Ecoland Patent Act is inconsistent with Article 27.1 of the TRIPS Agreement, and not justified by Article 27.2

- The ForestFuel Converter is subject to the patentability prescription of TRIPS Art. 27.1, because it is an invention that is new, involves an inventive step, and is capable of industrial application.
- Exclusion of the Converter from patentability is not justified by TRIPS Art. 27.2. The interpretation of the "necessary" standard in Art. 27.2 should be guided by the

interpretation of “necessary” in GATT Art. XX, primarily because the two Arts. have a common purpose.

- There is no “genuine relationship” of necessity between excluding the Converter from patentability and the protection of Ecoland’s environment or its animals and plants.
- Even if the Panel finds a genuine relationship between exclusion of the Converter from patentability and the protection of Ecoland’s environment or its animals and plants, a finding of necessity is precluded by the reasonable availability of less trade-restrictive alternatives that equally satisfy Ecoland’s policy objectives.

3. THE ECOLABELING REGULATION

The ecolabeling regulation is inconsistent with Arts. I:1 and III:4 of GATT 1994 and Arts. 2.1, 2.2, and 2.4 of the TBT Agreement.

- The ecolabeling regulation is an advantage afforded to like products produced with machinery that uses RecycloFuel, resulting in *de facto* discrimination against ForestFuel under Article I.
- The regulated imported products are like products within the scope of Art. III:4 and are afforded less favorable treatment to domestically produced like products.
- Even if Ecoland purports an Art. XX exception, the ecolabeling regulation is inconsistent with the TBT.
- The ecolabeling regulation is a technical regulation and violates Art. 2.1 of the TBT.
- Additionally, the regulation as applied creates unnecessary obstacles to international trade and are more trade restrictive than necessary to fulfill a legitimate objective in violation of Art. 2.2 of the TBT.
- Finally, the regulations are not based on effective and appropriate relevant international standards as required under Art. 2.4 of the TBT.

Statement of Facts

1. Forestland is a developed country WTO Member and the world's largest producer of ForestFuel biofuel, accounting for 50% of global production. Ten other WTO Members produce ForestFuel. Ecoland is a developing country WTO Member and the world's largest producer of RecycloFuel, accounting for 80% of global production. Only one other country, Enviroland, produces RecycloFuel. Ecoland does not produce ForestFuel.
2. Growing concerns of global climate change have prompted multilateral efforts to negotiate international standards and obligations. The available scientific evidence shows that ForestFuel and RecycloFuel both produce 50% fewer carbon emissions when burned compared to conventional fossil fuels. There is no conclusive scientific evidence comparing the carbon footprint PPMs for RecycloFuel and ForestFuel, and both have the same tariff classification number under the first six digits of the Harmonized System. Despite the generally accepted scientific evidence, Ecoland unilaterally initiated a variety of programs regulating the use and importation of ForestFuel as an environmentally friendly alternative biofuel source.
3. The ECTR imposes a sales tax of 10% on biofuels producing fewer than 50% emissions than conventional fossil fuels, which are subject to a 20% sales tax. ForestFuel is subject to an additional sales tax of 3% under the ECTR whereas RecycloFuel is not.
4. Ecoland has also instituted mandatory ecolabeling of products produced with machinery that uses biofuels and fossil fuels. The certification system imposes three label classifications: Category 1 products, produced with machinery that uses biofuel that have been refined in a manner that *does not* produce carbon emissions (depicting a happy furry marmot in front of a healthy Ecolandian Fir); Category 2 products, produced with machinery that uses biofuel that have been refined in a manner that *does* produce carbon emissions (depicting a lonely marmot); and Category 3 products, produced with machinery that uses fossil fuels (depicting a dead marmot hanging from a bare Ecolandian Fir). Consequentially, consumer demand for Category 1 products has risen 8%, while demand for Category 2 and 3 products has stagnated or fallen.
5. Ecoland has also refused to grant a patent for the Converter under Sec. 66.6 of the Ecoland Patent Act to Forestland Machinery Inc. The Converter can be used to adapt any machine to use ForestFuel at a very low cost.
6. Forestland is committed to environmental protection and recognizes its obligations under international law but disputes Ecoland's purported "green rationale" for its trade restrictive measures.

Identification of WTO Measures at Issue

Measure 1: The ECTR implements a three-tiered fuel sales tax that levies a 20% tax on conventional fossil fuels, a 13% tax on ForestFuel, and a 10% tax on RecycloFuel.

Measure 2: The **regulation** issued under **EPA Section 66.6** excludes the Converter from patentability on the grounds that commercial exploitation of the Converter threatens public order or morality.

Measure 3: The **ecolabeling regulation** issued under the **EPA 2005** proscribes a mandatory labeling scheme, depicting either happy, unhappy, or dead furry marmots, for products produced using biofuels and traditional fossil fuels.

Legal Pleadings

1. THE ECTR'S DISCRIMINATORY TAXATION SCHEME VIOLATES GATT ARTS. III:2 AND I:1, AND SCM ART. 3.1(B)

1.1. The ECTR Violates GATT Art. III:2

1.1.1. The ECTR's Treatment of ForestFuel Violates the Purpose of Art. III

1. As the AB noted in *Japan-Alcoholic Beverages II*, "Art. III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production."¹ This basic anti-protectionist principle is embodied in both of the prohibitions specified in Art. III:2.² Because Ecoland produces 80% of the world's RecycloFuel, and does not produce ForestFuel, by taxing ForestFuel at a rate 30% higher than the rate applied to RecycloFuel, the ECTR acts to protect Ecoland's domestic biofuel production against competitive imports. This protectionist measure violates the purpose of Art. III.

1.1.2. The ECTR Violates Art. III:2, First Sentence

2. Art. III:2, first sentence prohibits contracting parties from taxing imported products in excess of "like domestic products."³ This sentence establishes a two-part test: first, the products must be determined to be like products; second, if the products are alike, the imported product must be taxed in excess of its domestic analog.⁴ Here, ForestFuel and RecycloFuel are like products for the purposes of Art. III:2, and the 13% sales tax on

¹ *Japan-Alcoholic Beverages II*, p. 18.

² GATT, Art. III:2 consists of two sentences, which operate as independent restrictions on contracting parties. See, e.g., *Japan-Alcoholic Beverages II*, pp. 18-31.

³ GATT, Art. III:2.

⁴ *Japan-Alcoholic Beverages II*, pp. 18-19.

ForestFuel exceeds the 10% tax on RecycloFuel; the ECTR, therefore, violates the Art. III:2, first sentence.

1.1.2.1. ForestFuel and RecycloFuel are Like Products under Art. III:2, First Sentence

3. Previous Panel and AB reports have analyzed likeness under Art. III, first sentence using a factor test elaborated in the *Border Tax Report*.⁵ The factors include the products' physical properties, end uses, consumer tastes and habits and tariff classifications.⁶ The factors must be examined cumulatively and together with all other evidence to reach a determination of "likeness."⁷ Although the AB has suggested that Art. III:2, first sentence likeness should be construed narrowly relative to other Arts. such as I:1 and III:4,⁸ that requirement has not precluded findings of likeness under Art. III:2.⁹ Here, the comparison of ForestFuel and RecycloFuel under the *Border Tax* criteria shows that they are like products.

4. First, as monoalkyl esters, RecycloFuel and ForestFuel are essentially alike in their inherent physical properties, and upon combustion both fuels produce identical levels of carbon emissions. Though there are differences in the fuels' ancillary characteristics, namely in color and compressibility, the main physical properties of the two products suggest that the products should be considered alike.

5. Second, RecycloFuel and ForestFuel are identical in their primary end uses as fuels intended to operate machinery equipped with biofuel compatible combustion engines. In this application, both fuels replace traditional fossil fuels in order to reduce carbon emissions, and both achieve an identical percentage reduction. Furthermore, the availability of the Converter allows the two biofuels to be used interchangeably. Although ForestFuel has an additional application as an organic fertilizer, the available facts, such as the BVR and BMR, indicate that, like RecycloFuel, ForestFuel is primarily deployed as a biofuel.

6. Third, consumers have no preference for one biofuel over the other based on the qualities of the products themselves. The products are used identically to operate biofuel-capable machinery with a resulting 50% reduction in carbon emissions over traditional fossil

⁵ See, e.g., Panel Report, *Japan – Alcoholic Beverages*, ¶¶ 43-45; *EC – Asbestos*, ¶ 101-02.

⁶ *Border Tax Adjustments*, ¶ 18.

⁷ *EC – Asbestos*, ¶ 101 – 102.

⁸ *Japan – Alcoholic Beverages II*, pp. 19-20.

⁹ See, e.g., *Id.* at pp. 21-23.

fuels. To the extent, therefore, that consumers prefer “a biofuel that reduces carbon emissions by 50%,” they have no preference as between RecycloFuel and ForestFuel.

7. Though biofuel consumers are normally constricted in their choice of fuel by the settings of their machinery, there is no evidence that consumers’ choice of machinery reflects an underlying preference for a particular biofuel. The identical end use and impact of the two products suggest that consumers have no preference between the two fuels on their inherent merits. Furthermore, the availability of the Converter removes even the mechanical barrier to parity between the two fuels. While consumer demand for products produced by ForestFuel-powered manufacturing has stagnated since the implementation of the ecolabeling regulation, the effects of that regulation on consumer demand should not be incorporated into an analysis of the products’ likeness. To the extent that the regulation refers to PPMs and not inherent product qualities, it should not be considered in the determination of “likeness” under these two Articles.¹⁰

8. Finally, the identical six-digit classification of RecycloFuel and ForestFuel under the international harmonized system suggests that the products are alike.¹¹ As the AB observed in *Japan-Alcoholic Beverages II*, harmonized system classifications may be used on a case-by-case basis to support a finding of likeness where the classification is sufficiently precise. The distinction between the two biofuels in Ecoland’s domestic tariffs should not influence the determination of likeness. It indicates nothing beyond Ecoland’s interest in distinguishing the products to justify discrimination under the ECTR. Taken together, these factors favor the finding that RecycloFuel and ForestFuel are like products under Art. III:2, first sentence.

1.1.2.2. *The ECTR Taxes ForestFuel in Excess of RecycloFuel, a Like Domestic Product*

9. Having determined that ForestFuel and RecycloFuel are “like products” for the purposes of Art. III:2, first sentence, the ECTR violates that article if it taxes ForestFuel “in excess” of RecycloFuel. The ECTR’s tax regime taxes RecycloFuel—a domestic product of Ecoland—at 10%, while taxing ForestFuel—an imported product not produced in Ecoland—at 13%. As the latter exceeds the former, the ECTR violates Art. III:2, first sentence.

1.1.3. **The ECTR Violates Art. III:2, Second Sentence**

10. Art. III:2, second sentence prohibits contracting parties from applying internal measures to “imported or domestic products in a manner contrary to the [anti-protectionist] principles

¹⁰ See *Tuna – Dolphin I*, ¶¶ 5.14-5.16.

¹¹ See *Japan – Alcoholic Beverages II*, pp. 21-22.

set forth in paragraph 1.”¹² Drawing on the Ad Article to GATT Art. III and the principles in Art. III:1, the AB has found that a measure violates Art. III:2, second sentence if imported and domestic products that are “directly competitive or substitutable” are “not similarly taxed” under a tax regime applied “so as to afford protection to domestic production.”¹³

1.1.3.1. ForestFuel and RecycloFuel are Directly Competitive or Substitutable

11. As biofuels that reduce carbon emissions by 50% over traditional fossil fuels, ForestFuel and RecycloFuel are directly competitive or substitutable products. As the AB noted in *Korea-Alcohol*, while “like products” under III:2, first sentence “are a subset of directly competitive or substitutable products . . . [t]he category of directly competitive or substitutable products is broader.”¹⁴ Therefore, even if this Panel decides that ForestFuel and RecycloFuel are not “like products,” it may still find them to be directly competitive or substitutable. To make this determination, the Panel should examine the products’ end-uses, consumer tastes and habits, and the “marketplace,” i.e. the elasticity of demand.¹⁵ The evaluation of the marketplace must account not only for current substitutability, but also the potential substitutability of the two products.¹⁶

12. As described in sec. 1.2.1 above, ForestFuel and RecycloFuel have identical primary end-uses as biofuels that reduce carbon emissions by 50%, and there is no evidence of differential consumer preferences based on inherent qualities of the fuels themselves. Although there is evidence that the ecolabeling regulation has created a preference for products produced using RecycloFuel, the Panel must evaluate the potential substitutability of the biofuels absent the influence of that measure.¹⁷ On a level playing field, RecycloFuel and ForestFuel would have a “strong potentially direct competitive relationship”¹⁸ and therefore must be considered directly competitive or substitutable products.

¹² GATT, Art. III:2.

¹³ *Japan – Alcoholic Beverages II*, p. 24.

¹⁴ *Korea – Alcoholic Beverages*, ¶ 118.

¹⁵ *Japan – Alcoholic Beverages II*, p. 25.

¹⁶ *See Korea – Alcoholic Beverages*, ¶ 120.

¹⁷ *See Japan – Alcoholic Beverages II*, p. 25.

¹⁸ *Korea – Alcoholic Beverages*, ¶ 124 (quoting Panel Report, *Korea – Alcoholic Beverages*, ¶ 10.98).

1.1.3.2. *ForestFuel and RecycloFuel are not Similarly Taxed Under the ECTR*

13. As the AB explained in *Japan-Alcoholic Beverages II*, “to be ‘not similarly taxed’, the tax burden on imported products must be heavier than on ‘directly competitive or substitutable’ domestic products, and that burden must be more than *de minimis* in any given case.”¹⁹ In this case, the ECTR imposes a 30% higher tax burden on ForestFuel, exceeding any reasonable standard of *de minimis* dissimilarity.

1.1.3.3. *The ECTR Affords Protection to the Domestic Production of RecycloFuel*

14. By taxing ForestFuel at a rate 30% greater than RecycloFuel, the ECTR is applied “so as to afford protection” to the domestic production of RecycloFuel. The determination is not a matter of evaluating legislative intent, but rather an “objective analysis of the structure and application of the measure in question on domestic as compared to imported products.”²⁰ Ecoland produces 80% of the world’s RecycloFuel and does not produce ForestFuel; thus, any distinction between ForestFuel and RecycloFuel is a *de facto* distinction between imported and domestic products. Because ForestFuel is only produced using hydroelectric power while RecycloFuel is only produced using solar power, the ECTR applies to the competing biofuels so as to apply a lower tax burden on the domestic product, objectively affording protection to Ecoland’s domestic RecycloFuel production.

15. RecycloFuel and ForestFuel are directly competitive or substitutable biofuels. Because the ECTR taxes ForestFuel at a rate 30% higher than RecycloFuel in a manner that protects domestic production, the ECTR controverts the anti-protectionist principles embodied in Art. III, and violates the specific requirements of Art. III:2, second sentence.

1.2. The ECTR Violates Art. I:1

16. The ECTR conflicts with Ecoland’s obligations under Art. I:1 because it advantages imported biofuels from some contracting parties over like biofuels from other contracting parties. A measure violates Art. I:1 if “there is an advantage, of the type covered by Art. I and which is not accorded unconditionally to all ‘like products’ of all WTO Members.”²¹ Art. I:1 explicitly extends to “all matters referred to in paras. 2 and 4 of Art. III;”²² thus, this claim

¹⁹ *Japan – Alcoholic Beverages II*, p. 27.

²⁰ *Id.* at p. 29.

²¹ *Indonesia – Autos*, ¶ 14.138.

²² GATT, Art. I:1.

incorporates the arguments set forth above in sec. 1.1 that the ECTR's discriminatory taxation measures are covered under either or both sentences of Art. III:2.

17. First, ForestFuel and RecycloFuel are "like products" for the purposes of Art. I:1. As the panel noted in *Indonesia-Autos*, the "same considerations [as under Art. III:2] justify a finding" of likeness "for purposes of Article I:1."²³ Notably, the AB referred to Art. III:2 as a whole rather than either the first or second sentence individually. The scope of likeness under Art. I:1 therefore encompasses both the first sentence's "like products" analysis and the second sentence's "directly competitive or substitutable" analysis. Thus, this claim incorporates the arguments presented in sec. 1.1 above demonstrating the likeness and directly competitive or substitutable nature of ForestFuel and RecycloFuel under Art. III:2. To the extent that the relationship between ForestFuel and RecycloFuel satisfies either test, they are like products for the purposes of Art. I:1.

18. Second, the 30% tax advantage conferred to RecycloFuel under the ECTR are not "accorded unconditionally to all 'like products' of all WTO Members." As the AB noted in *Indonesia-Autos*, "a legislation itself may violate [Art. I:1] if it could lead in principle to less favourable treatment of the same products."²⁴ Because Enviroland also produces RecycloFuel, the advantage extended to RecycloFuel under the ECTR extends in principle to RecycloFuel imported from Enviroland. This conditional advantage is denied to ForestFuel—a like product—imported from Forestland and other Member nations, in violation of Art. I:1.

1.3. The ECTR Violates Art. 3.1(b) of the SCM Agreement

19. The ECTR effectively subsidizes the use of domestically-produced RecycloFuel over the use of imported ForestFuel. SCM Art. 3.1(b) prohibits "subsidies contingent . . . on the use of domestic over imported goods."²⁵ A measure constitutes a subsidy if "government revenue that is otherwise due is forgone or not collected" and "a benefit is thereby conferred."²⁶

20. Here, the ECTR sets a baseline sales tax for conventional fuels and biofuels at 20%, with discounted rates of 13% for biofuels that reduce carbon emissions by 50% but "are produced in a manner that creates carbon emissions," and of 10% for such biofuels that do not produce

²³ *Indonesia – Autos*, ¶ 14.141.

²⁴ *Id.* at ¶ 14.141 (citing Panel Report, *U.S. – Non-rubber Footwear*, ¶ 6.12).

²⁵ SCM, Art. 3.1(b).

²⁶ SCM, Art. 1.1.

carbon emissions in their production. Although there is no conclusive scientific evidence that the production of ForestFuel produces net carbon emissions, Ecoland has applied the ECTR to tax ForestFuel at 13%, while RecycloFuel is taxed at the 10%. Thus, the ECTR subsidizes both ForestFuel and RecycloFuel by foregoing revenue otherwise due under the general 20% fuel tax rate. Moreover, the ECTR offers a deeper subsidy to RecycloFuel vis-à-vis ForestFuel, subsidizing the former over the latter. In each case, the subsidized product benefits in the consumer market from the reduced tax burden. RecycloFuel benefits particularly as against ForestFuel, given that ForestFuel is natively cheaper than RecycloFuel.

21. This subsidy to RecycloFuel violates Art. 3.1(b) because it is contingent in fact on the use of a domestic good over an imported good. As the AB established in *Canada-Autos*, the context, object and purpose of Art. 3.1(b) require that the word “contingent” includes both *de jure* and *de facto* contingency.²⁷ Here, the structure of the ECTR, Ecoland’s scientifically-unsupported findings regarding the production of ForestFuel, and the contours of the biofuel market indicate that the ECTR does in fact create a subsidy contingent on the use of domestic over imported goods. Although the ECTR does not refer to RecycloFuel and ForestFuel, its provisions dovetail with Ecoland’s comparative evaluation of RecycloFuel and ForestFuel’s respective PPMs to effectively discriminate between those two products. Ecoland only produces RecycloFuel, and only in a manner that Ecoland has determined to be carbon neutral, while ForestFuel is only produced—by Forestland and others—in a manner that Ecoland has determined to emit carbon. The practical application of the ECTR results precisely in a deeper subsidy for RecycloFuel over ForestFuel. This subsidy is therefore contingent in fact on the use of domestic over imported biofuel.

2. THE REGULATION ISSUED UNDER SECTION 66.6 OF THE EPA TO EXCLUDE THE CONVERTER FROM PATENTABILITY VIOLATES ART. 27.1 OF THE TRIPS AGREEMENT

2.1. The Converter is subject to patentability under Art. 27.1 of the TRIPS Agreement

22. The Converter is a novel device enabling any machine to run on ForestFuel. It was invented through the research of Forestland Machinery, Inc. Most companies in Forestland have chosen to use the Converter, in. By virtue of its novelty, the inventive step it embodies, and its capacity for useful industrial application, the Converter is *prima facie* subject to patentability without discrimination as to its place of invention, field of technology and whether it is imported or locally produced, under Art. 27.1 of the TRIPS Agreement.

²⁷ See *Canada – Autos*, ¶¶ 138-43.

2.2. Ecoland Does not Have a Justification for Excluding the Converter from Patentability Under TRIPS Art. 27.2

23. TRIPS Art. 27.2 permits members to exclude inventions from patentability when prevention of the commercial exploitation of those inventions within their territory is “necessary” to protect human, animal or plant life or health, or to avoid serious prejudice to the environment. An Ecolandian regulation issued under Sec. 66.6 of the EPA enumerates inventions for which the prevention of commercial exploitation within Ecoland is “necessary” under the terms of Art. 27.2, and excludes these inventions from patentability. The enumerated inventions include the ForestFuel Converter. Like Art. XX of the GATT, Art. 27.2 of the TRIPS Agreement is an exception to an affirmative WTO obligation. As such, the party invoking its protection for has the burden of showing that the social or environmental measure to be justified falls within its scope.²⁸ Here, exclusion of the ForestFuel Converter from patentability is not “necessary” for the protection of Ecoland’s natural resources or environment, so the regulation issued under Section 66.6 of the EPA is not justified under TRIPS Art. 27.2. As such, compliance with the patentability prescription in Art. 27.1 requires that Ecoland issue a patent for the Converter.

2.3. The Interpretation of “Necessary” Under TRIPS Art. 27.2 Should be Guided by the Interpretation of “Necessary” Under GATT Art. XX

24. The appropriate standard of “necessary” within Art. 27.2 has not yet been elaborated by the Appellate Body. However, the Panel should adopt the meaning used in the enumerated exceptions of Art. XX of the GATT, because Art. 27.2 of TRIPS and Art. XX of GATT have a similar purpose of balancing substantive trade obligations with domestic social and environmental considerations.²⁹ Under that standard, a “necessary” measure is one with a genuine relationship of ends and means to the objective pursued.³⁰ The relationship should be significantly closer to “indispensable” than “simply making a contribution to.”³¹ If the Panel finds the relationship between the measure and the objective pursued to be genuine, it must then decide whether there are any alternative measures that would contribute with

²⁸ *US – Gambling*, ¶ 309.

²⁹ For discussion of the purpose of GATT Art. XX, see *US – Gasoline*, p. 18.

³⁰ *Brazil – Retreaded Tyres*, ¶ 145.

³¹ *Korea – Certain Measures on Beef*, ¶ 161.

equal effectiveness to the policy objective, with fewer restrictive effects on trade.³² Here, Forestland has the obligation of showing the existence of less restrictive measures.³³ Once this obligation is met, Ecoland must show that the proposed alternatives are not reasonably available, or fail to achieve the desired level of protection.³⁴ An alternative measure is not “reasonably available” where the responding Member is not capable of taking it, or where it imposes an undue burden on the responding Member, because of prohibitive costs or substantial technical difficulties.³⁵

2.4. Excluding the Converter from Patentability is not “Necessary” for Purposes of any Legitimate Policy Objective Under TRIPS Art. 27.2

25. Forestland surmises that Ecoland excluded the Converter from patentability under the EPA Sec. 66.6 regulation with regard to a policy objective of limiting its carbon footprint, in order to protect its indigenous wildlife. However, there is no “genuine relationship” between exclusion of the ForestFuel Converter from patentability and the protection of Ecoland’s environment. The Converter can enable all machinery in Ecoland that would otherwise require fossil fuels to run on a biofuel, thereby producing 50% fewer carbon emissions. If the regulation issued under Sect. 66.6 of the EPA works to completely block the Converter from Ecoland’s markets because it cannot be sold profitably, this potential decrease in machinery emissions will go unrealized. Preventing consumers from adapting their machines to run on ForestFuel instead of RecycloFuel does not justify this foregone environmental benefit, because there is no conclusive scientific evidence indicating that RecycloFuel has a smaller carbon footprint than ForestFuel. Even Ecoland does not propose that the aggregate emissions differential between RecycloFuel and ForestFuel is nearly as great as between conventional fossil fuels and low-emission biofuels like ForestFuel. Hence, excluding the Converter from sale in Ecoland will actually obviate potential reductions in Ecoland’s carbon emissions. Furthermore, the Converter is inexpensive and easy to install. Hence, there is no concern that “commercial exploitation” will make its environmental benefits inaccessible to Ecolandian consumer.

³² *Brazil – Retreaded Tyres*, ¶ 156.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at ¶ 156.

2.5. Ecoland Could Fulfill its Policy Objectives Using a Less Trade-Restrictive Measure

26. A “necessary” measure must be the least trade restrictive alternative that satisfies the achievement of the objective pursued by the measure.³⁶ Even if the Panel finds a genuine relationship between the regulation issued under Section 66.6 of the EPA and the protection of Ecoland’s environment, it still fails the “necessary” test because its objectives could be effectively satisfied using a variety of alternatives that are both “reasonably available” and less trade-restrictive. For example, Ecoland could introduce furry marmots that have already adapted to warmer temperatures into its environment, which would preserve the marmot stocks and address Ecoland’s carbon footprint by helping to facilitate Fir tree regeneration.

3. ECOLAND’S ECOLABELING REGULATION VIOLATES GATT ARTS. I AND III:4 AND ARTS. 2.1, 2.2 AND 2.4 OF THE TBT AGREEMENT

3.1. The Mandatory Ecolabeling Regulation is Inconsistent with Arts. I and III:4 of GATT

3.1.1. The Ecolabeling Regulation is Inconsistent with GATT Art. I

27. Art. I:1 requires that “any advantage . . . granted by any Member to any product originating in or destined for any other country shall be accorded . . . to the like product originating in or destined for the territories of *all other Members*.”³⁷ As applied, the ecolabeling regulation grants Category 1 products an advantage in the domestic market with respect to similar goods that are labeled under Category 2 or 3. Because the ecolabeling measure is a regulation that classifies products into categories prior to sale, it must be considered a regulation that affects the internal sale or offering for sale of those products. Thus the critical issues are a determination of product likeness and a finding that a like product from one exporting Member is granted an advantage over any other exporting Member.

3.1.1.1. The Products Categorized Under the Ecolabeling Regulation are Like Products in Art. I:1

28. The panel in *Indonesia-Autos* explained that the same considerations in a discussion of like products under Art. III:2 justify a finding of likeness under Art. I:1.³⁸ Under Art. III:2, the panel emphasized the “same end uses and the same basic properties, nature and quality”³⁹ of the products. Here, the products’ end uses, basic properties, nature or quality

³⁶ Appellate Body, *Brazil – Retreaded Tyres*, ¶ 156

³⁷ GATT, Art. I:1 (emphasis added).

³⁸ *Indonesia – Autos*, ¶ 14.141; *see supra*, § 1.2.

³⁹ *Id.* at ¶ 14.110.

are not affected by the carbon emitted during production of the fuel that is used in the machinery to produce the products.

3.1.1.2. *The Ecolabeling Regulation Results in de facto Discrimination Between Like Products.*⁴⁰

29. Upon entering Ecoland's domestic market, products receive one of three ecolabels. Once affixed with a label, products labeled under Category 1 receive a significant market benefit and national support, whereas the same products that receive a Category 2 label have stagnant demand, and the same products that receive Category 3 labels are stigmatized and in fact lose demand. The only products that receive Category 1 labels are produced with machinery that use RecycloFuel. Because demand for Category 1 products has increased by 8%, manufacturers of products will, for no other reason but to receive a market advantage, be compelled to substitute RecycloFuel in place of ForestFuel for the production of the same product. But for the artificial distinction created by the ecolabeling regulation, the rights of Members are made conditional on private contractual obligations of the manufacturers of products in choosing fuels, and thus the regulation is an improper regulation under Art. I.⁴¹ Finally, because Enviroland and Ecoland are the sole producers of RecycloFuel, as a result of the application of the ecolabeling regulation, ForestFuel, which is not produced by either Enviroland or Ecoland, is discriminated against in the marketplace, causing a significant market advantage to one Member of the WTO but not another.

3.1.2. The Ecolabeling Regulation is Inconsistent with Art. III:4

30. The broad and fundamental purpose of Art. III is to avoid protectionism in the application of internal regulatory measures⁴² and to protect the expectations of an equal competitive relationship between like imported and domestic products.⁴³ For a violation under Art. III:4 to be established, the imported and domestic products at issue must be like products, the measure at issue must be a law or regulation that affects the internal sale or offering for sale of the products, and the imported products must be accorded less favorable treatment than that accorded to like domestic products.⁴⁴

⁴⁰ *Canada – Autos*, ¶ 78 (holding that Art. I applies to *de facto* and *de jure* discrimination).

⁴¹ *Indonesia – Autos*, ¶ 14.145.

⁴² *Japan – Alcoholic Beverages II*, p. 16.

⁴³ *Id.* at p. 16.

⁴⁴ *Korea – Certain Measures on Beef*, ¶ 133.

3.1.2.1. *The Products Categorized Under the Ecolabeling Regulation are Like Products in Art. III:4*

31. After utilizing the *Border Tax* criteria⁴⁵ for product likeness, the products categorized within the ecolabeling regulation must be considered like products. The ecolabeling regulation merely distinguishes between products based solely on non-product related PPMs, which do not affect the physical characteristics of the products.⁴⁶ Second, the end uses of the products are not changed based on non-product related PPMs of the fuels that are used in producing the products. Third, though consumer preference for products may be influenced by a product's eco-friendly reputation, RecycloFuel from Ecoland and ForestFuel from Forestland are both biofuels that do not have a different carbon-footprint. Finally, internationally accepted tariff classifications do not categorize products based on non-product related PPMs. Because the regulation is aimed at global climate change, the greatest weight in determining likeness should be the international tariff classification of Biofuels and not the domestic classification which can be seen as a disguised restriction on international trade. While no single criteria is dispositive of product likeness, under either a narrow or broad interpretation of likeness, the four criteria weigh heavily in favor of finding that the products regulated by the ecolabeling regime are like products.

3.1.2.2. *Imported Category 2 and 3 Products Receive Less Favorable Treatment than Like Domestically Produced Category 1 Products*

32. The AB in *Korea-Beef* found that modifying the conditions of competition to the detriment of imported like products is evidence of discrimination.⁴⁷ Because demand for Category 1 products has increased 8% following the implementation of the ecolabeling regulation and demand for Category 2 and 3 products has stagnated or dropped, imported Category 2 and 3 are effectively prevented from benefiting from favorable sales conditions that like Category 1 products receive in the Ecoland marketplace.⁴⁸ Essentially the regulation results in an inequality of competitive conditions for like products in Ecoland.⁴⁹ The central consequence of Ecoland's category system can only be reasonably construed as a

⁴⁵ See *supra*, § 1.1.2.1.

⁴⁶ *Tuna – Dolphin I*, ¶ 5.15. DSU, Art. 3.2 ensures security and predictability in the dispute settlement process, thus the findings in a panel report are helpful in determining the scope of Member obligations.

⁴⁷ *Korea – Certain Measures on Beef*, ¶ 137.

⁴⁸ *U.S. – Gasoline*, ¶ 6.10.

⁴⁹ *Japan – Alcoholic Beverages II*, pp. 16-17.

manipulation of consumer preference and an arbitrary distinction between two otherwise similar products. If Ecoland claims an Art. XX exemption to its GATT obligations, the burden is upon Ecoland to show a *prima facie* case that its ecolabeling regulation satisfies the exemption.⁵⁰ Even if the ecolabeling regulation qualifies as an exception under Art. XX of the GATT, the regulation fails to comply with the specialized obligations⁵¹ under the TBT.

3.2. The Ecolabeling Regulation is also Inconsistent with TBT Arts. 2.1, 2.2, and 2.4

3.2.1. The Ecolabeling Regulation Falls Within the Scope of the TBT

33. In accordance with Art. 3 of the DSU clarification of existing provisions shall be in accordance with customary rules of interpretation of public international law.⁵² Applying VCLT Art. 31.1 to Annex 1.1 clearly identifies non-product related PPMs as within the scope of the TBT. The omission of *related* in the second sentence of Annex 1.1 may not be interpreted as an implied requirement that regulations dealing with process and production labeling must *relate* to the physical characteristics of that product and instead suggests that labeling requirements that apply to a product's production and process method shall be considered a technical regulation within the meaning of the TBT.

3.2.2. The ecolabeling regulation is a technical regulation under the TBT.

34. Under the TBT, a technical regulation is a document that identifies a group of products, stipulates or provides product characteristics (explaining that the characteristics of a product include any objectively definable feature or quality), and requires mandatory compliance.⁵³ First, the ecolabeling regulation clearly identifies products produced with machinery that use biofuels or fossil fuels as the group of products requiring certification.⁵⁴ Second, the labeling regime lays down characteristics of the PPMs and divides the products into three categories. Finally, compliance with the ecolabeling regime is mandatory. Thus the ecolabeling regulation is a technical regulation and must comply with the obligations set forth in the TBT Agreement.

⁵⁰ Panel Report, *EC – Asbestos*, ¶ 8.177.

⁵¹ See *EC – Asbestos*, ¶ 80.

⁵² DSU, Art. 3.2.

⁵³ *EC – Asbestos*, ¶ 67.

⁵⁴ See *Id.* at ¶ 70.

3.2.2.1. *The Regulation Violates the National Treatment and Most Favored Nation Principles Embodied in TBT Art. 2.1*

35. The language of Art. 2.1 essentially imports the most favored nation principle and the national treatment obligation language of GATT Art. I and Art. III. VCLT Art. 31.2 permits this panel to refer to GATT 1994 as a related treaty to inform the context and purpose of the TBT.⁵⁵ Furthermore, the dispute settlement system of the WTO relies on security and predictability and alternative interpretations of similar provisions within the same architecture of agreements would create absurd and confusing results.⁵⁶ The similar language between the GATT and the TBT evidence internally consistent obligations and so it is informative to refer to GATT jurisprudence to determine the meaning and scope of Art. 2.1. Because the regulated products are like products under GATT 1994 and because Enviroland and Ecoland receive tangible and significant market advantages over like products produced with biofuels from Forestland, the ecolabeling regulation violates Ecoland's obligations under TBT Art. 2.1.⁵⁷

3.2.2.2. *The Regulation is Applied with the Effect of Creating Unnecessary Obstacles to International Trade and is More Trade Restrictive than Necessary*

36. Unlike the general exceptions under GATT Art. XX, Art. 2.2 imposes affirmative obligations on a contracting Member, requiring that technical regulations "not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."⁵⁸ Specifically, a 1993 Note from the Secretariat concluded that the "degree of restrictiveness should be proportional to the risk of non-fulfillment of the legitimate objectives."⁵⁹ Thus necessity within Art. 2.2 may be seen as similar to the cost-benefit analysis test found in the GATT Art. XX exception. Additionally, the regulation may not constitute arbitrary discrimination or be a disguised restriction to international trade.⁶⁰

37. As the measure is constructed, non-fulfillment does not necessarily affect the supply of products, but the fulfillment of the measure significantly affects the market conditions. The

⁵⁵ VCLT, Art. 31.2(a).

⁵⁶ See DSU, Art. 3.2.

⁵⁷ See *supra*, §§ 3.1-3.2.

⁵⁸ TBT, Art. 2.2.

⁵⁹ See Marceau, p. 832 (citing Doc. TER/W/16 and corr. 1).

⁶⁰ TBT, Preamble.

measure introduces inflammatory images and misleading information into the marketplace in order to positively influence demand of Category 1 products, which happen to use a biofuel that Ecoland has a substantial economic interest in. Because the measure does not *prohibit* the consumption of allegedly environmentally unfriendly goods and is merely a regulatory intervention created to coerce consumers into supporting products produced with machinery that uses RecycloFuel, the regulation's costs on international trade are greatly disproportionate to the benefits alleged. Since the ecolabeling regime is a regulation that is targeted at informing consumers in order to influence demand, a reasonably available and lesser trade-restrictive program includes either a voluntary regulation or merely a non-inflammatory label. First, a voluntary scheme might be economically beneficial to Ecoland as a developing country because it shifts the financial burden of regulation from the government to producers and would receive less stringent requirements as a standard within the TBT. Second, a simple label that informs consumers of the carbon footprint of a product rather than one that evokes apocalyptic images of dying national symbols would not only be less trade restrictive but also more scientifically accurate. However, as it stands, the ecolabeling regulation is merely a disguised restriction on international trade and provides a competitive market benefit to products produced with RecycloFuel.

38. Finally, the categorical distinctions are arbitrarily measured and applied. A mere additional pound of carbon emission would trigger a Category 2 label, resulting in unfavorable market penetration in Ecoland. The regulation does not account for other sources of pollution and is clearly targeted at providing a disguised benefit to RecycloFuel in the international market of biofuels.

3.2.2.3. Ecoland did not Use Relevant Effective or Appropriate International Standards as the Basis of Technical Regulations

39. The TBT recognizes the WTO's preference for multilateralism and in fact obligates Member States to base technical measures on international standards subject to narrow grounds of exception.⁶¹ The ISO lays out guidance standards for all environmental labeling programs and thus is both an effective and appropriate standard to be the basis for any ecolabeling regulation.⁶² Type I labels under ISO14024 of the Guidance Standards best describe the ecolabeling regime that Ecoland has instituted, a third-party certified ecolabel. Though Type I labels are primarily aimed at voluntary programs, mandatory ecolabeling

⁶¹ TBT, Art. 2.4.

⁶² ISO 14020-14024.

regulations should still comply with the standards since they are a relevant and informative part of the international standards for *all* ecolabeling.⁶³ ISO14024 requests that the party implementing an ecolabeling program consult with environmental organizations and other relevant stakeholders and reassess and revisit product categorization. Though life-cycle labels are permissible, they must be based on thorough and comprehensive scientific methodology.⁶⁴ ISO14020 explains that environmental labels shall be accurate, verifiable, relevant and non-deceptive and that labels assist consumers in making accurately informed choices. Contrary to international standards, Ecoland did not consult with Forestland before instituting their labeling regulation. Additionally, because Ecoland's labeling regulation deceptively misinforms consumers of environmental impacts, is not supported by accepted scientific research and unnecessarily intrudes into Forestland's domestic regulations, the labels are directly contradictory of the standards set out by the ISO and cannot be considered the basis thereof.⁶⁵

40. Ecoland did to negotiate classifications of biofuels based on carbon footprints but not carbon emissions. Nor did Ecoland consult Forestland or any environmental organization concerning its specific ecolabeling program. The only available scientific evidence suggests that substituting a biofuel, such as RecycoFuel or ForestFuel, in place of fossil fuels will reduce carbon dioxide emissions when burned. There is no conclusive scientific evidence that differentiates the carbon footprint of RecycoFuel from ForestFuel.

41. Because the environmental impact is not as Ecoland has characterized, as the Categories currently appear, consumers will be misinformed about the effects of purchasing Category 2 products. The labels are purely targeted at the carbon footprints of the fuels used in production of products and not the complete carbon footprint of the products themselves.

42. Finally, the ecolabeling regulation is thrice removed from the emissions it targets – that is, the regulation targets the emissions of the production method of the biofuels that are used to operate the machinery that is used to produce the products that receive a label. In effect, the regulation reaches into the PPMs of different States in order to control and shape the internal domestic policies of that State despite a lack of scientific evidence which shows that the use of products within its own jurisdiction have any effect on the environment.

⁶³ TBT, Art. 2.4

⁶⁴ IMPLEMENTING ISO 14000, p. 419.

⁶⁵ EC – Sardines, ¶ 248.

Request for Findings

The Government of Forestland asks the Panel to recommend that the DSB declare i) that the Ecoland Carbon Taxation Regulation (ECTR) is inconsistent with GATT Arts. I and III:2 of the GATT 1994 and Art. 3.1(b) of the SCM Agreement; ii) that the regulation issued under Sec. 66.6 of the Ecoland Patent Act is inconsistent with Art. 27.1 of the TRIPS Agreement; and iii) that the ecolabeling regulation is inconsistent with Art.s 2.1, 2.2, and 2.4 of the TBT Agreement; or, alternatively, Arts. I and III:4 of the GATT 1994.