



ELSA MOOT COURT COMPETITION (EMC²) ON WTO LAW 2008-2009

BENCH MEMORANDUM

ECOLAND – MEASURES RELATING TO BIOFUELS MADE FROM PINE CONES

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Summary of Arguments

Ecoland Carbon Taxation Regulation (ECTR)

The ECTR applies three categories of fuel taxes:

- (1) 20% on conventional gasoline;
- (2) 10% on biofuels that produce 50% fewer emissions than conventional fossil fuels (Recyclofuel and Forestfuel); and
- (3) 3% on biofuels that are produced in a manner that creates carbon emissions (Forestfuel) (Case, paras. 4 & 11). Forestland's concerns stem from the more favourable tax treatment provided to Recyclofuel, as compared to Forestfuel, under the ECTR.

Forestland claims that the ECTR is inconsistent with Articles I and III:2 of the GATT 1994 and with Article 3.1(b) of the SCM Agreement.

Forestland bears the burden of proof under:

- (1) SCM Agreement Article 1.1 and 3.1(b) to prove the lower tax rate on Recyclofuel is a “financial contribution” because the Government of Ecoland is foregoing government revenue “otherwise due”, there is a “benefit” to producers or consumers, and the subsidy is contingent upon the use of domestic over imported goods);
- (2) GATT Article I:1 to prove the lower tax rate on imported Recyclofuel is an “advantage”, not accorded immediately and unconditionally, and imported Recyclofuel and Forestfuel are “like products”;
- (3) GATT Article III:2, first sentence to prove domestic Recyclofuel and Forestfuel “like products” and taxes applied to Forestfuel are in excess of those applied to Recyclofuel; and
- (4) GATT Article III:2, second sentence to prove domestic Recyclofuel and Forestfuel are “directly competitive or substitutable products”, not similarly taxed, and the dissimilar taxes are applied so as to afford protection to domestic production.

Ecoland bears the burden of proof under GATT Article XX to prove:

- (1) Under XX(b), the policy goal of the ECTR is covered by XX(b) and is “necessary”;
- (2) Under XX(g), the ECTR “relates to” the conservation of “exhaustible natural resources and is “made effective in conjunction with restrictions on domestic production or consumption; and
- (3) Under the chapeau, the ECTR is not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

Some incorrect or marginal arguments are not included here, but are discussed in the main part of the Bench Memorandum: SCM Articles 27.3 and GATT Articles III:8(b) and XX(d). For more detailed analysis, please see the main part of the Bench Memorandum.

Order Of Examination

FORESTLAND	ECOLAND
Issue - SCM 1.1, financial contribution	
Under SCM 1.1(a)(1)(ii), not charging the 3% tax on Recyclofuel is a financial contribution by a government, because government revenue that is otherwise due is foregone or not collected and there is no basis for the differential treatment. The biofuel taxes are similar, since they are all fuel taxes, and the taxpayers are in similar situations (either as fuel producers or consumers). The ECTR categories are comparable to the foreign and domestic sales categories in <i>US - FSC</i> and the more favourable tax treatment of the domestically produced product is comparable to the more favourable import duty treatment for domestic producers of automobiles in <i>Canada - Autos</i> .	A WTO Member is “free <i>not</i> to tax any particular categories of revenues”. Recyclofuel is not subject to the 3% additional tax due to the nature of the product and therefore no tax revenue is foregone. The taxes are not comparable because the products are not similar: they are distinguished on the basis of their carbon emissions. Thus, there is no basis for identical tax treatment. This case is distinguishable from <i>US - FSC</i> because the products were identical in that case, but not in this case. <i>US - FSC</i> dealt with an export tax under SCM Agreement Article 3.1(a), whereas the claim in this case is under SCM Agreement Article 3.1(b).
Issue - SCM 1.1, benefit	
ECTR confers a benefit on Recyclofuel producers in three possible ways: (1) by allowing them to sell their product for less than they otherwise could, making their product more price-competitive than it would have been in the market; or (2) by allowing them to sell their product for the same price, with the tax differential making their product more price-competitive than it would have been in the market; or (3) by allowing them to sell their product for a higher price, thereby enjoying a wider profit margin than they would have.	The ECTR benefits the consumer, rather than Recyclofuel producers; as such, no benefit is conferred on Recyclofuel producers. There is no benefit that the consumer would not otherwise be able to obtain in the market place.
Issue - SCM 3.1(b)	
The 3% difference in tax treatment between Forestfuel and Recyclofuel is only available to consumers in Ecoland if they use Recyclofuel (a domestic good for 80% of the world supply) instead of Forestfuel (an imported good). It is thus contingent in fact on the use of domestic over imported goods.	Because Recyclofuel from Enviroland receives the same tax treatment as Recyclofuel from Ecoland, any subsidy is available to consumers regardless of the origin of the goods. It is thus not contingent in fact or in law on the use of domestic over imported goods.
Issue - GATT I:1, advantage	
ECTR is an internal tax and thus constitutes an advantage of the type covered by Article I:1. ECTR provides more favourable treatment to Recyclofuel from Enviroland than Forestfuel from Forestland and the ten other WTO Members that produce Forestfuel, by applying a sales tax of 10% to Recyclofuel and a sales tax of 13% to Forestfuel. The term “advantage” covers discrimination in which the distinct treatment is based on different conditions prevailing between countries, in this case different sources of energy.	Concede that internal taxes are covered, unless Forestland does not meet its burden of proof.

FORESTLAND	ECOLAND
Issue - GATT I:1, like products	
<p>ForestFuel and RecycloFuel from <i>Enviroland</i> are like products.</p> <p>Physical properties: Each produces 50% fewer carbon emissions when they are burned, compared to the carbon emissions of conventional fossil fuels. The available scientific evidence supports the view that substituting RecycloFuel or ForestFuel for conventional fossil fuels will reduce carbon dioxide emissions. Both products are fuels, both are flammable, both can be burned to power machinery, and both are composed of carbon, hydrogen and oxygen.</p> <p>End uses: Recyclofuel and Envirofuel are in a competitive relationship as both are fuels. The alternative use of Forestfuel as a fertilizer does not change this fact. The Forestfuel Converter allows Forestfuel to be used by the same machines as Recyclofuel. In this regard, the two biofuels compete in the global marketplace.</p> <p>Consumer preferences: But for the ecolabelling regulation, consumers would treat both fuels the same, since they were not aware of which fuel was used to produce the products before the ecolabelling.</p> <p>Tariff classification: Even if HS classification cannot be applied directly to decide like products, it is useful to support the decision of likeness based on other criteria. Ecoland's discriminatory tariff classification system should not be considered as evidence that the products are not like products.</p> <p>PPMs: PPMs should not be taken into account; rather, likeness should be based on the characteristics of the product as such.</p>	<p>ForestFuel and RecycloFuel from <i>Enviroland</i> are not like products.</p> <p>Physical properties: The chemical composition of RecycloFuel is different from that of ForestFuel. Both biofuels are monoalkyl esters, but the number and combination of these three elements is different in each. ForestFuel burns more rapidly than RecycloFuel. RecycloFuel is a golden colour, while ForestFuel is brown. RecycloFuel is more volatile than ForestFuel. Unlike ForestFuel, RecycloFuel can be compressed, making it less expensive to transport and requiring fewer vessels to transport.</p> <p>End uses: Forestfuel and Recyclofuel have different end uses, since the latter cannot be used as a fertilizer. The relevant market is the Ecoland market, not the global market. Since machines and vehicles are normally set to run on a specific type of biofuel, and the Forestfuel Converter has been denied a patent in Ecoland, the two biofuels do not compete directly in Ecoland.</p> <p>Consumer preferences: Once the labelling scheme was introduced, demand for products produced with Forestfuel stagnated while demand for products produced with Recyclofuel increased by 8%, indicating a consumer preference for Recyclofuel.</p> <p>Tariff classification: Its tariff classification is valid and supports the decision that the biofuels are not like products based on other criteria.</p> <p>PPMs: PPMs should be taken into account to determine likeness.</p>

FORESTLAND	ECOLAND
Issue - GATT I:1, unconditionally	
<p>ECTR violates Article I:1 because it makes the application of the more favourable 10% tax rate conditional upon Forestland's environmental policies. An advantage can not be conditional upon criteria that are unrelated to the product itself.</p>	<p>The issue of conditionality can not be determined independently of the issue of whether Forestfuel and Recyclofuel are like products. Since they are not like products, subjecting them to different tax treatment does not amount to a condition.</p>
Issue - GATT III:2, first sentence, like products	
<p>Forestfuel and Recyclofuel from <i>Ecoland</i> are like products. See arguments under Article I:1, above.</p>	<p>Forestfuel and Recyclofuel from <i>Ecoland</i> are not like products. The "accordion of likeness" is more narrow in the first sentence of Article III:2 than in Article I:1.</p>
Issue - GATT III:2, first sentence, Internal taxes in excess of	
<p>Even the smallest amount of 'excess' is too much, since the prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a <i>de minimis</i> standard. Since Recyclofuel and Forestfuel are like products, and the latter is subject to a tax that is 3% higher than the former, there is a violation. Article III:2 applies regardless of the policy objective of the tax measure.</p>	<p>Concede that the tax differential is "in excess of", unless Forestland does not meet its burden of proof.</p>
Issue - GATT III:2, second sentence, directly competitive or substitutable products	
<p>The Forestfuel Converter allows the two products to compete directly. In Ecoland, demand for products produced with machinery using Forestfuel have stagnated, demand for produced with machinery using Recyclofuel has increased by 8% and demand for products produced with machinery using conventional fossil fuels has decreased by 10%.</p> <p>While the evidence suggests that the changes in market share are due to the ecolabelling regulation, this does not exclude the possibility that the ECTR and the patent regulation have also affected demand for these products. While the case does not provide any direct evidence regarding the change in market share of the biofuels, changes in demand for products made with the biofuels would affect demand for the biofuels themselves.</p>	<p>Given that "biofueled machines are normally set to run on a specific type of biofuel" and the differences in burn rates, volatility and chemical composition, Forestfuel and Recyclofuel at best compete <i>indirectly</i> as fuels, but there is no <i>direct</i> competitive relationship.</p> <p>There is no evidence regarding the market shares of Forestfuel and Recyclofuel and Forestland has not met its burden of proof in this regard.</p>

FORESTLAND	ECOLAND
Issue - GATT III:2, second sentence, not similarly taxed	
<p>The <i>de minimis</i> level referred to by the AB should be calculated in light of the <i>de minimis</i> levels set out in the Covered Agreements.</p> <p>Since taxes are more akin to subsidies and dumping margins than to agricultural production, <i>de minimis</i> should be defined as 1-2%. The <i>de minimis</i> level for developing countries in the SCM Agreement of 3% is inappropriate in the context of GATT Article III since, as with the Antidumping Agreement, Article III does not provide for special and differential treatment for developing countries.</p> <p>On this measure, the tax differential of 3% in the case at hand qualifies as more than <i>de minimis</i>. The panel should disregard the fiscal categories created by Ecoland, because Recyclofuel and Forestfuel are directly competitive or substitutable products.</p>	<p>It is inappropriate to interpret the AB's use of the term "<i>de minimis</i>" as if it were treaty language. This term does not appear in GATT Article III:2. Moreover, the AB made it clear that what constitutes <i>de minimis</i> in the context of GATT Article III:2, second sentence, would vary with the circumstances of each case. Therefore, it is inappropriate to define a fixed percentage based on provisions in other Covered Agreements.</p> <p>Moreover, setting a fixed percentage would amount to an amendment of the GATT and add to the obligations of Members, contrary to DSU Article 3.2.</p> <p>Alternatively, since the <i>de minimis</i> range in the Covered Agreements is 1-10%, it would be inappropriate to assume that the AB intended the <i>de minimis</i> level in GATT Article III:2, second sentence to fall at the lower end of this range. Since they are not directly competitive or substitutable products, the panel should consider the relevant tax differential to be that within each fiscal category. Since the tax rate is the same for Forestfuel, regardless of its origin, the tax rate is identical.</p>
Issue - GATT III:2, second sentence, applied so as to afford protection to domestic production	
<p>Since Enviroland's Recyclofuel production only accounts for 20% of the world supply, in practice there must be relatively little importation of Recyclofuel in Ecoland. Thus, in practice, the lower tax bracket of the ECTR principally applies to domestic production. The policy objectives of the tax are only relevant to confirm that it is applied so as to afford protection.</p>	<p>If 'directly competitive or substitutable products' are not 'not similarly taxed', then there is neither need to inquire further as to whether the tax has been applied 'so as to afford protection'.</p> <p>Alternatively, the taxation has not been applied so as to afford protection. The minimal tax differential is evidence of a lack of protective application. There is no evidence regarding the volume of imports from Enviroland. Therefore, there is no evidence that the lower tax bracket applies mainly to domestic production. The environmental objectives of the ECTR should be taken into account in determining whether the measures are applied 'so as to afford protection to domestic production'.</p>
Issue - GATT XX	
<p>Article XX does not apply to violations of SCM Agreement.</p>	<p>Article XX does apply to violations of SCM Agreement.</p>
Issue - GATT XX(g), exhaustible natural resources	
<p>Forestland should concede that the ECTR aims to conserve exhaustible natural resources, as long as Ecoland meets its burden of proof on this point.</p>	<p>The ECTR aims to conserve three exhaustible natural resources: the global climate, the furry marmot and the Ecolandian fir tree wilderness. There is a sufficient jurisdictional nexus between Ecoland and these resources.</p>

FORESTLAND	ECOLAND
Issue - GATT XX(g), relating to	
<p>While there is scientific evidence to support a shift from consumption of conventional fossil fuels to biofuels, the differential tax treatment of Forestfuel and Recyclofuel does not relate to the reduction of carbon emissions.</p> <p>The available scientific evidence supports the view that substituting either biofuel for conventional fossil fuels will reduce carbon emissions and there is no conclusive scientific evidence comparing the carbon footprint of the Recyclofuel production process to that of Forestfuel. The structure and design of the measure is not based on any specific obligations in the GWA, which does not contain specific rules regarding the classification of biofuels and requires that measures to reduce carbon emissions be based on the available scientific evidence.</p> <p>The available scientific evidence shows that deforestation is responsible for 20% of the increase in carbon emissions, but the ECTR fails to recognize the contribution of the Forestfuel industry to the preservation of forests. Thus, the GWA provides evidence that the ECTR does not relate to the reduction of carbon emissions, but rather to preferential treatment for the domestically produced biofuel.</p> <p>The conservation of the global climate is unlikely to contribute to the preservation of the furry marmot, since its breeding cycle has already been disrupted and it is unlikely that the ECTR will have a sufficient impact on climate change in sufficient time to reverse the effects on the furry marmot or the fir trees.</p>	<p>The policy goal of the ECTR is to reduce carbon emissions in order to comply with its obligations under the GWA, combat global warming and protect the environment.</p> <p>The ECTR seeks to reduce carbon emission by shifting consumption from fuels whose production process produces higher carbon emissions to fuels whose production process produces lower carbon emissions through the economic incentive of a consumption tax.</p> <p>The GWA serves as evidence that the reduction of carbon emissions relates to the conservation of the global climate. Since the differential tax treatment of Forestfuel and Recyclofuel is based on the different carbon emissions resulting from their production processes, there is a close and genuine relationship between the general structure and design of the measure and the policy goal of reducing carbon emissions to conserve the global climate. In turn, the conservation of the global climate will contribute to the preservation of the furry marmot and the fir trees.</p>
Issue - GATT XX(g), made effective in conjunction with restrictions on domestic production or consumption	
<p>While this clause does not require identical treatment of domestic and imported products, any differences in treatment must be justified by reference to the evidence regarding the reasons for the differential treatment. Since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel, the difference in tax treatment does not meet this requirement.</p>	<p>This requirement has been met, since the ECTR has been in force since 1 January 2008 and applies to domestic consumption of both imported and domestic fuels.</p> <p>Since this clause does not require identical treatment of domestic and imported products, and the minor difference in tax treatment can be justified by the differences in the carbon footprints of Recyclofuel and Forestfuel, this requirement has been met.</p>

FORESTLAND	ECOLAND
Issue - GATT XX(b), policy goal	
<p>Concede that the protection of the furry marmot and the Ecolandian environment fall within the range of policies covered by Article XX(b), unless Ecoland fails to make its case on this issue. In that case, argue that Ecoland has failed to meet its burden of proof.</p> <p>However, Forestland can argue that Article XX(b) does not apply to transnational or global environmental concerns. Thus, climate change does not fall within the range of policies covered by Article XX(b).</p>	<p>The policy goal of the ECTR is to reduce carbon emissions in order to comply with Ecoland's obligations under the GWA, to combat global warming, to protect the environment and to protect the furry marmot and the Ecolandian fir trees that depend on the furry marmot's digestive system.</p> <p>Ecoland should cite <i>Brazil – Retreaded Tyres</i> to support its argument that the protection of the furry marmot through the reduction of carbon emissions, like the protection of monkeys in Brazil, falls within the range of policies covered by Article XX(b): the protection of animal life or health. In <i>Brazil – Retreaded Tyres</i>, the panel accepted that environmental protection falls within the range of policies covered by Article XX(b). The protection of the Ecolandian fir trees falls under the category of “plant life or health”.</p>
Issue - GATT XX(b), necessary	
<p>Importance of the interests or values: Forestland should concede this point, unless Ecoland fails to make its case on this issue, but argue that environmental protection should be accorded less weight than human health.</p> <p>Contribution to the end pursued: Ecoland must demonstrate that the ECTR “is apt to produce a material contribution to the achievement of its objective”. There is no evidence that the ECTR will have any significant impact on climate change or the protection of the furry marmot. Alternatively, the ECTR will only make “a marginal or insignificant contribution” to the reduction of carbon emissions and that is not enough for the ECTR to be considered necessary.</p> <p>Trade impact: Forestland should concede that the trade impact of the ECTR is minimal, unless Ecoland does not meet its burden of proof, but argue that the impact of the eco-labelling scheme and the Patent Act should also be taken into account.</p>	<p>Importance of the interests or values: Ecoland should cite the finding of the Panel in <i>Brazil – Retreaded Tyres</i> that “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and that protecting the environment is no less important”.</p> <p>Contribution to the end pursued: The contribution of the ECTR to addressing climate change and protecting the furry marmot should be considered in conjunction with the effects of the ecolabelling program and its efforts to preserve furry marmot habitat. A trade-restrictive measure, the contribution of which is not immediately observable, can be justified under Article XX(b).</p> <p>Trade impact: The trade impact of the ECTR is minimal, since it does not prevent market access and only applies a minimally higher tax to Forestfuel.</p>

FORESTLAND	ECOLAND
Issue - GATT XX(b), necessary cont.,	
<p>Alternative measures: The proposal of Ecoland's scientists to introduce furry marmots from other countries into Ecoland would achieve the same objectives as the ECTR with respect to the protection of furry marmots. Indeed, introducing furry marmots that can adapt to climate change is likely to be more effective than the Ecolandian measures, whose impact on climate change is not likely to be felt for many years, if ever.</p> <p>An alternative to the ECTR is to recognize Forestland's efforts to combat climate change through the Biofueled Vehicles Regulation, the Biofueled Machinery Regulation and preservation of Forestland's pine forests. The alternatives should be considered in the light of relevant international norms. Since the GWA requires countries to base their measures for carbon emission reductions on available scientific evidence and that evidence shows that the preservation of forests is an important factor in mitigating climate change, the preservation of forests in Forestland is a reasonable alternative.</p>	<p>Alternative measures: Ecolandian scientists do not know why furry marmots have not adapted to climate change in the way that other furry marmots have. Thus, there is no evidence that this alternative would work. Also, the introduction of furry marmots from other countries is merely to preserve animal species, not to protect the animal life and health of Ecoland, and is thus not an alternative.</p> <p>The GWA does not provide any specific rules regarding the preservation of forests. Moreover, any alternative measures should be measures that Ecoland can take, rather than measures that are beyond its control and that would require consultations or negotiations with Forestland. Even if forest preservation is a reasonable alternative, Ecoland cannot preserve its own forests without protecting the furry marmot.</p>
Issue - GATT XX, chapeau	
<p>The application of the ECTR results in discrimination between Recyclofuel from Ecoland and Enviroland and Forestfuel from Forestland and ten other WTO Members. The ECTR fails the chapeau test because:</p> <p>(1) Ecoland requires WTO members to adopt "essentially the same policy" as Ecoland to mitigate climate change without taking into account other policies and measures a country may have adopted that would have a comparable effect on climate change, specifically the steps that Forestland has taken to reduce its carbon emissions and to meet its carbon reduction commitments under the GWA;</p> <p>(2) Ecoland applied the same standard for the power source of biofuel refineries without taking into consideration whether it was appropriate for the conditions prevailing in other countries, specifically whether solar power is a viable alternative to hydroelectric power in the Forestfuel producers. Ecoland bears the burden of proof under the chapeau and there is no evidence in the case that Ecoland took these issues into consideration;</p>	<p>Concede that there is discrimination, but argue that any discrimination is neither arbitrary nor unjustifiable, nor does it amount to a disguised restriction on international trade. The ECTR meets the chapeau test because:</p> <p>(1) Ecoland engaged in "serious, across-the-board negotiations" with the objective of concluding a multilateral agreement on climate change (the GWA), before enacting the ECTR;</p> <p>(2) those negotiations addressed the issue of how biofuels should be classified and the role that forest preservation should have in mitigating climate change;</p>

Issue - GATT XX, chapeau cont.,

(3) Ecoland failed to engage in negotiations with five Forestfuel producers that are not signatories to the GWA and there is no evidence that those WTO Members were part of the GWA negotiations;

(4) The reason for the discrimination—the carbon footprints of the products—has no rational connection to the objective of reducing carbon emissions, since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel.

(3) membership in the GWA is open to all WTO Members, including the Forestfuel producers that chose not to sign the GWA;

(4) the chapeau does not require that Ecoland succeed in its efforts to negotiate a multilateral solution to the classification of biofuels and credit for forest conservation in mitigating climate change;

(5) the parties affected by the decisions of any Ecolandian government agency are entitled to seek judicial review in the Ecoland courts;

(6) the reason for the discrimination—the carbon footprints of the products—has a rational connection to the objective of reducing carbon emissions in order to mitigate climate change.

Regulation under s. 66.6, Ecoland Patent Act

Forestland Machinery Inc. has invented a device that can be used to adapt any machine to use ForestFuel at a very low cost (the ForestFuel Converter) (Case, para. 19). Forestland Machinery Inc. was granted a patent on the ForestFuel Converter in 2007 in Forestland, in the ten other WTO Members that produce ForestFuel and in several other countries. However, Forestland Machinery Inc. was refused a patent in Ecoland under Section 66.6 of the Ecoland Patent Act, which excludes from patentability “inventions, the prevention of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”. A regulation issued under Section 66.6 lists the products that are excluded from patentability on these grounds. This list includes the ForestFuel Converter (Case, para. 20).

Forestland bears the burden of proof under TRIPS Article 27.1 to show:

- (1) The Forestfuel Converter is an “invention”, is “new”, involves an inventive step and is capable of industrial application; and
- (2) Its exclusion from patentability amounts to discrimination as to the place of invention, the field of technology or whether products are imported or locally produced.

Ecoland bears the burden of proof under TRIPS Article 27.2 to show:

- (1) The policy goal of the patent regulation is to protect animal life or health or to avoid serious prejudice to the environment;
- (2) It is “necessary” and
- (3) The exclusion is not made merely because the exploitation is prohibited by their law.

FORESTLAND	ECOLAND
Issue - TRIPS 27.1	
<p>Ecoland's regulation under s. 66.6 of the Ecoland Patent Act is inconsistent with TRIPS Article 27.1. The Forestfuel Converter is:</p> <ol style="list-style-type: none"> (1) an "invention"; and (2) new; involves an inventive step; and is capable of industrial application. <p>Forestland Machinery Inc. "invented" and was granted a patent on the ForestFuel Converter in 2007 in several countries. The Forestfuel Converter met the requirements of the patent laws of these WTO Members. Since Forestland Machinery Inc. "invented" the ForestFuel Converter, the implication is that this is a new product and involves an inventive step. The ForestFuel Converter can be used to adapt any machine to use ForestFuel, so it is capable of industrial application.</p> <p>The exclusion of the Forestfuel Converter from patentability in Ecoland amounts to "discrimination" as to:</p> <ol style="list-style-type: none"> (1) the place of invention; (2) the field of technology; or (3) whether products are imported or locally produced. <p>Since the case provides no evidence of a competing product that was granted a patent in Ecoland, Forestland will have to argue that the denial of a patent for the Forestfuel Converter amounts to indirect, <i>de facto</i> discrimination against Forestfuel (an imported product), by placing it at a disadvantage in the Ecoland market against Recyclofuel (a locally produced product).</p> <p>The term "discrimination" in Article 27.1 encompasses the denial of patents in order to disadvantage a product whose patent is not in issue. The term "discrimination" should be interpreted broadly to encompass this type of discrimination.</p>	<p>The panel should exercise caution in its interpretation of the term "discrimination" with respect to this type of de facto argument, in order to avoid a broader interpretation than the wording and objectives of the agreement allow.</p> <p>TRIPS Article 1.3 requires that treatment be accorded to "nationals" and both the national treatment and MFN obligations in TRIPS apply to "nationals", not products.</p> <p>TRIPS Article 27.1 only requires non-discrimination with respect to Forestland Machinery Inc., inventor of the Forestfuel Converter.</p> <p>Since there is no evidence that any inventor of a competing product has been granted a patent, Forestland has failed to meet its burden of proof under Article 27.1.</p>

FORESTLAND	ECOLAND
Issue - TRIPS 27.2, Policy goal.	
<p>The requirement to prevent commercial exploitation has not been met, because sales of Forestfuel are allowed, the sole purpose of the Forestfuel Converter is to enable Forestfuel to be used, and there is no evidence that commercial exploitation is banned.</p> <p>Denying patent protection to the Forestfuel Converter does not “avoid serious prejudice to the environment”. Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel, there is no proof that denying patent protection will avoid serious prejudice to the environment.</p> <p>Ecoland has the burden of proof under Article 27.2, as the party invoking the exception. Moreover, since the Forestfuel Converter “can be used to adapt any machine to use Forestfuel”, including machines that are set to run on fossil fuels, and substituting Forestfuel for conventional fossil fuels will reduce carbon emissions, denying patent protection to the Forestfuel Converter actually hampers efforts to “avoid serious prejudice to the environment”.</p>	<p>Ecoland has the burden of proof to show that (1) the commercial exploitation of the Forestfuel Converter is prevented within its territory by the patent regulation; and (2) that prevention 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”. The policy goal of the patent regulation is to reduce carbon emissions in order to comply with its obligations under the GWA, combat global warming and protect the environment.</p> <p>The patent regulation achieves this goal in different ways:</p> <ol style="list-style-type: none"> (1) by denying patent protection to a technology that facilitates the use of a fuel that contributes to global warming; (2) by facilitating the development of a similar technology to convert machines to use Recyclofuel, which has a smaller carbon footprint than Forestfuel, based on the technology used in the Forestfuel Converter; and (3) by discouraging the use of Forestfuel by discouraging the sale of the Forestfuel Converter in Ecoland. <p>The protection of the furry marmot through the reduction of carbon emissions falls within the range of policies covered by Article 27.2 (the protection of animal life or health) and the preservation of the Ecolandian fir tree does as well (the protection of plant life or health).</p>
Issue - TRIPS 27.2, Necessary	
<p><u>The importance of the interests or values:</u> Concede the importance of protecting the environment, but argue that denying patent protection to the Forestfuel Converter does not protect the environment.</p>	<p><u>The importance of the interests or values:</u> Few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and protecting the environment is no less important”.</p>

FORESTLAND	ECOLAND
Issue - TRIPS 27.2, Necessary cont.,	
<p>Contribution to the end pursued: The patent regulation makes no contribution to the achievement of its purported objective, since there is no proof that denying patent protection will avoid serious prejudice to the environment and denying patent protection to the Forestfuel Converter actually hampers efforts to “avoid serious prejudice to the environment”, since it may have the effect of discouraging the sale of the Forestfuel Converter in Forestland.</p> <p>Trade impact: The only way for the patent regulation to achieve the goal of discouraging the use of Forestfuel is if it has the effect of discouraging the sale of the Forestfuel Converter in Forestland, which implies an impact on trade. Moreover, Ecoland bears the burden of proof to show that it meets the exception.</p> <p>Alternative measures: The proposal of Ecoland’s scientists to introduce furry marmots from other countries into Ecoland would achieve the same objectives as the patent regulation with respect to the protection of furry marmots. Introducing furry marmots that can adapt to climate change is likely to be more effective than the Ecolandian measures, whose impact on climate change is not likely to be felt for many years, if ever.</p> <p>A more effective alternative to the patent regulation is to grant patent protection to the Forestfuel Converter so that Forestfuel can be used in place of fossil fuels. There is no evidence that denying patent protection to the Forestfuel Converter will facilitate the development of a similar technology for Recyclofuel. Another alternative is to issue a compulsory license under TRIPS Article 31 so that the technology can be used to develop a similar technology for Recyclofuel. This would be more consistent with the objectives of TRIPS than denying patent protection altogether.</p>	<p>Contribution to the end pursued: The patent regulation contributes to the goal of reducing carbon emissions by facilitating the development of a similar technology to convert machines to use Recyclofuel, which has a smaller carbon footprint than Forestfuel, and by discouraging the use of Forestfuel by discouraging the sale of the Forestfuel Converter in Ecoland.</p> <p>The contribution of the patent regulation to addressing climate change and protecting the furry marmot should be considered in conjunction with the effects of the ECTR, the ecolabelling program and its efforts to preserve furry marmot habitat. A measure adopted in order to attenuate global warming and climate change, the contribution of which is not immediately observable, can be justified under TRIPS Article 27.2.</p> <p>Trade impact: There is no evidence regarding the trade impact of the patent regulation.</p> <p>Alternative measures: Ecolandian scientists do not know why their furry marmots have not adapted to climate change in the way that other furry marmots have. Thus, there is no evidence that introducing furry marmots from other countries would work. Granting a patent, and then a compulsory license, would not achieve Ecoland’s desired level of protection.</p>

FORESTLAND	ECOLAND
Issue - TRIPS 27.2, "exclusion is not made merely because the exploitation is prohibited by their law"	
<p>The patentability of the Forestfuel Converter in all other jurisdictions mentioned in the case supports the view that the exclusion of patentability in the Ecoland regulation is made merely because the exploitation is prohibited by Ecolandian law. Ecoland bears the burden of proof on this issue.</p>	<p>Ecoland must show that the "exclusion is not made merely because the exploitation is prohibited by their law". The inquiry must take place in a broader context than the national law of Ecoland.</p> <p>The justification for exclusion must be based on one of the permissible grounds for exclusion set out in Article 27. Ecoland must adduce evidence that supports the exclusion of the Forestfuel Converter from patentability in light of the facts of the case. The GWA goal of reducing carbon emissions supports the exclusion of patentability for products that defeat that purpose.</p>

Ecolabelling Regulation

Ecoland's mandatory ecolabelling regulation certifies products under three categories:

- Category 1: products must carry the "furry marmot friendly" label if they have been produced with machinery that uses biofuels that have been refined in a manner that does not produce carbon emissions (only Recyclofueled products have been so certified);
- Category 2: products must carry the "unhappy furry marmot" label if they have been produced with machinery that uses biofuels that have been refined in a manner that does produce carbon emissions (Forestfueled products have been certified under this category); and
- Category 3: products must carry the "furry marmot unfriendly" label if they have been produced with machinery that uses fossil fuels.

The Ecoland Ecosystem Protection Agency (EEPA) provides certification on the basis of the information provided by the suppliers and the available scientific evidence and publishes its certification decisions on its website. Consumer demand for furry marmot-friendly labeled goods in Ecoland has increased by 8% since the entry into force of the regulation. Demand for "unhappy furry marmot" products has stagnated in the Ecoland market. Demand for "furry marmot unfriendly" products has decreased by 10%. (Case paras. 15-17).

Forestland bears the burden of proof under:

- (1) TBT Agreement Annex 1.1 to prove the ecolabelling regulation is a "technical regulation";
- (2) TBT Agreement Article 2.1 to prove Recyclofuel and Forestfuel are like products and the latter is subject to less favourable treatment;
- (3) TBT Agreement Article 2.2 to prove there is no legitimate objective, the measure creates unnecessary obstacles to trade, is prepared, adopted or applied with that view in mind, and is more trade-restrictive than necessary, given the risks non-fulfillment would create;
- (4) TBT Agreement Article 2.4 to show that Ecoland has failed to use relevant international standards as a basis for its technical regulation;
- (5) GATT Article I:1 to show advantage, conditionality and like products; and
- (6) GATT Article III:4 to show the measure is covered, domestic Recyclofuel and Forestfuel are like products, and the latter is subject to less favourable treatment.

Ecoland bears the burden of proof under GATT Article XX (b), (g) and the chapeau (see summary under ECTR, above).

Order Of Examination

FORESTLAND	ECOLAND
Issue - TBT, Technical regulation	
<p>Forestland must show that the ecolabelling regulation is a “technical regulation”, as defined in TBT Agreement, Annex 1.1., which involves three criteria.</p> <p>Identifiable product: The ecolabelling regulation applies indirectly to biofuels or fossil fuels, which constitute an identifiable group of products.</p> <p>Characteristics of the product: Annex 1.1 permits the document to lay down “related processes and production methods” or to “deal exclusively with...labelling requirements as they apply to a product, process or production method”. PPM labels are covered by the TBT Agreement”.</p> <p>Mandatory: The ecolabelling regulation is mandatory.</p>	<p>Identifiable product: The ecolabelling regulation applies to products produced with machinery that uses biofuels or fossil fuels. This is not an identifiable group of products because it potentially includes any manufactured product.</p> <p>Characteristics of the product: The only characteristic that the ecolabelling regulation lays down has to do with the fuel used to make the products, which is not “related” to the products themselves. The definition of “technical regulation” indicates that the TBT Agreement does not apply to non product related PPMs.</p> <p>Mandatory: Concede, unless Forestland fails to make this point. In that case, Forestland has not met its burden of proof.</p>
Issue - TBT 2.1, like products	
<p>Since the ecolabelling regulation targets fuels, the products that should be compared are Recyclofuel and Forestfuel, and these are like products. This leads to the same arguments regarding “like products” as for the ECTR, above.</p> <p>Alternatively, in order to meet its burden of proof, Forestland might argue that the categorization of the products is in fact based on their origin and that this relieves Forestland of the obligation to prove that the products are similar.</p>	<p>Since there is no evidence regarding the characteristics of the products, other than the fuel used to produce them, Forestland has not met its burden of proof on the issue of whether they are “like products”. Since the ecolabelling regulation does not identify products based on their origin, Forestland must prove likeness based on the four criteria.</p> <p>Alternatively, PPMs must be taken into account in determining likeness under the TBT Agreement because this agreement refers explicitly to PPMs. The different PPMs means the two biofuels are not like products. The term “like products” should be more narrowly construed in TBT Agreement Article 2.1 than in GATT Articles I and III.</p>
Issue - TBT 2.1, Treatment no less favourable.	
<p>Only products produced with Recyclofuel have been granted Category 1 certification and now use the “furry marmot friendly” label. All products produced with Forestfuel have been certified as Category 2 products and now use the “unhappy furry marmot” label.</p> <p>Given the nature of the labels, Category 2 products receive less favourable treatment than Category 1 products.</p>	<p>Ecoland should concede that Category 2 products receive less favourable treatment than Category 1 products, unless Forestland fails to make a <i>prima facie</i> case. In that case, argue that Forestland has not met its burden of proof.</p>

FORESTLAND	ECOLAND
Issue - TBT 2.2, Legitimate objective	
<p>The ecolabelling regulation does not protect the environment, the furry marmot or the Ecolandian fir tree.</p> <p>Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel, there is no proof that discouraging the consumption of Category 2 products will protect the environment.</p> <p>Moreover, since the breeding cycle of the furry marmot has already been disrupted, it is unlikely that the disadvantageous treatment of Forestfuel-produced products will have any effect on the climate change that has caused the disruption.</p>	<p>The objective of the ecolabelling regulation is the “protection of...animal or plant life or health, or the environment” and to reduce carbon emissions in order to comply with its obligations under the GWA, combat global warming and protect the environment. In particular, the ecolabelling regulation is designed to protect the furry marmot and the Ecolandian fir trees that depend on the furry marmot’s digestive system. The ecolabelling regulation achieves this goal by discouraging the use of Forestfuel by discouraging the purchase of Category 2 products, thereby creating disincentives to use Forestfuel. The protection of the furry marmot through the reduction of carbon emissions falls within the range of policies covered by the “protection of...animal or plant life or health, or the environment”. Protecting the Ecolandian fir tree does as well. Ecoland may argue that the issue of scientific proof should be addressed below, under the phrase “risks non-fulfilment would create”, or may choose to address this point here.</p>
Issue - TBT 2.2, Unnecessary obstacles to international trade	
<p>Obstacles to trade: The ecolabelling regulation creates obstacles to trade by preventing demand for imported Category 2 products from growing.</p> <p>Unnecessary: GATT jurisprudence indicates that the term “unnecessary” refers to the issue of whether there are WTO-consistent measures that are reasonably available and equally effective in achieving the goal of the measure. Voluntary ecolabelling would be consistent with Article 2 of the TBT Agreement, because a voluntary scheme would not qualify as a “technical regulation”. A voluntary ecolabelling scheme that complies with the substantive requirements of the TBT Agreement regarding standards would be consistent with the TBT Agreement. If one accepts the reasoning applied to the dolphin-safe label in <i>US – Tuna (Mexico)</i>, voluntary ecolabelling would also be GATT-consistent. Another WTO-consistent alternative to the ecolabelling regulation is a labelling program that recognizes Forestland’s efforts to combat climate change through the Biofueled Vehicles Regulation, the Biofueled Machinery Regulation and preservation of Forestland’s pine forests. As the GWA requires countries to base their CER measures on available scientific evidence and that evidence shows that the preservation of forests is an important factor in mitigating climate change, recognizing the effect of Forestland’s preservation of forests is a reasonable alternative.</p>	<p>Obstacles to trade: The ecolabelling regulation does not create obstacles to trade, since imports are not restricted and the decision whether to buy the products is left to the consumer.</p> <p>Unnecessary: Voluntary ecolabelling would not discourage the purchase of Category 2 products to the same extent that mandatory labelling does and therefore would be less effective in reducing carbon emissions by creating disincentives to use Forestfuel. The Preamble of the TBT Agreement allows each Member to determine the level of protection it considers appropriate.</p> <p>The GWA does not provide any specific rules regarding the preservation of forests. Moreover, any alternative measures should be measures that Ecoland can take, rather than measures that are beyond its control and that would require consultations or negotiations with Forestland.</p>

FORESTLAND	ECOLAND
Issue - TBT 2.2, prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade	
<p>The design of the measure demonstrates an intention to disadvantage Category 2 and Category 3 products against Category 1 products, by requiring the use of unnecessarily negatively emotive images for the former two categories in contrast to the positively emotive image for the latter.</p> <p>The collection of Ecolandian measures makes it more likely that Category 2 products will be imported and that Category 1 products will be produced domestically, since Ecoland produces 80% of the world supply of Recyclofuel, Recyclofuel is subject to lower sales taxes under the ECTR and the Forestfuel Converter has been denied a patent in Ecoland. The effect of the ecolabels has been to increase demand for Category 1 products at the expense of the other two categories.</p>	<p>The design of the categories is origin-neutral. Forestfuel can be used to produce products in Ecoland. The evidence indicates that Category 1 products have gained market share at the expense of Category 3 products, not Category 2 products, since the latter has maintained its market share.</p>
Issue - TBT 2.2, More trade-restrictive than necessary.	
<p>Forestland bears the burden of proof to show that the ecolabelling regulation is more trade-restrictive than necessary. GATT jurisprudence indicates that the term “more trade-restrictive than necessary” refers to the issue of whether there are less WTO-inconsistent measures that are reasonably available and equally effective in achieving the goal of the measure. The same arguments regarding the alternative of voluntary labeling can be used here</p>	<p>Same.</p>
Issue - TBT 2.2, risks non-fulfillment would create.	
<p>Forestland should focus its argument here on the contribution of the measure to the end pursued. Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel, there is no proof that discouraging the consumption of Category 2 products will protect the environment.</p> <p>Moreover, since the breeding cycle of the furry marmot has already been disrupted, it is unlikely that the disadvantageous treatment of Forestfuel-produced products will have any effect on the climate change that has caused the disruption or on the subsequent impact on the Ecolandian fir trees. The available scientific evidence supports the view that substituting either Recyclofuel or Forestfuel for conventional fossil fuels will reduce carbon dioxide emissions.</p>	<p>Since the TBT Agreement does not explicitly regulate risk assessment or require scientific bases for regulations, the implicit requirement for some scientific basis should be significantly less rigorous than the explicit requirements of the SPS Agreement.</p> <p>Ecoland is entitled to rely on the evidence that it has regarding the carbon footprints of Forestfuel and Recyclofuel, since Article 2.2 only requires a consideration of “available scientific and technical information”. Article 2.2 does not require “conclusive” scientific evidence. Ecoland may “rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.”</p>

FORESTLAND	ECOLAND
<p>Issue - TBT 2.5, rebuttable presumption of compliance with TBT 2.2 where a technical regulation for one of the explicitly mentioned legitimate objectives is in accordance with relevant international standards. If the teams present these arguments here, they will undermine their arguments under TBT 2.4, below.</p>	
<p>Neither the GWA nor ISO standards establish any standards regarding the classification of biofuels according to their carbon footprint.</p>	<p>The relevant international standard is the GWA and the GWA qualifies as a relevant international standard because membership is open to all WTO Members. Unlike in the SPS Agreement, where the standard setting bodies are clearly and exhaustibly identified, the organizations or bodies that could develop “standards” within the definition of TBT Annex 1 are not. An environmental agreement like GWA, with quasi universal membership, could develop international standards that may fall within the scope of the TBT Agreement. Alternatively, the ecolabelling regulation is in accordance with ISO standards regarding ecolabelling.</p>
<p>Issue - TBT 2.4, relevant international standards as a basis for technical regulations except when ineffective or inappropriate. The teams will have to be careful with respect to the framing of their arguments under Article 2.4, to avoid undermining their arguments under GATT Article XX.</p>	
<p>Forestland bears the burden of proof.</p> <p>The relevant international standard is the GWA and that the GWA qualifies as a relevant international standard because membership is open to all WTO Members, citing the definition in Annex 1.4 of “international body or system” as a “Body or system whose membership is open to the relevant bodies of at least all Members”. Forestland might also argue that the ISO standards regarding ecolabelling are the relevant international standard.</p>	<p>The GWA and ISO standards do not establish any standards regarding the classification of biofuels according to their carbon footprint.</p>
<p>Issue - GATT I:1, advantage</p>	
<p>The ecolabelling regulation creates an advantage for Recyclofuel by creating an incentive for producers of products to use Recyclofuel in order to be able to use the positive ecolabel and disadvantages Forestfuel by creating a disincentive for producers of products to use Forestfuel by denying them access to the positive label and requiring them to use the negative label. The effect of the ecolabels on market share provides evidence that these incentives and disincentives have an impact on the competitiveness of the products in the market. Thus, the ecolabelling regulation, like the ECTR, provides more favourable treatment to Recyclofuel from Enviroland than to Forestfuel from Forestland and the ten other WTO Members that produce Forestfuel.</p>	<p>If Forestland makes a prima facie case on this point, then Ecoland should concede the point. Otherwise, Ecoland should argue that Forestland has not met its burden of proof.</p>

FORESTLAND	ECOLAND
Issue - GATT I:1, like products	
See the analysis of whether Forestfuel and Recyclofuel are like products in the ECTR section, above.	Same.
Issue - GATT I:1, conditionally	
The ecolabelling regulation conditions access to the positive label on the use of one fuel over another.	If Forestland makes a prima facie case on this point, then Ecoland should concede the point. Otherwise, Ecoland should argue that Forestland has not met its burden of proof.
Issue - GATT III:4, measures covered	
<p>The ecolabelling regulation is a regulation that affects the sale, purchase and use of Forestfuel imports and domestically produced Recyclofuel through the incentives and disincentives noted above.</p> <p>While the ecolabelling regulation is origin-neutral on its face, in practice it results in de facto discrimination between imported Forestfuel and domestically produced Recyclofuel, which constitutes the overwhelming majority of Recyclofuel that is available in Ecoland.</p>	If Forestland makes a prima facie case on this point, then Ecoland should concede the point. Otherwise, Ecoland should argue that Forestland has not met its burden of proof.
Issue - GATT III:4, like products	
<p>See the analysis of Forestfuel and Recyclofuel in the ECTR section on Article III:2, above.</p> <p>Forestland should note that the accordions of similarity is broader in Article III:4 than in Article III:2, and that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products”.</p> <p>Thus, the panel should consider the evidence adduced under both the first and second sentences of Article III:2 with respect to the ECTR, regarding the competitive relationship between Forestfuel and Recyclofuel.</p>	Forestfuel and Recyclofuel are not like products, using the same analysis used in the ECTR section on Article III:2, above.
Issue - GATT III:4, Less favourable treatment	
The ecolabelling regulation provides less favourable treatment to Forestfuel by requiring producers that use Forestfuel to use a less favourable ecolabel than that used by producers that use Recyclofuel.	If Forestland makes a prima facie case on this point, then Ecoland should concede the point. Otherwise, Ecoland should argue that Forestland has not met its burden of proof.
Issue - GATT XX	
The arguments under GATT Art. XX regarding the ECTR apply here, <i>mutatis mutandi</i> . Forestland should argue that GATT Art. XX does not apply to the TBT Agreement.	The arguments under GATT Art. XX regarding the ECTR apply here, <i>mutatis mutandi</i> . Ecoland should argue that GATT Art. XX does apply to the TBT Agreement.



I. Introduction

The 2008/2009 EMC² Case deals with a hypothetical dispute regarding trade and regulatory measures that aim to address climate change by categorizing biofuels according to their carbon footprint. Forestland, the complainant, is one of ten WTO Members that produces Forestfuel, a biofuel made from pine cones. Ecoland, the respondent, produces 80% of the world supply of Recyclofuel, a biofuel made from recycled vegetable-based cooking oil. The Case raises legal issues regarding the relationship between WTO Law and international environmental law and the relationship between various WTO Agreements.

The teams must analyze:

- (1) The Ecoland Carbon Taxation Regulation (ECTR) under SCM Agreement Article 3.1(b) and GATT Articles I:1, III:2 and XX;
- (2) The patentability of environmental technologies under a regulation of the Ecoland Patent Act under Articles 27.1 and 27.2 of the TRIPS Agreement; and
- (3) The Ecoland ecolabeling regulation under Articles 2.1, 2.2 and 2.4 of the TBT Agreement and GATT Articles I:1, III:4 and XX.

II. Ecoland Carbon Taxation Regulation (ECTR)

A. Preliminary issues

1. Order of examination: SCM Agreement before GATT 1994

In general, panels examine claims under the more specific agreement on trade in goods before examining claims under the GATT 1994. This is because a provision of the more specific agreement prevails over a GATT 1994 provision in the event of a conflict (General interpretative note to Annex 1A).

2. Relationship between SCM Agreement and GATT Articles I, III and XX

The SCM Agreement does not preclude action “under other relevant provisions of GATT 1994, where appropriate” (SCM Agreement, note 56).

The SCM Agreement and GATT Article III:2 are not mutually exclusive. There is no general conflict between these two sets of provisions. They can apply cumulatively to different aspects of the same measure. *Indonesia – Autos* (Panel), paras. 14.36, 14.97-14.99. The same logic would apply to the relationship between the SCM Agreement and GATT Article I:1.

It is not clear whether GATT Article XX may be invoked to justify a violation of the SCM Agreement. This issue is analyzed below, in the section on GATT Article XX.

3. The Measure

The teams should be clear on precisely what they are challenging. Is it the ECTR as a whole? The differential tax rates: between conventional gasoline and biofuels or only between the different types of biofuels? The 3% tax on biofuels produced in a manner that creates carbon emissions? Is the same measure challenged under the SCM Agreement as under the GATT 1994?

B. SCM Agreement, Article 3.1(b)

1. Application to developing countries

Ecoland is a developing country. Some teams might argue that the prohibition under SCM Agreement Article 3.1(b) does not apply to developing countries, because SCM Agreement Article 27.3 states that this is the case for the first five years from the date of entry into force of the WTO Agreement. However, this would be incorrect. The WTO Agreement entered into force on 1 January 1995. Ecoland has been a WTO Member since 1 January 1995 (Clarifications, para. 1).

2. Is the ECTR a “subsidy” under Article 1.1?

The SCM Agreement only applies to the ECTR if it constitutes a subsidy within the meaning of SCM Agreement Article 1.1. A ‘financial contribution’ and a ‘benefit’ are two separate legal elements in Article 1.1, which together determine whether a subsidy exists. *Brazil – Aircraft* (AB), para. 156.

a. Financial contribution by a government

The relevant part of Article 1.1 defines a subsidy as follows:

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)(1);

(footnote original) 1 In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

The two principal cases on this point held that there was a subsidy within the meaning of SCM Agreement Article 1.1(a)(1)(ii) in the following situations: (1) different tax treatment for income from foreign and domestic sales (*US – FSC*) and (2) an exemption from payment of a MFN import duty that would otherwise apply to auto imports, conditional upon domestic production requirements (*Canada – Autos*).

The ECTR applies three categories of fuel taxes: (1) 20% on conventional gasoline; (2) 10% on biofuels that produce 50% fewer emissions than conventional fossil fuels (Recyclofuel and Forestfuel); and (3) 3% on biofuels that are produced in a manner that creates carbon emissions (Forestfuel) (Case, paras. 4 & 11).

According to the AB, “the mere fact that revenues are not ‘due’ from a fiscal perspective does not determine that the revenues are or are not ‘otherwise due’ within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement”. *US – FSC (Article 21.5 – EC)* (AB), para. 88. A “financial contribution” does not arise simply because a government does not raise revenue which it could have raised. The term “otherwise due” implies a comparison with a “defined normative benchmark”, as established by the tax rules applied by the Member in question. *US – FSC* (AB), para. 90. The determination of “whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the hands of taxpayers in similar situations”. *US – FSC (Article 21.5 – EC)* (AB), para. 98.

Forestland can argue that not charging an additional 3% tax on Recyclofuel constitutes the “foregoing of revenue otherwise due” by the Government of Ecoland. There is no rational basis for treating Forestfuel differently from Recyclofuel. Forestland should stress the comparable nature of the products concerned. The taxes are similar, since they are all fuel taxes, and the taxpayers are in similar situations (either as fuel producers or consumers). Forestland should identify the relevant “normative benchmark” for undertaking this analysis. For example, Forestland can argue that the overall scheme of the ECTR is comparable to a general rule (20% tax) and exceptions (13% for Forestfuel, 10% for Recyclofuel) or exemptions, or alternatively, a general 13% rule for biofuels, with an exception/exemption/reduction of 3% for Recyclofuel. By not collecting the “full amount” (whether 20% or 13%), the Government is foregoing revenue that is otherwise due. The ECTR categories are comparable to the foreign and domestic sales categories in *US – FSC* and the more favourable tax treatment of the domestically produced product is comparable to the more favourable import duty treatment for domestic producers of automobiles in *Canada – Autos*. Forestland can argue that the reference in footnote 1 to “the exemption of an exported product from duties or taxes borne by the like product” indicates that Article 1.1(a)(1)(ii) is intended to apply to other cases where like products receive different consumption tax treatment, citing the AB: “The tax measures identified in footnote 1 as not constituting a ‘subsidy’ involve the exemption of exported products from product-based consumption taxes”. *US – FSC* (AB), para. 93.

Ecoland can argue that the taxes are not comparable because the products are not similar: they are distinguished on the basis of their carbon emissions. Ecoland should rely on the AB's statement that revenue is not otherwise due just because certain revenue is not taxed (or not taxed at as high a level as it could be): a WTO Member is "free *not* to tax any particular categories of revenues". *US – FSC* (AB), para. 90. Ecoland should stress the separate nature of the three taxes under the ECTR, and the different nature of the products concerned, that provide a rational basis for treating them differently. Ecoland can distinguish the facts in this case from *US – FSC* on the basis that the products were the same in that case, but are different in the case at hand. Ecoland can also distinguish *US – FSC* on the basis that *US – FSC* dealt with an export tax under SCM Agreement Article 3.1(a), whereas the claim in this case is under SCM Agreement Article 3.1(b). Ecoland can argue that Recyclofuel would not be subject to the 3% additional tax due to the nature of the product and therefore no tax revenue is foregone.

Ecoland can argue that, as in *Canada – Autos*, footnote 1 does not bear upon the sales taxes at issue in this case because footnote 1 only deals with duty and tax exemptions for *exported* products, citing the AB in *Canada – Autos*: "Footnote 1 ... deals with duty and tax exemptions or remissions for exported products. The measure at issue applies, in contrast, to imports For this reason we do not consider that footnote 1 bears upon the import duty exemption at issue in this case". *Canada – Autos* (AB), para. 92. Ecoland can distinguish the case at hand from *Canada – Autos* on the basis that the ECTR does not condition tax treatment on domestic production, since the Recyclofuel from Enviroland is subject to the same treatment as the Recyclofuel from Ecoland.

b. 1.1(b) benefit is thereby conferred

In *Canada – Aircraft*, the AB interpreted of the term "benefit" under Article 1.1(b) as follows: "a financial contribution will only confer a 'benefit', i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market." *Canada – Aircraft* (AB), para. 149. "A 'benefit' ... must be received and enjoyed by a beneficiary or a recipient" and "calls for an inquiry into what was conferred on the recipient"; the measurement of the benefit is not whether there was a cost to the government. *Canada – Aircraft* (AB), para. 154. The person or entity receiving the benefit does not have to be the same as the one who received the financial contribution. *US – Countervailing Measures on Certain EC Products*, para. 110. Each team should analyze whether a benefit is obtained from the ECTR, by whom, whether such a benefit could have been otherwise obtainable in the marketplace, and what the relevant marketplace is.

Forestland should argue that the ECTR confers a benefit on Recyclofuel producers in the Ecolandian market in one of three possible ways: (1) by allowing them to sell their product for less than they otherwise could, making their product more price-competitive than it otherwise would have been in the market; or (2) by allowing them to sell their product for the same price, with the tax differential making their product more price-competitive than it otherwise would have been in the market; or (3) by allowing them to sell their product for a higher price, thereby enjoying a wider profit margin than they otherwise would.

Ecoland may argue that any benefits from the ECTR would affect the consumer, rather than Recyclofuel producers, because the ECTR is a consumption tax. No benefit is conferred on Recyclofuel producers, since the tax is not applied to producers. Ecoland may argue that there is no benefit that the consumer would not otherwise be able to obtain in the market place.

3. Specificity

Prohibited subsidies are deemed to be specific. SCM Agreement, Article 2.3

4. Article 3.1(b)

Article 3.1(b) provides as follows:

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

...

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

In *Canada – Autos*, the AB held that “contingency” under Article 3.1(b) includes contingency in law and contingency in fact. *Canada – Autos* (AB), paras. 139-143. The ECTR does not refer to imported goods or domestic goods, so there is no contingency in law (de jure). There is no evidence regarding whether any Recyclofuel is imported into Ecoland. The legal significance of the presence or absence of imported Recyclofuel in Ecoland is debatable. Does it matter, for purposes of assessing whether the subsidy is contingent, if there are no imports of Recyclofuel? Is it sufficient that there are potential imports because there are producers outside Ecoland? Even if there are some imports of recyclofuel into Ecoland, could the “subsidy” nevertheless be found to be de facto contingent on the use of domestic over imported goods, for purposes of Article 3.1(b), on the grounds that Ecoland is by far the largest worldwide producer of the subsidized product, and Ecoland does not produce any of the product that is not receiving the subsidy (Forestfuel)?

Forestland must argue that the 3% difference in tax treatment between Forestfuel and Recyclofuel is only available to consumers in Ecoland if they use Recyclofuel (80% of the world supply is produced in Ecoland, so an even higher percentage of Recyclofuel sales are likely the domestic product) instead of Forestfuel (an imported good). It is thus contingent in fact on the use of domestic over imported goods.

Ecoland can argue that, because Recyclofuel from Enviroland receives the same tax treatment as Recyclofuel from Ecoland, any subsidy is available to consumers regardless of the origin of the goods. It is thus not contingent in fact or in law on the use of domestic over imported goods.

C. GATT, Article I

1. Whether the claim adequately identifies Article I:1

DSU Article 6.2 requires the complainant to “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”, *inter alia*.

Ecoland might argue that Forestland’s claim of a violation of “Article I” is insufficiently precise to meet this requirement and that Article 6.2 requires Forestland to specify that its allegation involves Article I:1. However, GATT Article I does not contain multiple obligations. The other paragraphs in Article I set out exceptions to the general MFN obligation set out in paragraph 1. Thus, it is difficult to argue that Ecoland’s ability to defend itself is diminished at all by Forestland’s failure to specify that its allegation refers to Article I:1. Moreover, the case does not contain a formal request for the establishment of a panel. Rather, it sets out the allegations in paragraph 21 more informally, as is usual for the moot competition.

2. Order of examination

Article I:1 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The order of examination of the issues in Article I:1 is (1) Whether the measures provides an advantage of the type covered by Article I:1 and (2) Whether the advantages are offered (i) to all like products and (ii) unconditionally. *Indonesia – Autos* (Panel), para. 14.138.

3. Burden of proof

Forestland has the burden of proof to establish a *prima facie* violation of Article I:1. If Forestland does not meet its burden of proof regarding each of the three elements of Article I:1, then **Ecoland should make the point that** Forestland has not proved its claim. If Forestland meets its burden of proof, then the burden of proof shifts to Ecoland to establish that it has complied with the obligation. *US – Wool Shirts and Blouses* (AB), p. 14; *EC – Tariff Preferences* (AB), para. 8.7.

4. Advantage of the type covered by Article I:1

Forestland should argue that the ECTR is an internal tax and thus constitutes an advantage of the type covered by Article I:1. In *Canada – Autos*, the AB gave the term “advantage” a broad interpretation: “The words of Article I:1 refer not to *some* advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘*any advantage*’; not to *some* products, but to ‘*any product*’; and not to like products from *some* other Members, but to like products originating in or destined for ‘*all other*’ Members.” *Canada – Autos* (AB), para. 79. Article I:1 applies to “all matters referred to in paragraphs 2 and 4 of Article III”, *inter alia*. Article III:2 applies to “internal taxes or other internal charges of any kind”.

If Forestland establishes a *prima facie* case on this point, then **Ecoland should concede this point**. If not, then **Ecoland should argue that** Forestland has not met its burden of proof.

Forestland should argue that the ECTR provides more favourable treatment to Recyclofuel imports from Enviroland than Forestfuel imports from Forestland and the ten other WTO Members that produce Forestfuel, by applying a sales tax of 10% to Recyclofuel and a sales tax of 13% to Forestfuel (Case, para. 11). Article I:1 requires that: “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Forestland should argue that the discrimination between Forestfuel and Recyclofuel is based on the different sources of power used by Forestfuel and Recyclofuel producers to produce their respective biofuels and the different ways in which Forestland and Ecoland have chosen to meet their obligations under the GWA. The term “advantage” covers not only explicit discrimination, but also discrimination in which the distinct treatment is based on different conditions prevailing between countries. *Belgium – Family Allowances* (GATT Panel).

Ecoland might argue that Article I:1 only applies to imports and, since there is no evidence of imports from Enviroland, there is no violation of Article I:1. It is not clear whether Enviroland exports Recyclofuel to Ecoland (Case, para.1). It is not clear whether the ten other Members export Forestfuel to Ecoland. It is clear that Forestland does (Case, para. 3).

In this case, **Forestland should argue that** Article I:1 refers to the origin of the product, not imports. It would defeat the purpose of Article I:1 if Members could avoid the obligation by enacting measures that prevented imports. According to the AB in *EC – Bananas III*, “The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin..., irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons.” *EC – Bananas III* (AB), para. 190. Similarly, in the context of GATT Article III, the AB stated that “Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.” *Japan – Alcoholic Beverages II*, p. 16.

5. Like products

a. Definition of “like products” in Article I:1

In *Japan – Alcoholic Beverages II*, the AB explained that the “concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.” *Japan – Alcoholic Beverages II* (AB), p. 21.

In *Indonesia – Autos*, the Panel compared the concepts of “like products” under Articles I and III as follows: “We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I.” *Indonesia – Autos* (Panel), para. 14.141.

This jurisprudence suggests that the same four criteria that apply to determine likeness in GATT Article III also apply in the context of GATT Article I. However, Forestland should argue that the accordion of similarity should be wider in Article I than in Article III:2 (citing *Japan – Alcoholic Beverages II* and Condon (2006), p. 58) and Ecoland should argue that it should be narrower in Article I than in Article III:4 (citing *Indonesia – Autos*).

The AB has consistently applied the following four criteria to determine whether products are in a competitive relationship that would lead to the conclusion that they are like products:

- The physical properties, nature and quality of the products
- The extent to which the products may serve the same or similar end uses in a given market
- The extent to which consumers perceive and treat the products as alternative means of satisfying a want or demand
- Tariff classification of the products

In *EC – Asbestos*, the AB noted that the four criteria used to determine likeness are “simply tools to assist in the task of sorting and examining the relevant evidence. They are neither treaty mandated nor a closed list of criteria that will determine the legal characterization of a product.” *EC – Asbestos* (AB), para. 102. The source of the first three criteria is the Working Party Report on *Border Tax Adjustments*, while the fourth criterion was added by subsequent GATT panels. The AB also noted that the purpose of the like products analysis is “to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace”. *EC – Asbestos* (AB), para. 103.

b. The physical properties, nature and quality of the products

Forestland should cite the following evidence to support the argument that RecycloFuel and ForestFuel are like products. Each produces 50% fewer carbon emissions when they are burned, compared to the carbon emissions of conventional fossil fuels (Case, para. 4). The available scientific evidence supports the view that substituting RecycloFuel or ForestFuel for conventional fossil fuels will reduce carbon dioxide emissions (Case, para. 13). Both products are fuels, both are flammable, both can be burned to power machinery, and both are composed of carbon, hydrogen and oxygen.

Ecoland should cite the following evidence to support the argument that RecycloFuel and ForestFuel are not like products. The chemical composition of RecycloFuel is different from that of ForestFuel. In *EC – Asbestos*, the difference in chemical composition between the two products indicated that they were not like products. Both biofuels are monoalkyl esters, meaning that they are composed of hydrogen, carbon and oxygen, although the number and combination of these three elements is different in each of the biofuels. ForestFuel burns more rapidly than RecycloFuel. RecycloFuel is a golden colour, while ForestFuel is brown. RecycloFuel is more volatile than ForestFuel. Unlike ForestFuel, RecycloFuel can be compressed, making it less expensive to transport and requiring fewer vessels to transport. (Case, para. 4).

c. The extent to which the products may serve the same or similar end uses in a given market

Both Forestfuel and Recyclofuel are fuels. However, ForestFuel can also be used as an organic fertilizer, whereas RecycloFuel cannot. Biofuelled machines and vehicles are normally set to run on a specific type of biofuel (Case, para. 4). However, the Forestfuel Converter can be used to adapt any machine to use Forestfuel (Case, para. 19).

Forestland should emphasize that Recyclofuel and Envirofuel are in a competitive relationship as fuels and that the alternative use of Forestfuel as a fertilizer does not change this fact. Forestland can argue that the Forestfuel Converter allows Forestfuel to be used by the same machines as Recyclofuel. In this regard, the two biofuels compete in the global marketplace.

Ecoland should argue that Forestfuel and Recyclofuel have different end uses, since the latter cannot be used as a fertilizer. Ecoland should argue that the relevant market is the Ecoland market, not the global market. Since machines and vehicles are normally set to run on a specific type of biofuel, and the Forestfuel Converter has been denied a patent in Ecoland, the two biofuels do not compete directly in Ecoland.

d. The extent to which consumers perceive and treat the products as alternative means of satisfying a want or demand

Forestland should argue that, but for the ecolabelling regulation, consumers would treat both fuels the same, since they were not aware of which fuel was used to produce the products before the ecolabelling (Clarifications, para. 10).

Ecoland should argue that, once the labelling scheme was introduced, demand for products produced with Forestfuel stagnated while demand for products produced with Recyclofuel increased by 8%, indicating a consumer preference for Recyclofuel.

Forestland can respond that it is not clear whether the increase in demand for the latter came at the expense of the former, since demand for products produced with fossil fuels decreased 10%. Nor is it clear whether the changes in demand are due to consumer preferences relating to these two products or the labelling scheme itself. Thus, this evidence is inconclusive.

e. Tariff classification of the products

As the AB noted in *Japan – Alcoholic Beverages II*, the tariff classification of products is a problematic criterion where it is not sufficiently detailed. Since the Harmonized System only harmonizes the first six digits, each government has discretion to determine more detailed product classification. Moreover, the Harmonized System was not designed to resolve the issue of whether products are similar according to the GATT. *Japan – Alcoholic Beverages II* (AB), p. 25. Under the first six digits of the Harmonized System, both biofuels have the same tariff classification number. Ecoland uses eight digits in its tariff classification, of which the first six digits use the Harmonized System. Under Ecoland's eight-digit system, RecycloFuel and ForestFuel have different tariff classification numbers (Case, para. 4).

Forestland should argue that, even if HS classification cannot be applied directly to decide like products, it is useful to support the decision of likeness based on other criteria. Ecoland's discriminatory tariff classification system should not be considered as evidence that the products are not like products. The fact that two products are classified in the same category up to the six-digit HS level should be accorded more weight than the fact that they do not fall in the same product category in a national, eight-digit classification system. In *Spain – Unroasted coffee*, the GATT panel found Spain's tariff classification system to be inconsistent with GATT Article I:1, because it resulted in discriminatory tariff treatment for Brazilian coffee. When a Member has discretion to sub-divide its classification system for purposes of applying tariffs, the sub-divisions made do not mean that the products are not like.

Ecoland should argue that its tariff classification is valid, as in *Canada/Japan – Tariff on imports of spruce, pine, fir (SPF) dimension lumber*, in which the GATT panel found that Japan's classification of lumber based on the species was a legitimate means of implementing its trade policy. It thus provides evidence to support a conclusion that the biofuels are not like products based on other criteria.

f. Processing and production methods (PPMs) & Articles I & III

A key issue in this case is whether processing and production methods of products (PPMs) can be used to determine likeness. The PPM issue is central in the context of the labelling program, which assigns labels based solely on the PPM. However, it also applies in the case of the ECTR, since the ECTR categorizes biofuels in part based on their PPMs.

The facts from the case that are relevant to the PPMs issue are as follows.

In favour of Ecoland: Ecoland has concluded that the production process for ForestFuel increases the amount of carbon dioxide in the atmosphere because the producers of ForestFuel use hydroelectricity to power their pine cone conversion refineries. The increasing production of ForestFuel has led to the construction of several dams to power the ForestFuel refineries. These dams have flooded large areas of wilderness in Forestland and in other countries that produce ForestFuel.

The plant material in the flooded areas produces carbon dioxide as it decomposes under water, increasing carbon emissions and reducing the amount of plant material that would otherwise absorb carbon dioxide. In contrast, the RecycloFuel refineries use solar power, which produces zero emissions. Thus, Ecoland has concluded that the ForestFuel production process creates carbon emissions, unlike RecycloFuel (Case, para. 12).

In favour of Forestland: The available scientific evidence supports the view that substituting Recyclofuel or Forestfuel for conventional fossil fuels will reduce carbon dioxide emissions. There is no conclusive scientific evidence comparing the carbon footprint of the RecycloFuel production process to that of ForestFuel (Case, para. 13).

Ecoland should argue that PPMs be taken into account to determine likeness. Ecoland might argue that, since the health effects of asbestos were relevant to determining likeness in *EC – Asbestos* (under the first and third criteria), the environmental effects of the biofuel production process are relevant in this case. Ecoland can cite Howse's argument that the AB ruling in *EC – Asbestos* supports the view that non-discriminatory process-based measures are consistent with GATT Article III:4, based on their consideration of consumer preferences (Howse 2002, p. 515). However, **Forestland** can distinguish *EC – Asbestos* by arguing that the health effects of asbestos are related to the product as such, not its production method.

Forestland should argue that PPMs should not be taken into account; rather, likeness should be based on the characteristics of the product as such. In *US – Tuna (Mexico)*, the GATT panel held that the term "like products" did not apply to production processes, but rather to products as such. It therefore did not permit differentiation between products based on production processes that had no effect on the quality of the product. *US – Tuna (Mexico)* (GATT panel), p. 41. Forestland should also cite *US – Lamb Safeguard (AB)*, *US – Cotton Yarn (AB)* and Marceau and Trachtman (2002), pp. 857-858.

Ecoland can counter that, as an unadopted GATT report, *US – Tuna (Mexico)* has no normative value. However, **Forestland** can point out that a panel may find useful orientation in its reasoning. *Japan – Alcoholic Beverages II (AB)*, pp. 14-15.

Forestland should also argue that it is more appropriate to address the PPM issue under GATT Article XX, rather than GATT Article I or III, in order to avoid addressing the issue of whether PPMs should be used to determine likeness through judicial interpretation, which would exceed the role assigned to panels under DSU Article 3.2. Forestland can cite the argument of Gaines that the intention of the WTO members to not permit PPM-based trade measures under GATT, except under an Article XX exception, is confirmed by the explicit reference in the TBT Agreement to "products and related processes and production methods" and the absence of any corresponding amendment to Article III in GATT 1994, given the prevailing view that such measures were not allowed under Article III of GATT 1947 (Gaines 2002, p. 416). Forestland can also cite Condon's argument that the purpose of advocating the inclusion of PPMs in the like product analysis is to avoid the restrictive interpretation of Article XX that was used by GATT panels. However, the interpretation of Article XX in the *US – Shrimp* case lessens the need to remove the PPMs analysis from Article XX. Moreover, Article XX is the more appropriate place to decide the complex issues at stake in the trade and environment debate, not only with respect to trade law, but also with respect to public international law (Condon 2006, p. 63). Forestland can also cite Condon as follows: "non-product-related PPM trade measures are not permitted under Article III and must therefore be justified under Article XX" (Condon 2006, pp. 68-69).

Ecoland can counter the foregoing argument by arguing that the same evidence regarding PPMs can be considered under both Articles III and XX, for different purposes, citing the AB in *EC – Asbestos*:

“[D]ifferent inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risk may be relevant in assessing the competitive relationship in the marketplace between allegedly “like” products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a Member has a sufficient basis for “adopting or enforcing” a WTO-inconsistent measure on the grounds of human health.” *EC – Asbestos* (AB), para. 115.

Forestland should argue that, even if PPMs are taken into account, there is no conclusive evidence comparing the carbon footprint of the RecycloFuel production process to that of ForestFuel. Therefore there is no basis for determining likeness based on the PPMs other than the fact that they are different (solar versus hydroelectric), which in no way affects the product as such nor the carbon footprint.

Ecoland should respond that it is entitled to rely on its own research regarding the carbon footprint of Forestfuel (Case, para. 12), because “a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.” *EC – Asbestos* (AB), para. 178, citing *EC – Hormones* (AB), para. 194.

6. Whether the advantages are offered unconditionally

Forestland should argue that the ECTR violates Article I:1 because it makes the application of the more favourable 10% tax rate conditional upon Forestland’s environmental policies. Forestland should cite *EC – Tariff Preferences* (Panel), para. 7.59, in which access to tariff preferences were conditional upon countries suffering from an illicit drug problem. The Panel interpreted Article I:1 as prohibiting the placing of conditions on access to preferential treatment. Forestland should also cite *Indonesia – Autos* (Panel), para. 14.145, in which the panel held that an advantage could not be conditional upon criteria that were unrelated to the product itself. Forestland can also cite Condon: “GATT Article I requires that like products be granted unconditional market access, which may imply that non-discriminatory access to the importing nation’s market can not be made conditional upon the exporting country’s environmental policies” (Condon 2006, p.54).

Ecoland should argue that the issue of conditionality can not be determined independently of the issue of whether Forestfuel and Recyclofuel are like products, citing *Canada – Autos* (Panel), para. 10.22, and Matsushita et al, Second Ed, p. 216. Since they are not like products, subjecting them to different tax treatment does not amount to a condition.

D. GATT, Article III:2

1. First sentence

The first sentence of Article III:2 provides as follows: “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”

According to the AB in *Japan – Alcoholic Beverages II*, the two issues in this sentence are (1) whether the relevant products are like products and (2) whether the imported product is subject to an internal tax that is in excess of that applied to the domestic product. If the answer to both questions is affirmative, then there is a violation of the first sentence of Article III:2.

Forestland might not refer to the first sentence at all, and focus exclusively on the second sentence. If Forestland decides to go directly to the second sentence, judges may want to see whether they can get Forestland to admit that it is doing so because the products are not “like”, at least within the meaning of the first sentence of III:2.

a. Like products

Regarding the first issue, the like products analysis under Article I:1 applies, but the comparison is between Forestfuel and Recyclofuel from Ecoland, rather than from Enviroland. However, there is an issue of whether the “accordion of likeness” is squeezed more narrowly in the first sentence of Article III:2 than in Article I:1. *EC – Asbestos* established that the concept of like products in Article III:4 is broader than in III:2, but it is not clear whether the breadth of like products in I:1 is closer to that of III:2 or III:4. If two products are like for I:1, must they be like for III:2? If they are not like for I:1, does it necessarily follow that they are not like for III:2?

Forestland must argue that they are like products.

Ecoland must argue that they are not.

b. Internal taxes in excess of

Forestland should note that even the smallest amount of ‘excess’ is too much, since the prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a “trade effects test” nor is it qualified by a *de minimis* standard. *Japan – Alcoholic Beverages II* (AB), p. 23. Thus, if Recyclofuel and Forestfuel are like products, since the latter is subject to a tax that is 3% higher than the former, there is a violation. Article III:2 applies regardless of the policy objective of the tax measure. *Argentina – Hides and Leather* (Panel), para. 11.144; *Japan – Alcoholic Beverages II* (AB), p. 16.

Ecoland should concede this point.

2. Second sentence

Article III:2, second sentence, provides as follows: “Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.” The Ad Note to Article III:2 fleshes out this obligation as follows: “A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.”.

According to the AB, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

- (1) the imported products and the domestic products are ‘directly competitive or substitutable products’ which are in competition with each other;

(2) the directly competitive or substitutable imported and domestic products are 'not similarly taxed'; and

(3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is 'applied ... so as to afford protection to domestic production'.

...Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence." *Japan – Alcoholic Beverages II* (AB), p.24; *Canada – Periodicals* (AB), pp. 24-25; and *Chile – Alcoholic Beverages* (AB), para. 47.

a. Directly competitive or substitutable products

"[T]he object and purpose of Article III is the maintenance of equality of competitive conditions for imported and domestic products". *Korea – Alcoholic Beverages* (AB), para. 127 "[T]he 'directly competitive or substitutable' relationship must be present in the market at issue", in this case, the Ecolandian market. *Korea – Alcoholic Beverages* (AB), para. 137.

The scope of the term 'directly competitive or substitutable' is not limited to situations where consumers already regard products as alternatives. *Korea – Alcoholic Beverages* (AB), para. 120. The word 'substitutable' means products that are capable of being substituted for one another. The word 'directly' suggests a degree of proximity in the competitive relationship between the domestic and the imported products. *Korea – Alcoholic Beverages* (AB), para. 116.

The factors that may be considered in deciding whether two subject products are "directly competitive or substitutable" include the nature of the compared products, the competitive conditions in the relevant market, their physical characteristics, common end-use, and tariff classifications. *Japan – Alcoholic Beverages II* (AB), p. 25. Other factors include channels of distribution, price relationships including cross-price elasticities, and any other characteristics. *Korea – Alcoholic Beverages* (Panel), para. 10.61. Thus, the evidence and arguments used to determine whether Forestfuel and Recyclofuel are like products (above) can also be applied to the issue of whether they are "directly competitive or substitutable".

In this case, there is no evidence regarding channels of distribution. The only evidence regarding price relationships is that Recyclofuel is "less expensive to transport" (Case, para. 4) and that "Forestfuel is less expensive than Recyclofuel in all markets" (Case, para. 3).

Actual consumer demand may be influenced by measures other than internal taxation. *Korea – Alcoholic Beverages* (AB), para. 123. The lack of patentability of the Forestfuel Converter in Ecoland may affect the competitive relationship between Forestfuel and Recyclofuel by preventing machines and vehicles in Ecoland from being adapted to use Forestfuel. Therefore, **Forestland should argue that** the effect of the patent regulation should be taken into account in determining the competitive relationship between the two biofuels, as well as the effect of the ecolabelling regulation.

In *Korea – Alcoholic Beverages*, the Panel reviewed the negotiating history of Article III:2, second sentence. The Geneva session of the Preparatory Committee provided examples of products that could be directly competitive or substitutable, including coal and fuel oil. There was some disagreement with respect to these products. The Panel noted that, even if most power generation systems are set up to utilize either coal or fuel oil, but not both, these two products could still compete indirectly as fuels.

However, an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste. *Korea – Alcoholic Beverages* (Panel), paras. 10.37-10.39. **Ecoland should argue that** the situation in the case at hand is analogous. Given that “biofueled machines are normally set to run on a specific type of biofuel” and the differences in burn rates, volatility and chemical composition (Case, para. 4), Forestfuel and Recyclofuel at best compete *indirectly* as fuels, but there is no *direct* competitive relationship. **Forestland should argue that** the Forestfuel Converter changes the competitive relationship between the two products and allows them to compete directly.

Changes in the market share of imported and domestic products are relevant to determining whether they are ‘directly competitive or substitutable’. *Canada – Periodicals* (AB), p. 28. In Ecoland, demand for products produced with machinery using Forestfuel has stagnated, demand for products produced with machinery using Recyclofuel has increased by 8% and demand for products produced with machinery using conventional fossil fuels has decreased by 10% (Case, para. 17). The case states that these changes in demand have occurred since the entry into force of the ecolabelling regulation, in 2006. The ECTR and the patent regulation both entered into force on 1 January 2008. The evidence therefore suggests that the changes in market share are due to the ecolabelling regulation, but without excluding the possibility that the ECTR and the patent regulation have also affected demand for these products. However, the products under comparison here are the biofuels themselves. The case does not provide any direct evidence regarding the change in market share of the biofuels. Nevertheless, it is reasonable to assume that changes in demand for products made with the biofuels would affect demand for the biofuels themselves.

Ecoland should argue that there is no evidence regarding the market shares of Forestfuel and Recyclofuel and note that Forestland bears the burden of proof in this regard.

Forestland should argue that the indirect evidence is sufficient to meet its burden of proof on this point.

b. Not similarly taxed

According to the AB, “there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic ‘directly competitive or substitutable products’ but may nevertheless not be enough to justify a conclusion that such products are ‘not similarly taxed’ for the purposes of Article III:2, second sentence.” The differential taxation must be “more than *de minimis*” and “be determined on a case-by-case basis”. *Japan – Alcoholic Beverages II* (AB), pp. 26-27.

While the AB has not defined precisely what constitutes “more than *de minimis* in any given case”, the effect of the tax differential on the competitive relationship in the market is relevant to determining whether the tax differential is sufficient in a particular case. Thus far, WTO jurisprudence has found the following differences in tax rates to qualify as more than *de minimis*: 80% (*Canada – Periodicals* (AB), p. 28); 35% (*Indonesia – Autos* (Panel), para. 14.115); “considerably more than 20%” (*Mexico – Taxes on soft drinks*, para. 82.0); and 20% (*Chile – Alcoholic Beverages* (AB), para. 53). **Ecoland** should use this jurisprudence to argue that the 3% tax differential between Forestfuel and Recyclofuel is less than *de minimis* and far below the levels considered in any jurisprudence to date.

Different WTO Agreements use different *de minimis* thresholds for different purposes; these provisions might serve as “context” for interpreting Article III:

- Agreement on Agriculture, Article 6.4(a) sets a *de minimis* threshold of 5% of the value of total agricultural production to determine which domestic subsidies are included in the calculation of whether a Member has complied with its domestic support commitments; Agreement on Agriculture, Article 6.4(b) establishes a threshold of 10 % for developing countries.
- SCM Agreement, Article 11.9 sets a *de minimis* threshold for subsidies of 1% to continue a countervailing duty investigation; SCM Agreement, Article 27.10 sets a *de minimis* threshold for imports from developing countries of 2% for subsidies or 4% of imports; SCM Agreement, Article 27.11 sets a *de minimis* threshold for subsidies of 3% subsidy for certain categories of developing countries.
- Antidumping Agreement, Article 5.8 sets a *de minimis* threshold for the margin of dumping of 2% or 3% of imports.

Forestland should argue that the *de minimis* level referred to by the AB should be calculated in light of the *de minimis* levels set out in the Covered Agreements. Since taxes are more akin to subsidies and dumping margins than to agricultural production, *de minimis* should be defined as 1-2%. The *de minimis* level for developing countries in the SCM Agreement of 3% is inappropriate in the context of GATT Article III since, as with the Antidumping Agreement, Article III does not provide for special and differential treatment for developing countries. On this measure, the tax differential of 3% in the case at hand qualifies as more than *de minimis*.

Ecoland should counter that it is inappropriate to interpret the AB’s use of the term “*de minimis*” as if it were treaty language. This term does not appear in GATT Article III:2. Moreover, the AB made it clear that what constitutes *de minimis* in the context of GATT Article III:2, second sentence, would vary with the circumstances of each case. Therefore, it is inappropriate to define a fixed percentage based on provisions in other Covered Agreements. Moreover, setting a fixed percentage would amount to an amendment of the GATT and add to the obligations of Members, contrary to DSU Article 3.2. Alternatively, Ecoland should argue that, since the *de minimis* range in the Covered Agreements is 1-10%, it would be inappropriate to assume that the AB intended the *de minimis* level in GATT Article III:2, second sentence to fall at the lower end of this range.

If Ecoland argues that taxing imports of Recyclofuel from Enviroland at the same rate as domestic Recyclofuel compensates for the differential taxation of imports of Forestfuel, **Forestland should argue that** “dissimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2”. *Canada – Periodicals* (AB), p. 28.

In *Chile – Alcoholic Beverages*, Chile argued that there was “similar taxation” of domestic and imported production because all beverages within each fiscal category, which were based on specific alcohol content, were subject to identical tax rates, irrespective of their origin. The AB rejected this argument because the Panel had found, and Chile had not appealed, that imported beverages of a specific alcohol content are directly competitive or substitutable with other domestic distilled alcoholic beverages of a different alcohol content. *Chile – Alcoholic Beverages* (AB), paras. 51-52.

Forestland should cite this Panel report and argue that the panel in the case at hand should disregard the fiscal categories created by Ecoland, on the grounds that Recyclofuel and Forestfuel are directly competitive or substitutable products.

Ecoland should argue that, since they are not directly competitive or substitutable products, the panel should consider the relevant tax differential to be that within each fiscal category. Since the tax rate is the same for Forestfuel, regardless of its origin, the tax rate is not only similar, but identical.

c. So as to afford protection to domestic production

If 'directly competitive or substitutable products' are not 'not similarly taxed', then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied 'so as to afford protection'. *Japan – Alcoholic Beverages II* (AB), p. 27.

Ecoland should argue that this is the case. Alternatively, Ecoland should argue that the taxation has not been applied so as to afford protection.

The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application. *Japan – Alcoholic Beverages II* (AB), p. 33.

Ecoland should argue that the opposite is also true; i.e. the minimal tax differential is evidence of a lack of protective application.

An examination of whether dissimilar taxation has been applied so as to afford protection requires an analysis of the structure and application of the measure in question on domestic as compared to imported products. Its protective application can be discerned from the design, the architecture, and the revealing structure of a measure. *Japan – Alcoholic Beverages II* (AB), p. 29.

Forestland should argue that, since Enviroland's Recyclofuel production only accounts for 20% of the world supply (Case, para. 1), in practice there must be relatively little importation of Recyclofuel in Ecoland. Thus, in practice, the lower tax bracket of the ECTR principally applies to domestic production, as in *Korea – Alcoholic Beverages* and *Chile – Alcoholic Beverages*. **Ecoland** should distinguish these two cases by arguing that there is no evidence in this case regarding the volume of imports from Enviroland and that therefore there is no evidence that the lower tax bracket applies "almost exclusively" to domestic production, in contrast to the situation in those cases.

In the case at hand, the objective of the measures, including the ECTR, is stated to be "to combat global warming, reduce [Ecoland's] carbon emissions in accordance with its obligations under the GWA, and protect the environment and the health of its citizens" (Case, para. 10). However, it is unclear to what extent the intended objective of a tax measure is relevant to determining whether it has been applied so as to afford protection.

Forestland should argue that it is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless 'applied to imported or domestic products so as to afford protection to domestic production'. *Japan – Alcoholic Beverages II* (AB), p. 27-28. Similarly, in *Chile – Alcoholic Beverages* the AB refused to accept explanations of policy objectives which were not ascertainable from the objective design, architecture and structure of the measure. *Chile – Alcoholic Beverages* (AB), paras. 71-72.

Ecoland should argue that the environmental objectives of the ECTR should be taken into account, citing *Canada – Periodicals*, pp. 30-32, where the AB did ascribe some significance to the statements of representatives of the Canadian executive about the policy objectives of the part of the Excise Tax Act at issue.

Forestland should counter that the policy objectives of the tax are only relevant to confirm that it is applied so as to afford protection, but that Ecoland’s reasons for the tax cannot be used to call into question a conclusion that the measures are applied ‘so as to afford protection to domestic production’, citing *Korea – Alcoholic Beverages (AB)*, para. 150.

3. Article III:8(b) of GATT

Ecoland might claim that, should the ECTR be found to be a subsidy, it be exempted from Article III through the application of Article III:8(b). In that case,

Forestland should reply that Article III:8(b) only applies to subsidies paid “exclusively to domestic producers”. Since the ECTR also benefits Enviroland producers, this condition is not met. In addition, “subsidies that result from product-tax discrimination are subject to the prohibitions of Article III:2 of GATT”. *Indonesia – Autos (Panel)*, para. 14.121. Moreover, “the prohibition of discriminatory internal taxes in Article III:2 would be ineffective if discriminatory internal taxes on imported products could be generally justified as subsidies for competing domestic producers in terms of Article III:8(b)”. *Indonesia – Autos (Panel)*, para. 14.120, citing *US – Malt Beverages (GATT Panel)*, para. 5.9.

E. GATT, Article XX

1. Order of examination

The analysis under GATT Article XX is two-tiered: first, provisional justification of the measure under one of the paragraphs of Article XX; second, further appraisal of the same measure under the introductory clauses of Article XX (the chapeau). *US – Gasoline (AB)*, p. 22; *US – Shrimp (AB)*, paras. 119-120. In the case at hand, the applicable paragraphs are (b), (g) and (possibly) (d). Since the threshold of Article XX(g) is lower than that of XX(b) or (d), Ecoland should choose to begin with Article XX(g).

2. Burden of proof

The party invoking the exception has the burden of proof, in this case **Ecoland**.

3. Does GATT Article XX apply to a violation of the SCM Agreement?

In *US – Shrimp (Thailand)* and *US – Customs Bond Directive*, the AB declined to express a view on the systemic issue of whether a defence under GATT Article XX(d) was available to justify a measure found to constitute a “specific action against dumping” under Article 18.1 of the Antidumping Agreement. *US – Shrimp (Thailand)* and *US – Customs Bond Directive (AB)*, paras. 310, 319. Article 18.1 of the Anti-Dumping Agreement provides that “[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement.” Having found that the EBR constituted “specific action against dumping” and that it was not a “reasonable security” under the Ad Note to Article VI of the GATT 1994, and thus was not “in accordance with the provisions of the GATT 1994, as interpreted by the [Anti-Dumping] Agreement”, the Panel in that case examined the United States’ defence under Article XX(d) of the GATT 1994, but found that the measure could not be justified as necessary.

In the case at hand, some teams might argue that any inconsistency with SCM Agreement Article 3.1(b) can be justified under GATT Article XX. This is because a provision of the more specific agreement only prevails over a GATT 1994 provision to the extent that there is a conflict.

General interpretative note to Annex 1A provides as follows:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.

Is there a conflict between SCM Agreement Article 3.1(b) and GATT Article XX? SCM Agreement Article 32.1 provides that “[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.” SCM Agreement note 56 provides that “[t]his paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.” However, SCM Agreement Article 3.1 indicates that subsidies contingent on the use of domestic goods are prohibited “[e]xcept as provided in the Agreement on Agriculture”. This could be interpreted as precluding the application of any other exceptions, including the general exceptions of GATT Article XX.

However, the preamble of the Agreement on Agriculture refers to “the need to protect the environment” and Article 14 of the Agreement on Agriculture indicates that the SPS Agreement applies cumulatively to the Agreement on Agriculture. The preamble of the SPS Agreement indicates that it elaborates on GATT rules, in particular Article XX(b). Thus, the argument could be made that the Agreement on Agriculture opens the door to the application of GATT Article XX(b). However, the Agreement on Agriculture only applies to the “agricultural products” listed in Annex 1 of the Agreement on Agriculture: Article 2. Thus, the application of GATT Article XX(b) to SCM Agreement Article 3.1(b) would be limited to measures affecting these agricultural goods.

Are biofuels agricultural goods? Annex 1 of the Agreement on Agriculture covers chapters 1 to 24 (except for fish and fish products) and several specific headings in other chapters of the Harmonized System (HS) of the World Customs Organization (WCO). All other chapters and headings are considered to be industrial goods by the WTO. Ethanol falls under HS chapter 22, and is therefore an agricultural good. Biodiesel falls under HS chapter 38, making it an industrial good (see <http://worldtradelaw.typepad.com/ielpblog/2008/03/is-a-biofuel-et.html>).

There is no evidence in the case regarding whether Recyclofuel is classified as an agricultural good or an industrial good. Since Ecoland has the burden of proof under Article XX, and it is unable to prove the nature of Recyclofuel, Ecoland will have difficulty arguing that Article XX applies to justify a breach of Article 3.1(b) of the SCM Agreement.

A more general argument might be raised regarding the applicability of GATT Article XX to all Agreements in Annex 1A, including the SCM Agreement, based on the argument that all WTO Agreements are cumulative and apply simultaneously and that the effective interpretation principle requires that both rights (such as those in Article XX) and obligations are cumulative. Marceau and Trachtman (2002), pp. 874-875. GATS Article XIV ensures that similar rights are available in Annex 1B (services) and TRIPS Article 27.2 ensures that similar rights are available (with respect to patents) in Annex 1C (intellectual property).

Thus, applying GATT Article XX to all Agreements in Annex 1A would ensure that similar rights are available in all three annexes.

4. Article XX(g)

Article XX(g) applies to measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

Ecoland must make a prima facie case that the ECTR meets these requirements.

a. Exhaustible natural resources

In *US – Shrimp*, the AB interpreted the term “exhaustible natural resources” “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment” and took into consideration definitions in international environmental agreements to hold that this term includes both living and non-living natural resources. *US – Shrimp* (AB), paras. 128-131. The AB and GATT panels have found the following to be exhaustible natural resources: clean air (*US – Gasoline* (AB)); migratory sea turtles (*US – Shrimp* (AB)); salmon and herring (*Canada – Salmon and Herring* (GATT Panel)); tuna (*US – Tuna from Canada* (GATT Panel); and dolphins (*US-Tuna (Mexico)* (GATT Panel)).

Ecoland should argue that the ECTR aims to conserve three exhaustible natural resources: the global climate, the furry marmot and the Ecolandian fir tree wilderness. In *US – Shrimp*, since the migratory sea turtles were listed under CITES as being in danger of extinction, the AB held that they were exhaustible natural resources. The furry marmot is threatened with extinction and listed as such under the GAPTS (Case, para. 14). Therefore, it should also be considered an exhaustible natural resource. **Ecoland should argue that** preserving the global climate is analogous to the preservation of clean air in *US – Gasoline*. The teams also might raise arguments regarding whether the furry marmot and the Ecolandian fir tree should be addressed under XX(g) or XX(b).

In *US – Shrimp*, the AB held there was a sufficient jurisdictional nexus between migratory sea turtles and the United States because they spent part of their migratory life cycle in American waters, without ruling on whether there was a jurisdictional limit implied in the language of Article XX(g). Since the furry marmot lives in Ecoland, there is a sufficient jurisdictional nexus between Ecoland and the furry marmot. Climate change has had a negative impact on Ecoland’s environment (Case, paras. 5-6). Therefore, there should be a sufficient jurisdictional nexus between Ecoland and climate change. Regarding climate change, Ecoland could also refer to the following passage in *US – Shrimp*:

The words of Art. XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. [...] From the perspective embodied in the Preamble of the WTO Agreement [[Rf: objective of sustainable development]], the generic term of “natural resources” is not “static” in its content or reference but is rather, by definition, evolutionary. *US – Shrimp* (AB), paras. 129-130.

b. Relating to

The term “relating to” has been interpreted to mean “primarily aimed at”, rather than “necessary or essential”. *Canada – Salmon and Herring* (GATT Panel); *US – Gasoline* (AB); *US – Shrimp* (AB). The term “relating to” required an examination of “the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources”.

This requires “a close and genuine relationship of ends and means” and an examination of “the relationship between the general structure and design of the measure...and the policy goal it purports to serve”. *US – Shrimp* (AB).

Ecoland should argue that the policy goal of the ECTR is to reduce carbon emissions (Case, para. 11) in order to comply with its obligations under the GWA, combat global warming and protect the environment (Case, para. 10). The ECTR seeks to reduce carbon emissions by shifting consumption from fuels whose production process produces higher carbon emissions to fuels whose production process produces lower carbon emissions through the economic incentive of a consumption tax. The GWA serves as evidence that the reduction of carbon emissions relates to the conservation of the global climate (Case, para. 9). Since the differential tax treatment of Forestfuel and Recyclofuel is based on the different carbon emissions resulting from their production processes (Case, para. 12), there is a close and genuine relationship between the general structure and design of the measure and the policy goal of reducing carbon emissions to conserve the global climate. In turn, the conservation of the global climate will contribute to the preservation of the furry marmot and the fir trees.

Forestland should argue that, while there is scientific evidence to support a shift from consumption of conventional fossil fuels to biofuels, the differential tax treatment of Forestfuel and Recyclofuel does not relate to the reduction of carbon emissions, since the available scientific evidence supports the view that substituting either biofuel for conventional fossil fuels will reduce carbon emissions and there is no conclusive scientific evidence comparing the carbon footprint of the Recyclofuel production process to that of Forestfuel (Case, para. 13). Moreover, the structure and design of the measure is not based on any specific obligations in the GWA, which does not contain specific rules regarding the classification of biofuels and requires that measures to reduce carbon emissions be based on the available scientific evidence (Case, para. 9). The available scientific evidence shows that deforestation is responsible for 20% of the increase in carbon emissions (Case, para. 9), but the ECTR fails to recognize the contribution of the Forestfuel industry to the preservation of forests (Case, para. 18). Thus, the GWA provides evidence that the ECTR does not relate to the reduction of carbon emissions, but rather to preferential treatment for the domestically produced biofuel. The conservation of the global climate is unlikely to contribute to the preservation of the furry marmot, since its breeding cycle has already been disrupted and it is unlikely that the ECTR will have a sufficient impact on climate change in sufficient time to reverse the effects on the furry marmot or the fir trees.

c. Made effective in conjunction with restrictions on domestic production or consumption

Article XX(g) requires that conservation measures be “made effective in conjunction with restrictions on domestic production or consumption”. In *US – Gasoline*, the AB interpreted “made effective” as referring to a governmental measure being “operative”, as “in force”, or as having “come into effect”. The clause does not establish an empirical “effects test” for the availability of the Article XX(g) exception. The phrase “in conjunction with” meant “together with” or “jointly with”. This clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources, but does not require identical treatment of domestic and imported products. *US – Gasoline* (AB), pp. 20-21. In *US – Shrimp*, the AB found that the requirement was met because the same standards were imposed on American shrimp fishermen and enforced with civil and criminal sanctions.

Ecoland should argue that the requirement of even-handedness has been met, since the ECTR has been in force since 1 January 2008 and applies to domestic consumption of both imported and domestic fuels. Since this clause does not require identical treatment of domestic and imported products, and the minor difference in tax treatment can be justified by the differences in the carbon footprints of Recyclofuel and Forestfuel, this requirement has been met.

Forestland should argue that, while this clause does not require identical treatment of domestic and imported products, any differences in treatment must be justified by reference to the evidence regarding the reasons for the differential treatment. Since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel, the difference in tax treatment does not meet this requirement.

5. Article XX(b)

Article XX(b) applies to measures “necessary to protect human, animal or plant life or health”.

Ecoland must make a prima facie case that the policy goal at issue falls within the range of policies designed to protect human, animal or plant life or health. Once it is established that the policy goal fits the exception, **Ecoland must demonstrate that** the ECTR is “necessary” to achieve the policy goal. To demonstrate that the measure is necessary involves weighing and balancing a series of factors. First, the greater the importance of the interests or values that the challenged measure is intended to protect, the more likely it is that the measure is necessary. Second, the greater the extent to which the measure contributes to the end pursued, the more likely that the measure is necessary. Third, the less the trade impact of the challenged measure, the more likely that the measure is necessary. Fourth, whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available. The weighing and balancing process of the first three factors also informs the determination of the fourth. AB reports in *Korea – Beef*, *EC – Asbestos*, *US – Gambling*, *Dominican Republic – Cigarettes* and *Brazil – Retreaded Tyres*.

a. Whether the policy goal at issue falls within the range of policies

Ecoland should argue that the policy goal of the ECTR is to reduce carbon emissions (Case, para. 11) in order to comply with its obligations under the GWA, combat global warming, to protect the environment (Case, para. 10) and to protect the furry marmot and the Ecolandian fir trees that depend on the furry marmot’s digestive system. Ecoland should cite *Brazil – Retreaded Tyres* to support its argument that the protection of the furry marmot through the reduction of carbon emissions, like the protection of monkeys in Brazil, falls within the range of policies covered by Article XX(b): the protection of animal life or health. In *Brazil – Retreaded Tyres*, the panel accepted that environmental protection falls within the range of policies covered by Article XX(b). Moreover, the protection of the Ecolandian fir trees falls under the category of “plant life or health”.

Forestland should concede that the protection of the furry marmot and the Ecolandian environment fall within the range of policies covered by Article XX(b), unless Ecoland fails to make its case on this issue. In that case, Forestland should argue that Ecoland has failed to meet its burden of proof. However, Forestland can argue that Article XX(b) does not apply to transnational or global environmental concerns, citing *Condon* (2004). Thus, climate change does not fall within the range of policies covered by Article XX(b).

b. Whether the ECTR is “necessary” to achieve the policy goal

(i) *The importance of the interests or values*

Ecoland should cite the finding of the Panel in *Brazil – Retreaded Tyres* that “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and that protecting the environment is no less important”. *Brazil – Retreaded Tyres* (Panel), para. 7.108. The AB agreed that protection of the environment is an important value. *Brazil – Retreaded Tyres* (AB), para. 179.

Forestland should concede that protecting the environment is important, unless Ecoland fails to make its case on this issue. In that case, Forestland should argue that Ecoland has failed to meet its burden of proof. However, Forestland could argue that the weight accorded to the objective of environmental protection could be less than that accorded to the objective of protecting human life or health, given the AB’s characterization of the former as “important” (*Brazil – Retreaded Tyres*) and of the latter as “both vital and important in the highest degree” (*EC – Asbestos*).

(ii) *The extent to which the measure contributes to the end pursued*

Ecoland should argue that the contribution of the ECTR to addressing climate change and protecting the furry marmot should be considered in conjunction with the effects of the ecolabelling program and its efforts to preserve furry marmot habitat. Ecoland could also refer to para. 154 of the AB Report in *Brazil – Retreaded Tyres*, where the AB emphasized the need to view the measure against the broader context of a comprehensive strategy to deal with a problem. The comprehensive regulatory scheme is apt to induce sustainable changes in behaviour over time. Ecoland should argue that a trade-restrictive measure, the contribution of which is not immediately observable, can be justified under Article XX(b) and cite the AB in *Brazil – Retreaded Tyres*:

“We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change...—can only be evaluated with the benefit of time.” *Brazil – Retreaded Tyres* (AB), para. 151.

Forestland should argue that Ecoland must demonstrate that the the ECTR “is apt to produce a material contribution to the achievement of its objective”. *Brazil – Retreaded Tyres* (AB), para. 151. There is no evidence that the ECTR will have any significant impact on climate change or the protection of the furry marmot. Alternatively, the ECTR will only make “a marginal or insignificant contribution” to the reduction of carbon emissions and that is not enough for the ECTR to be considered necessary. *Brazil – Retreaded Tyres* (AB), para. 150.

(iii) *The trade impact of the challenged measure*

Ecoland should argue that the trade impact of the ECTR is minimal, since it does not prevent market access and only applies a minimally higher tax to Forestfuel.

Forestland should concede the trade impact of the ECTR is minimal, unless Ecoland fails to make its case on this issue. In that case, Forestland should argue that Ecoland has failed to meet its burden of proof. However, Forestland could argue that, if a “comprehensive regulatory strategy” is relevant the extent of the contribution, then it should also be looked at in assessing the trade restrictive impact of the measure. Thus, the cumulative impact of the ECTR, the eco-labelling scheme and the Patent Act should be taken into account, which together have much more significant restrictive effects.

(iv) Whether alternative measures would achieve the same objectives as the ECTR

Ecoland may point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is “necessary”. If Forestland raises a WTO-consistent alternative measure that, in its view, Ecoland should have taken, Ecoland will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not, in fact, “reasonably available”. If Ecoland demonstrates that the alternative is not “reasonably available”, in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary”. *US – Gambling (AB)*, paras. 310-311.

Forestland should argue that the proposal of Ecoland’s scientists to introduce furry marmots from other countries into Ecoland (Case, para. 7) would achieve the same objectives as the ECTR with respect to the protection of furry marmots. Indeed, introducing furry marmots that can adapt to climate change is likely to be more effective than the Ecolandian measures, whose impact on climate change is not likely to be felt for many years, if ever.

Ecoland should counter that Ecolandian scientists do not know why furry marmots have not adapted to climate change in the way that other furry marmots have (Case, para. 7). Thus, there is no evidence that this alternative would work. Also, it may be argued that the introduction of furry marmots from other countries is merely to preserve animal species, not to protect the animal life and health of Ecoland, and is thus not an alternative.

Forestland could argue that an alternative to the ECTR is to recognize Forestland’s efforts to combat climate change through the Biofueled Vehicles Regulation, the Biofueled Machinery Regulation and preservation of Forestland’s pine forests (Case, para. 18). Forestland should argue that, as in *Thailand – Cigarettes (GATT Panel)*, the alternatives should be considered in the light of relevant international norms. Since the GWA requires countries to base their measures for carbon emission reductions on available scientific evidence and that evidence shows that the preservation of forests is an important factor in mitigating climate change (Case, para. 9), the preservation of forests is a reasonable alternative.

Ecoland should argue that the GWA does not provide any specific rules regarding the preservation of forests (Case, para. 9). Moreover, any alternative measures should be measures that Ecoland can take, rather than measures that are beyond its control and that would require consultations or negotiations with Forestland. *US – Gambling (AB)*, paras. 316-318. Even if forest preservation is a reasonable alternative, Ecoland cannot preserve its own forests without protecting the furry marmot (Case, para. 6).

On the issue of scientific evidence, **Ecoland should rely** on the following statement of the AB in *EC – Asbestos*: “In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.” *EC – Asbestos (AB)*, para. 178, citing *EC – Hormones (AB)*, para. 194.

6. Article XX(d)

Two elements must be shown “[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX”. The first element is that “the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994”, and the second is that “the measure must be ‘necessary’ to secure such compliance.” *Korea – Beef* (AB), para. 157. The terms “to secure compliance with laws or regulations” in Article XX(d) do not encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member’s obligations under an international agreement. The terms “laws or regulations” refer to rules that form part of the domestic legal system of a WTO Member, which may have international law as their source. *Mexico – Taxes on soft drinks* (AB), paras. 68-69.

Ecoland may argue that the ECTR can be justified as a measure that is necessary to ensure compliance with the GWA and the Ecosystem Protection Act, under Article XX(d). In that case,

Forestland should point out that there is no evidence in the case that the GWA has been implemented in Ecoland as part of its domestic legal system. Therefore, Ecoland cannot meet its burden of proof. It should also argue that laws or regulations to be secured compliance must be not inconsistent with the provisions of this Agreement.

7. Chapeau

The chapeau requires that a measure that has been provisionally justified under one of the paragraphs of Article XX not be applied in a manner that constitutes:

- (1) arbitrary discrimination between countries where the same conditions prevail;
- (2) unjustifiable discrimination between countries where the same conditions prevail; or
- (3) a disguised restriction on international trade.

Ecoland has the burden of proof to show that the application of the ECTR meets the requirements of the chapeau. In order for the measure to pass the chapeau test, Ecoland must prove that all three requirements have been met. In order for the measure to fail the chapeau test, Forestland only needs to show one of these three requirements has not been met.

There are three elements in the chapeau analysis of whether a measure is applied in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”:

- (1) the application of the measure results in discrimination;
- (2) the discrimination is arbitrary or unjustifiable; and
- (3) the discrimination occurs between countries where the same conditions prevail (between different exporting countries or between the exporting countries and the importing country).

The chapeau also refers to disguised restrictions on international trade. The jurisprudence has tended to find that the evidence that supports a finding of arbitrary or unjustifiable discrimination also supports a finding of disguised restrictions on international trade.

The purpose of the chapeau is to prevent the abuse of the exceptions in Article XX, ie., the chapeau embodies the recognition on the part of WTO Members of the need to maintain a balance between the right of a Member to invoke an exception on the one hand, and the substantive rights of the other Members on the other hand. *US-Shrimp* (AB).

In *US – Gasoline* and *US – Shrimp*, the AB identified two main criteria to determine whether discrimination that has been shown to exist is arbitrary or unjustifiable: (1) a serious effort to negotiate with a view to achieving the policy goal of the measure at stake; and (2) flexibility of the measure (e.g. in taking into account the situation prevailing in other countries). With respect to the second criteria, in *US – Shrimp* (Art. 21.5), the AB agreed with the Panel that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure, so as to avoid arbitrary or unjustifiable discrimination. (para. 144)

In *Brazil – Retreaded Tyres*, the AB held that “there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner “between countries where the same conditions prevail”, and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective”. *Brazil – Retreaded Tyres* (AB), para. 227.

Forestland should argue that the application of the ECTR results in discrimination between Recyclofuel from Ecoland and Enviroland and Forestfuel from Forestland and ten other WTO Members.

Ecoland should concede this point, but argue that any discrimination is neither arbitrary nor unjustifiable, nor does it amount to a disguised restriction on international trade.

In *US – Shrimp*, the AB found that the American regulations were arbitrary or unjustifiable because the US: (1) required WTO members to adopt “essentially the same policy” as that applied in the United States without taking into account other policies and measures a country may have adopted that would have a comparable effect on sea turtle conservation; (2) applied the same standard without taking into consideration whether it was appropriate for the conditions prevailing in other countries; (3) failed to engage in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition”; and (4) failed to provide due process in the denial of certification compared to those who were granted certification. *US – Shrimp* (AB), paras. 163-166, 181.

Ecoland should argue that the ECTR meets the chapeau test because:

- 1) Ecoland engaged in “serious, across-the-board negotiations” with the objective of concluding a multilateral agreement on climate change (the GWA), before enacting the ECTR (Case, paras. 8,9);
- (2) those negotiations addressed the issue of how biofuels should be classified and the role that forest preservation should have in mitigating climate change (Case, para. 9);
- (3) membership in the GWA is open to all WTO Members (Clarifications, para. 2), including the five Forestfuel producers that chose not to sign the GWA (Case, para. 8);
- (4) the chapeau does not require that Ecoland succeed in its efforts to negotiate a multilateral solution to the classification of biofuels and credit for forest conservation in mitigating climate change (*US – Shrimp* (Article 21.5 – *Malaysia*);
- (5) the parties affected by the decisions of any Ecolandian government agency are entitled to seek judicial review in the Ecoland courts (Clarifications, para. 14);
- (6) the reason for the discrimination – the carbon footprints of the products – has a rational connection to the objective of reducing carbon emissions in order to mitigate climate change.

Forestland should argue that the ECTR fails the chapeau test because:

- (1) Ecoland requires WTO members to adopt “essentially the same policy” as Ecoland to mitigate climate change without taking into account other policies and measures a country may have adopted that would have a comparable effect on climate change, such as the steps that Forestland has taken to reduce its carbon emissions and to meet its carbon reduction commitments under the GWA (Case, para. 18); and
- (2) Ecoland applied the same standard for the power source of biofuel refineries without taking into consideration whether it was appropriate for the conditions prevailing in other countries, specifically whether solar power is a viable alternative to hydroelectric power in the Forestfuel producers. Ecoland bears the burden of proof and there is no evidence that Ecoland took these issues into consideration. Ecoland also failed to engage in negotiations with five Forestfuel producers that are not signatories to the GWA and there is no evidence that they were part of the GWA negotiations (Case, para. 8). The reason for the discrimination – the carbon footprints of the products – has no rational connection to the objective of reducing carbon emissions, since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel (Case, para. 13).

III. Regulation under s. 66.6, Ecoland Patent Act

Forestland Machinery Inc. has invented a device that can be used to adapt any machine to use ForestFuel at a very low cost (the ForestFuel Converter) (Case, para. 19). Forestland Machinery Inc. was granted a patent on the ForestFuel Converter in 2007 in Forestland, in the ten other WTO Members that produce ForestFuel and in several other countries. However, Forestland Machinery Inc. was refused a patent in Ecoland under Section 66.6 of the Ecoland Patent Act, which excludes from patentability “inventions, the prevention of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”. A regulation issued under Section 66.6 lists the products that are excluded from patentability on these grounds. This list includes the ForestFuel Converter (Case, para. 20). The Ecoland Patent Act entered into force on 1 January 1995 and the regulation issued under Section 66.6 entered into force on 1 January 2008 (Clarifications, para. 7).

A. TRIPS Article 27.1

TRIPS Article 27.1 provides as follows:

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.⁽⁵⁾ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
(footnote original) ⁵ For the purposes of this Article, the terms “inventive step” and “capable of industrial application” may be deemed by a Member to be synonymous with the terms “non-obvious” and “useful” respectively.

Article 27.1 requires that patents be available for “any inventions”, whether products or processes and in all fields of technology, provided they meet three requirements: (1) they must be “new”; (2) they must “involve an inventive step”; and (3) they must be “capable of industrial application”. Inventions must meet each of these three criteria, but there is no definition of the term “inventions” or the term “new”. However, footnote 5 indicates a certain degree of flexibility in the manner in which Members may define these requirements (Condon 2007, p. 701).

Forestland must make a prima facie case that Ecoland’s regulation under s. 66.6 of the Ecoland Patent Act is inconsistent with TRIPS Article 27.1 because it does not make a patent “available”, but instead excludes the Forestfuel Converter ex ante, thereby breaching its obligation to decide individual patent cases on their merits.

Forestland must show that the Forestfuel Converter is an “invention”. The case states that Forestland Machinery Inc. has “invented” the ForestFuel Converter (Case, para. 19).

Forestland must show that the Forestfuel Converter is:

- (1) new;
- (2) involves an inventive step; and
- (3) is capable of industrial application.

The case states that Forestland Machinery Inc. was granted a patent on the ForestFuel Converter in 2007 in Forestland, in the ten other WTO Members that produce ForestFuel and in several other countries (Case, para. 20). The Forestfuel Converter met the requirements of the patent laws of these WTO Members. Moreover, since Forestland Machinery Inc. “invented” the ForestFuel Converter, the implication is that this is a new product and involves an inventive step. The case states that the ForestFuel Converter can be used to adapt any machine to use ForestFuel, so it is capable of industrial application.

Forestland must also make a prima facie case that the exclusion of the Forestfuel Converter from patentability in Ecoland amounts to “discrimination” as to:

- (1) the place of invention;
- (2) the field of technology; or
- (3) whether products are imported or locally produced.

According to the Panel in *Canada – Pharmaceutical Patents*, the term ‘discriminate’ in Article 27.1 extends beyond the concept of differential treatment and is potentially broader than national treatment or most-favoured nation treatment. Discrimination may arise from explicitly different treatment (*de jure* discrimination) or from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects (*de facto* discrimination). *Canada – Pharmaceutical Patents* (Panel), para. 7.94. Since the case provides no evidence of a competing product that was granted a patent in Ecoland, **Forestland will have to argue that** the denial of a patent for the Forestfuel Converter amounts to indirect, *de facto* discrimination against Forestfuel (an imported product), by placing it at a disadvantage in the Ecoland market against Recyclofuel (a locally produced product). **Forestland should argue that** the term “discrimination” in Article 27.1 encompasses the denial of patents in order to disadvantage a product whose patent is not in issue. Since non-discrimination obligations generally apply to both direct and indirect discrimination, and the term “discrimination” is potentially broader than national treatment or MFN, it should be interpreted broadly to encompass this type of discrimination. In this regard, **Forestland might cite** the following general statement regarding the nature of *de facto* discrimination:

[D]e facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable. Two main issues figure in the application of that general concept in most legal systems. One is the question of de facto discriminatory effect—whether the actual effect of the measure is to impose differentially disadvantageous consequences on certain parties. The other, related to the justification for the disadvantageous effects, is the issue of purpose—not an inquiry into the subjective purposes of the officials responsible for the measure, but an inquiry into the objective characteristics of the measure from which one can infer the existence or non-existence of discriminatory objectives. *Canada – Pharmaceutical Patents* (Panel), para. 7.101.

Ecoland should counter that the panel should exercise caution in its interpretation of the term “discrimination” with respect to this type of *de facto* argument, in order to avoid a broader interpretation than the wording and objectives of the agreement allow, citing *Indonesia – Autos* (Panel), paras. 14.272-14.274.

Ecoland should note that TRIPS Article 1.3 requires that treatment be accorded to “nationals” and that both the national treatment and MFN obligations in TRIPS apply to “nationals”, not products.

Ecoland should argue that, in the case at hand, Article 27.1 only requires non-discrimination with respect to Forestland Machinery Inc., inventor of the Forestfuel Converter. Since there is no evidence that any inventor of a competing product has been granted a patent, Forestland has failed to meet its burden of proof under Article 27.1.

B. TRIPS Article 27.2

Forestland Machinery Inc. was refused a patent in Ecoland under Section 66.6 of the Ecoland Patent Act, which 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”. Section 66.6 reproduces, in part, TRIPS Article 27.2. A regulation issued under Section 66.6 lists the products that are excluded from patentability on these grounds. This list includes the ForestFuel Converter (Case, para. 20).

TRIPS Article 27.2 provides as follows:

Members may exclude from patentability inventions, the prevention within their territory 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, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

In *Canada – Pharmaceutical Patents*, the Panel stated:

Article 27 does not prohibit *bona fide* exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible...that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers. *Canada – Pharmaceutical Patents* (Panel), para. 7.91.

As the party invoking this exception, **Ecoland has the burden of proof** to show that (1) the commercial exploitation of the Forestfuel Converter is prevented within its territory and (2) that prevention 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”.

Ecoland must argue that the patent regulation prevents the commercial exploitation of the Forestfuel Converter within its territory.

Forestland could argue that because sales of Forestfuel are allowed, and the sole purpose of the Forestfuel Converter is to enable Forestfuel to be used, the requirement to prevent commercial exploitation has not been met. Ecoland allows the commercial exploitation of Forestfuel. The case does not state whether Ecoland allows the commercial exploitation of the Converters, so Ecoland can not meet its burden of proof.

The phrase “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” echoes the language of GATT Article XX(a) (“necessary to protect public morals”) and GATT Article XX(b) (“necessary to protect human, animal or plant life or health”), as well as GATS Article XIV(a) (“necessary to protect public morals or to maintain public order” [GATS, Note 5: “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”]) and GATS Article XIV(b) (“necessary to protect human, animal or plant life or health”). Given the similarity of the language in all of these exceptions, and since the AB in *US – Gambling* interpreted the term “necessary” in GATS Article XIV(a) to mean the same as the term “necessary” in GATT Article XX, it is reasonable to do the same in TRIPS Article 27.2. Moreover, VCLT Article 31.4 provides that “a special meaning shall be given to a term if it is established that the parties so intended.” As the AB noted in *US – Stainless Steel (Mexico)*, WTO Members cite WTO jurisprudence in legal arguments in dispute settlement proceedings and take the jurisprudence into account when enacting or amending national legislation. *US – Stainless Steel (Mexico)* (AB), para. 160. WTO Members also take the jurisprudence into account when in trade negotiations. Thus, while the context of TRIPS Article 27.2 differs from that of GATS Article XIV and GATT Article XX (for example, the term “ordre public” is broader in Article 27.2 because it encompasses measures to “protect human, animal or plant life or health or to avoid serious prejudice to the environment”), the analytical process should be similar, given the language that is used.

Ecoland must make a prima facie case that the policy goal at issue falls within the range of policies designed to protect “to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”. Once it is established that the policy goal fits the exception, **Ecoland must demonstrate** that the ECTR is “necessary” to achieve the policy goal. To demonstrate that the measure is necessary involves weighing and balancing a series of factors. First, the greater the importance of the interests or values that the challenged measure is intended to protect, the more likely it is that the measure is necessary. Second, the greater the extent to which the measure contributes to the end pursued, the more likely that the measure is necessary. Third, the less the trade impact of the challenged measure, the more likely that the measure is necessary. Fourth, whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available.

1. Whether the policy goal at issue falls within the range of policies

Ecoland may argue that the policy goal of the patent regulation is to reduce carbon emissions in order to comply with its obligations under the GWA, combat global warming and protect the environment (Case, para. 10). Ecoland may argue that the patent regulation achieves this goal in different ways: (1) by denying patent protection to a technology that facilitates the use of a fuel that contributes to global warming; (2) by facilitating the development of a similar technology to convert machines to use Recyclofuel, which has a smaller carbon footprint than Forestfuel, based on the technology used in the Forestfuel Converter; and (3) by discouraging the use of Forestfuel by discouraging the sale of the Forestfuel Converter in Ecoland. Ecoland should cite *Brazil – Retreaded Tyres* to support its argument that the protection of the furry marmot through the reduction of carbon emissions, like the protection of monkeys in Brazil, falls within the range of policies covered by Article 27.2 (the protection of animal life or health) and that the preservation of the Ecolandian fir tree does as well (the protection of plant life or health).

Forestland should argue that denying patent protection to the Forestfuel Converter does not “avoid serious prejudice to the environment”, which is the relevant phrase to apply to measures that purport to address climate change. Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel (Case, para. 13), there is no proof that denying patent protection will avoid serious prejudice to the environment. **Thus**, Ecoland can not meet its burden of proof under Article 27.2. Moreover, since the Forestfuel Converter “can be used to adapt any machine to use Forestfuel” (Case, para. 19), including machines that are set to run on fossil fuels, and substituting Forestfuel for conventional fossil fuels will reduce carbon emissions (Case, para. 13), denying patent protection to the Forestfuel Converter actually hampers efforts to “avoid serious prejudice to the environment”.

2. Whether the patent regulation is “necessary” to achieve the policy goal

a. The importance of the interests or values

Ecoland should cite the finding of the Panel in *Brazil – Retreaded Tyres* that “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and that protecting the environment is no less important”. *Brazil – Retreaded Tyres* (Panel), para. 7.108. The AB agreed that protection of the environment is an important value. *Brazil – Retreaded Tyres* (AB), para. 179.

Forestland should concede the importance of protecting the environment, but argue that denying patent protection to the Forestfuel Converter does not protect the environment.

b. The extent to which the measure contributes to the end pursued

Ecoland should argue that the patent regulation contributes to the goal of reducing carbon emissions by facilitating the development of a similar technology to convert machines to use Recyclofuel, which has a smaller carbon footprint than Forestfuel, and by discouraging the use of Forestfuel by discouraging the sale of the Forestfuel Converter in Ecoland.

Ecoland should argue that the contribution of the patent regulation to addressing climate change and protecting the furry marmot should be considered in conjunction with the effects of the ECTR, the ecolabelling program and its efforts to preserve furry marmot habitat.

Ecoland should argue that if a measure adopted in order to attenuate global warming and climate change, the contribution of which is not immediately observable, can be justified under Article XX(b), then the same is true under TRIPS Article 27.2. *Brazil – Retreaded Tyres* (AB), para. 151.

Forestland should argue the patent regulation makes no contribution to the achievement of its purported objective and refer to its arguments, above, that there is no proof that denying patent protection will avoid serious prejudice to the environment and denying patent protection to the Forestfuel Converter actually hampers efforts to “avoid serious prejudice to the environment”, since it may have the effect of discouraging the sale of the Forestfuel Converter in Forestland.

c. The trade impact of the challenged measure

Ecoland can argue that there is no evidence regarding the trade impact of the patent regulation. However, **Forestland can argue that** the only way for the patent regulation to achieve the goal of discouraging the use of Forestfuel is if it has the effect of discouraging the sale of the Forestfuel Converter in Forestland, which implies an impact on trade. Moreover, Ecoland bears the burden of proof to show that it meets the exception.

d. Whether alternative measures would achieve the same objectives

Ecoland may point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is “necessary”. If Forestland raises a WTO-consistent alternative measure that, in its view, Ecoland should have taken, Ecoland will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not, in fact, “reasonably available”. If Ecoland demonstrates that the alternative is not “reasonably available”, in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary”. *US – Gambling (AB)*, paras. 310-311.

Forestland should argue that the proposal of Ecoland’s scientists to introduce furry marmots from other countries into Ecoland (Case, para. 7) would achieve the same objectives as the patent regulation with respect to the protection of furry marmots. Indeed, introducing furry marmots that can adapt to climate change is likely to be more effective than the Ecolandian measures, whose impact on climate change is not likely to be felt for many years, if ever.

Ecoland should counter that Ecolandian scientists do not know why furry marmots have not adapted to climate change in the way that other furry marmots have (Case, para. 7). Thus, there is no evidence that this alternative would work.

Forestland should argue that a more effective alternative to the patent regulation is to grant patent protection to the Forestfuel Converter so that Forestfuel can be used in place of fossil fuels. There is no evidence that denying patent protection to the Forestfuel Converter will facilitate the development of a similar technology for Recyclofuel. Another alternative is to issue a compulsory license under TRIPS Article 31 so that the technology can be used to develop a similar technology for Recyclofuel. This would be more consistent with the objectives of TRIPS than denying patent protection altogether.

Ecoland should counter that granting a patent, with or without a compulsory license, would not achieve Ecoland’s desired level of protection.

Ecoland must also show that the “exclusion is not made merely because the exploitation is prohibited by their law”. While the language of the chapeau in GATS Article XIV reflects that of the chapeau in GATT Article XX, TRIPS Article 27.2 contains no comparable language. Instead, Article 27.2 uses this phrase, which suggests that the inquiry must take place in a broader context than the national law of the Member in question; i.e. the justification for exclusion must be based on one of the permissible grounds for exclusion set out in Article 27. The negotiating history of the TRIPS Agreement appears to confirm this, since an earlier draft listed “law” as one of the permissible grounds for exclusion and was not included in the final text (MTN.GNG/NG11/W/76).

Since **Ecoland has the burden of proof**, it must adduce evidence that supports the exclusion of the Forestfuel Converter from patentability in light of the facts of the case. Thus, the arguments made above would be relevant to the determination of whether the exclusion is made merely because the exploitation is prohibited by Ecolandian law.

Ecoland may argue that the GWA goal of reducing carbon emissions supports the exclusion of patentability for products that defeat that purpose.



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Forestland may argue that the patentability of the Forestfuel Converter in all other jurisdictions mentioned in the case supports the view that the exclusion of patentability in the Ecoland regulation is made merely because the exploitation is prohibited by Ecolandian law.

IV. Ecolabelling Regulation

A. Order of examination/TBT Agreement-GATT Relationship

When a Member alleges that a measure violates both the TBT Agreement and GATT 1994, the allegations under the former are examined first. *EC – Sardines* (AB). The Preamble of the TBT Agreement states that it is intended to “further the objectives of GATT 1994”. While the AB has indicated that the TBT Agreement “does so through a specialized regime that applies solely to a limited class of measures” (*EC – Asbestos* (AB), para. 80), the jurisprudence also indicates that the two agreements apply cumulatively. Marceau and Trachtman (2002) argue that compliance with the more stringent requirements of the TBT Agreement should give rise to a presumption of compliance with GATT. In particular, a technical regulation that complies with TBT Agreement Articles 2.1 and 2.2 is likely to be compatible with GATT Article I, III and XX. However, a measure could be justifiable under GATT Article XX and not meet the requirements of the TBT Agreement, unless GATT Article XX also applies to the TBT Agreement. Marceau and Trachtman (2002), pp. 873-874.

B. TBT Agreement

1. Is the ecolabelling regulation a “technical regulation”?

For the TBT Agreement to apply, **Forestland must show that** the ecolabelling regulation is a “technical regulation”, as defined in TBT Agreement, Annex 1.1. *EC – Asbestos* (AB), para. 59; *EC – Sardines* (AB), para. 175.

According to the AB, a document must meet three criteria to fall within the definition of “technical regulation” in the TBT Agreement: (1) The document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. (2) The document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product, e.g. the means of identification, presentation and appearance of the product (*EC – Asbestos* (AB)). They may be prescribed or imposed in either a positive or a negative form. (3) Compliance with the product characteristics must be mandatory. *EC – Sardines* (AB), para. 176.

a. The document must apply to an identifiable product or group of products.

Forestland should argue that the ecolabelling regulation applies indirectly to biofuels or fossil fuels, which constitute an identifiable group of products.

Ecoland should argue that the ecolabelling regulation applies to products produced with machinery that uses biofuels or fossil fuels. This is not an identifiable group of products because it potentially includes any manufactured product.

b. The document must lay down one or more characteristics of the product.

Forestland must argue that this criterion is met, because Annex 1.1 permits the document to lay down “related processes and production methods” or to “deal exclusively with...labelling requirements as they apply to a product, process or production method”. Forestland should cite Marceau and Trachtman (2002), p. 861, where they state that “PPM labels appear to be covered by the TBT Agreement”.

Ecoland should argue that this criterion is not met, because the only characteristic that the ecolabelling regulation lays down has to do with the fuel used to make the products, which is not “related” to the products themselves. Ecoland should cite Marceau and Trachtman (2002), p. 862 on this point. Moreover, the definition of a technical regulation contained in Annex 1 of TBT, “document which lays down product characteristics or *their related* processes and production methods (emphasis added)” would suggest that the TBT Agreement does not apply to non product-related PPMs, i.e. PPMs that do not leave any trace in the final product itself.

c. Compliance with the product characteristics must be mandatory.

Forestland must point out that the ecolabelling regulation is mandatory (Case, para. 15). **Ecoland** should concede this point.

2. TBT Agreement Article 2.1

TBT Agreement Article 2.1 provides as follows: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”.

Forestland bears the burden of proof.

a. Like products

With respect to the ecolabelling regulation, unlike the ECTR, the only evidence regarding the likeness of the products is their PPMs. With respect to products produced using biofuels, the ecolabelling regulation categorizes products according to a double PPM: (1) the biofuel used in the production process and (2) the production process for the biofuel itself.

Forestland should argue that, since the ecolabelling regulation targets fuels, the products that should be compared are Recyclofuel and Forestfuel. In support of this argument, Forestland should cite *Mexico – Taxes on soft drinks*, where the Panel analyzed the likeness of the sweeteners used in the soft drinks, rather than the soft drinks themselves. This would then lead to the same analysis of “like products” as in the case of the ECTR.

Alternatively, **Forestland should argue that**, if the products under comparison are the products that have been produced with the various fuels, then PPMs that do not affect the product as such cannot be taken into account in determining likeness. However, this leaves Forestland with no evidence regarding the likeness of the products. Therefore, in order to meet its burden of proof, Forestland might argue that the categorization of the products is in fact based on their origin and that this relieves Forestland of the obligation to prove that the products are similar. In support of this argument, **Forestland should cite** WTO jurisprudence under GATT Article I:1, III:2 and III:4 that, where differential treatment is based on the origin of products, that distinction is sufficient to find a violation, without having to analyze whether the products are similar. **III:2: Argentina – Hides and Leather** (Panel), paras. 11.168-11.170; **Indonesia – Autos** (Panel), para. 14.113; **India – Autos** (Panel), para. 7.174; **III:4: Korea – Beef** (Panel), para. 627; **I:1: US – Certain EC products** (Panel), para. 6.54.

However, **Ecoland can counter** this argument by pointing out that the ecolabelling regulation does not identify products based on their origin.

Alternatively, **Forestland could argue that**, since the ecolabelling regulation applies to products across the board, it must necessarily apply to products that are identical, or at least “like”, in every respect but the PPM.

Ecoland should argue that, since there is no evidence regarding the characteristics of the products, Forestland has not met its burden of proof on the issue of whether they are “like products”. Alternatively, Ecoland must argue that PPMs must be taken into account in determining likeness under the TBT Agreement because this agreement refers explicitly to PPMs (see discussion regarding PPMs, above).

Ecoland must argue that the products are not like products. In support of this argument, Ecoland should argue that the term “like products” should be more narrowly construed in TBT Agreement Article 2.1 than in GATT Articles I and III if GATT Article XX does not apply to the TBT Agreement, citing Marceau and Trachtman (2002), p. 822 (see discussion regarding the applicability of GATT Article XX, above). Alternatively, Ecoland should argue that GATT Article XX does apply to the TBT Agreement, but that the products are nevertheless not “like products” because of the PPMs.

Forestland should argue that GATT Article XX does not apply to the TBT Agreement. However, this makes it difficult for Forestland to argue the term “like products” should be broadly construed in TBT Agreement Article 2.1.

b. Treatment no less favourable

While the terms “no less favourable treatment than” have not been tested in dispute settlement proceedings in the TBT context, in relation to GATT Art. III:4, the AB has indicated that whether or not products are treated less favorably should be assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products (*Korea – Various Measures on Beef*, para. 137).

Only products produced with Recyclofuel have been granted Category 1 certification and now use the “furry marmot friendly” label. All products produced with Forestfuel have been certified as Category 2 products and now use the “unhappy furry marmot” label. Given the nature of the labels, **Ecoland** should concede that Category 2 products receive less favourable treatment than Category 1 products, **unless Forestland fails to make a prima facie case** on this point, in which case **Ecoland should argue that** Forestland has not met its burden of proof.

3. TBT Agreement Article 2.2

TBT Agreement Article 2.2 provides as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

a. Legitimate objective

Forestland should argue that the ecolabelling regulation does not protect the environment, the furry marmot or the Ecolandian fir tree. Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel (Case, para. 13), there is no proof that discouraging the consumption of Category 2 products will protect the environment. Moreover, since the breeding cycle of the furry marmot has already been disrupted, it is unlikely that the disadvantageous treatment of Forestfuel-produced products will have any effect on the climate change that has caused the disruption.

Ecoland should argue that the objective of the ecolabelling regulation is the “protection of...animal or plant life or health, or the environment”. **Ecoland may argue that** policy goal of the ecolabelling regulation is to reduce carbon emissions in order to comply with its obligations under the GWA, combat global warming and protect the environment (Case, para. 10). In particular, the ecolabelling regulation is designed to protect the furry marmot and the Ecolandian fir trees that depend on the furry marmot’s digestive system. Ecoland may argue that the ecolabelling regulation achieves this goal by discouraging the use of Forestfuel by discouraging the purchase of Category 2 products, thereby creating disincentives to use Forestfuel. **Ecoland should cite** *Brazil – Retreaded Tyres* to support its argument that the protection of the furry marmot through the reduction of carbon emissions, like the protection of monkeys in Brazil, falls within the range of policies covered by the “protection of...animal or plant life or health, or the environment”. Protecting the Ecolandian fir tree does as well. Ecoland may argue that the issue of scientific proof should be addressed below, under the phrase “risks non-fulfilment would create”, or may choose to address this point here.

b. Unnecessary obstacles to international trade

The first issue here is whether the ecolabelling regulation creates obstacles to trade.

Forestland should argue that it does, by preventing demand for imported Category 2 products from growing.

Ecoland should argue that it does not, since imports are not restricted and the decision whether to buy the products is left to the consumer.

The second issue is whether the obstacles to trade are “unnecessary”. GATT jurisprudence would suggest that this term refers to the issue of whether there are WTO-consistent measures that are reasonably available and equally effective in achieving the goal of the measure.

Forestland should argue that voluntary ecolabelling would be consistent with Article 2 of the TBT Agreement, because a voluntary scheme would not qualify as a “technical regulation”. However, Forestland should also insist that any voluntary ecolabelling scheme would have to comply with the substantive requirements of the TBT Agreement regarding standards, as that term is defined in Annex 1. If one accepts the reasoning applied to the dolphin-safe label in *US – Tuna (Mexico)*, voluntary ecolabelling would also be GATT-consistent.

Forestland could also argue that a WTO-consistent alternative to the ecolabelling regulation is a labelling program that recognizes Forestland's efforts to combat climate change through the Biofueled Vehicles Regulation, the Biofueled Machinery Regulation and preservation of Forestland's pine forests (Case, para. 18). Since the GWA requires countries to base their measures for carbon emission reductions on available scientific evidence and that evidence shows that the preservation of forests is an important factor in mitigating climate change (Case, para. 9), recognizing the effect of Forestland's preservation of forests is a reasonable alternative.

Ecoland should respond that voluntary ecolabelling would not discourage the purchase of Category 2 products to the same extent that mandatory labelling does and therefore would be less effective in reducing carbon emissions by creating disincentives to use Forestfuel. In this regard, **Ecoland should emphasize that** the Preamble of the TBT Agreement allows each Member to determine the level of protection it considers appropriate.

Ecoland should also argue that the GWA does not provide any specific rules regarding the preservation of forests (Case, para. 9). Moreover, any alternative measures should be measures that Ecoland can take, rather than measures that are beyond its control and that would require consultations or negotiations with Forestland. *US – Gambling (AB)*, paras. 316-318.

The third issue is whether the ecolabelling regulation has been “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”. This suggests an inquiry into both the design of the measure and the effect of the measure.

Forestland should argue that the design of the measure demonstrates an intention to disadvantage Category 2 and Category 3 products against Category 1 products, by requiring the use of unnecessarily negatively emotive images for the former two categories in contrast to the positively emotive image for the latter. The collection of Ecolandian measures makes it more likely that Category 2 products will be imported and that Category 1 products will be produced domestically, since Ecoland produces 80% of the world supply of Recyclofuel, Recyclofuel is subject to lower sales taxes under the ECTR and the Forestfuel Converter has been denied a patent in Ecoland.

Ecoland should counter this argument by noting that the design of the categories is origin-neutral and that Forestfuel can be used to produce products in Ecoland.

Forestland should argue that the effect of the ecolabels has been to increase demand for Category 1 products at the expense of the other two categories.

Ecoland should counter that the evidence suggests that Category 1 products have gained market share at the expense of Category 3 products, not Category 2 products, since the latter has maintained its market share.

c. More trade-restrictive than necessary to fulfil a legitimate objective

Unlike under GATT Article XX(b), under TBT Agreement Article 2.2, **Forestland bears the burden of proof** to show that the ecolabelling regulation is more trade-restrictive than necessary. Marceau and Trachtman (2002), p. 831. GATT jurisprudence would suggest that the term “more trade-restrictive than necessary” refers to the issue of whether there are less WTO-inconsistent measures that are reasonably available and equally effective in achieving the goal of the measure. The same arguments regarding the alternative of voluntary labeling can be used here.

d. Taking account of the risks non-fulfillment would create

This phrase may suggest an analysis of the importance of the values and policies and the contribution of the measure to the end pursued. Marceau and Trachtman (2002), p. 831. The argument regarding whether the ecolabelling regulation pursues a legitimate objective, above, together with the explicit reference to environmental protection and the protection of human, animal or plant life or health as legitimate objectives, should apply to the issue of importance of the values.

Forestland should focus its argument here on the contribution of the measure to the end pursued. Since there is no conclusive scientific evidence comparing the carbon footprints of Forestfuel and Recyclofuel (Case, para. 13), there is no proof that discouraging the consumption of Category 2 products will protect the environment. Moreover, since the breeding cycle of the furry marmot has already been disrupted, it is unlikely that the disadvantageous treatment of Forestfuel-produced products will have any effect on the climate change that has caused the disruption or on the subsequent impact on the Ecolandian fir trees. Finally, the available scientific evidence supports the view that substituting either Recyclofuel or Forestfuel for conventional fossil fuels will reduce carbon dioxide emissions (Case, para. 13).

Ecoland should argue that, since the TBT Agreement does not explicitly regulate risk assessment or require scientific bases for regulations, the implicit requirement for some scientific basis should be significantly less rigorous than the explicit requirements of the SPS Agreement. Marceau and Trachtman (2002), p. 836.

On the issue of scientific evidence, **Ecoland should argue that** it is entitled to rely on the evidence that it has regarding the carbon footprints of Forestfuel and Recyclofuel, since Article 2.2 only requires a consideration of “available scientific and technical information”. On this point, **Ecoland should rely on** the following statement of the AB in *EC – Asbestos* to argue that it does not require “conclusive” scientific evidence: “In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.” *EC – Asbestos* (AB), para. 178, citing *EC – Hormones* (AB), para. 194.

e. Rebuttable presumption of compliance with Article 2.2

TBT Agreement Article 2.5 creates a rebuttable presumption of compliance with Article 2.2 where a technical regulation for one of the explicitly mentioned legitimate objectives is in accordance with relevant international standards. In *EC – Hormones*, the AB refused to read into SPS Agreement Article 3.2 a reverse presumption that non-compliance with an international standard leads to an inference of non-compliance, so deviations from international standards is not prohibited. Marceau and Trachtman (2002), p. 842.

Ecoland may argue that the relevant international standard is the GWA and that the GWA qualifies as a relevant international standard because membership is open to all WTO Members. Unlike in the SPS Agreement, where the standard setting bodies are clearly and exhaustively identified (CODEX, OIE, IPPC – see Annex A), the organizations or bodies that could develop "standards" within the definition of TBT Annex 1 are not. On this basis, it could be argued that an environmental agreement like GWA, with quasi-universal membership, could develop international standards that may fall within the scope of the TBT Agreement. On this question, the TBT Committee *Decision on Principles for the development of international standards, guides and recommendations with relation to Article 2, 5 and Annex 3 of the Agreement* can be informative though it remains a Committee Decision (See section B of Annex to Part I in the attached document). **Ecoland might also argue that** its ecolabelling regulation is in accordance with ISO standards regarding ecolabelling.

In this case, **Forestland may respond** that neither the GWA nor ISO standards establish any standards "regarding the classification of biofuels according to their carbon footprint" (Case, para. 9).

However, if they make these arguments, both Ecoland and Forestland will undermine their arguments under TBT Agreement Article 2.4 (see the following section).

4. TBT Agreement Article 2.4

TBT Agreement Article 2.4 provides as follows:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Forestland bears the burden of proof in seeking a ruling of inconsistency with Article 2.4. *EC – Sardines* (AB), paras. 274-275. Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. *EC – Sardines* (Panel), para. 7.74; *EC – Sardines* (AB), para. 205. Even if not adopted by consensus, an international standard can constitute a relevant international standard. *EC – Sardines* (AB), para. 227.

To be a "relevant international standard", the standard at issue would have to "bear upon, relate to, or be pertinent to" the ecolabelling regulation. *EC – Sardines* (Panel), para. 7.68. There must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other. A standard is used as a basis for a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation. *EC – Sardines* (AB), para. 245.

Forestland may argue that the relevant international standard is the GWA and that the GWA qualifies as a relevant international standard because membership is open to all WTO Members, citing the definition in Annex 1.4 of "international body or system" as a "Body or system whose membership is open to the relevant bodies of at least all Members". **Forestland might also argue that** the ISO standards regarding ecolabelling are the relevant international standard.

In this case, **Ecoland may respond that** the GWA and ISO standards do not establish any standards “regarding the classification of biofuels according to their carbon footprint” (Case, para. 9).

Ecoland may also respond that Article 12.4 provides that “developing country Members should not be expected to use international standards as a basis for their technical regulations...which are not appropriate to their development, financial and trade needs”.

Ecoland may argue that this entitles them to more leeway.

Forestland should argue that this provision is not mandatory.

The teams will have to be careful with respect to the framing of their arguments under Article 2.4, to avoid undermining their arguments under GATT Article XX.

C. GATT 1994

Forestland’s claims against the ecolabelling regulation under GATT need to focus on the indirect discrimination between Forestfuel and Recyclofuel. For a summary of the relevant jurisprudence, see the ECTR section, above. **Forestland** has the burden of proof under Articles I and III, whereas **Ecoland** has the burden of proof under Article XX.

1. GATT, Article I

a. Whether the claim adequately identifies Article I:1

See the analysis of this issue in the ECTR section, above.

b. Advantage

Forestland can argue that the ecolabelling regulation creates an advantage for Recyclofuel by creating an incentive for producers of products to use Recyclofuel in order to be able to use the positive ecolabel and disadvantages Forestfuel by creating a disincentive for producers of products to use Forestfuel by denying them access to the positive label and requiring them to use the negative label. The effect of the ecolabels on market share provides evidence that these incentives and disincentives have an impact on the competitiveness of the products in the market. Thus, the ecolabelling regulation, like the ECTR, provides more favourable treatment to Recyclofuel from Enviroland than to Forestfuel from Forestland and the ten other WTO Members that produce Forestfuel.

If Forestland makes a *prima facie* case on this point, then **Ecoland should concede** the point. Otherwise, **Ecoland should argue that** Forestland has not met its burden of proof.

c. Like products

See the analysis of whether Forestfuel and Recyclofuel are like products in the ECTR section, above.

d. Unconditionally

Forestland can argue that the ecolabelling regulation conditions access to the positive label on the use of one fuel over another. If Forestland makes a *prima facie* case on this point, then **Ecoland should concede** the point. Otherwise, **Ecoland should argue that** Forestland has not met its burden of proof.

2. GATT, Article III:4

a. Measures covered

Article III:4 covers “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

Forestland should argue that the ecolabelling regulation is a regulation that affects the sale, purchase and use of Forestfuel imports and domestically produced Recyclofuel through the incentives and disincentives noted above. If Forestland makes a *prima facie* case on this point, then

Ecoland should concede the point. Otherwise, **Ecoland should argue that** Forestland has not met its burden of proof.

Forestfuel should also argue that, while the ecolabelling regulation is origin-neutral on its face, in practice it results in *de facto* discrimination between imported Forestfuel and domestically produced Recyclofuel, which constitutes the overwhelming majority of Recyclofuel that is available in Ecoland. **Forestland should also make the point** that Article III:4 covers both direct and indirect discrimination, to support the comparison of Forestfuel and Recyclofuel (inputs), rather than a comparison of the final products that carry the labels, citing *Mexico – Taxes on soft drinks* (Panel), in which the differential treatment of soft drinks was based on the sweeteners used as inputs.

b. Like products

See the analysis of Forestfuel and Recyclofuel in the ECTR section on Article III:2, above.

Forestland should note that the accordion of similarity is broader in Article III:4 than in Article III:2, citing *Japan – Alcoholic Beverages* (AB), and that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products”, citing *EC – Asbestos* (AB), para. 99. Thus, the panel should consider the evidence adduced under both the first and second sentences of Article III:2 with respect to the ECTR, regarding the competitive relationship between Forestfuel and Recyclofuel, citing *Mexico – Taxes on soft drinks* (Panel), para. 8.106, where the Panel used the same evidence it used to determine whether the two products were “directly competitive or substitutable” under Article III:2, second sentence, in its analysis of whether the same products were “like products” under Article III:4.

Ecoland should argue that Forestfuel and Recyclofuel are not like products, using the same analysis used in the ECTR section on Article III:2, above.

c. Less favourable treatment

Forestland should argue that the ecolabelling regulation provides less favourable treatment to Forestfuel by requiring producers that use Forestfuel to use a less favourable ecolabel than that used by producers that use Recyclofuel.

If Forestland makes a *prima facie* case on this point, then **Ecoland should concede** the point. Otherwise, **Ecoland should argue** that Forestland has not met its burden of proof.

3. GATT Article XX

1. Order of examination

Regarding the order of examination of the issues under GATT Article XX, see the analysis of GATT Article XX in the ECTR section, above. This section uses the same order of examination.

2. Burden of proof

The party invoking the exception has the burden of proof, in this case **Ecoland**.

3. Relationship between GATT Article XX and the TBT Agreement

As noted above, a preliminary issue is whether GATT Article XX can be invoked to justify a violation of the TBT Agreement. Both teams should argue this point. They should also raise the issue of how the findings under the TBT Agreement should affect the findings under GATT Article XX. In addition to the arguments noted above, they might analyze what effect the Article XX chapeau language in the sixth paragraph of the Preamble of the TBT Agreement should have on this issue.

4. Article XX(g)

Article XX(g) applies to measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. **Ecoland must make a prima facie case that** the ecolabelling regulation meets these requirements.

a. Exhaustible natural resources

Ecoland must argue that the ecolabelling regulation aims to conserve three exhaustible natural resources: the global climate, the furry marmot and the Ecolandian fir tree. The arguments are the same as under this heading for the ECTR.

b. Relating to

The arguments here are similar to those under this heading for the ECTR.

Ecoland must argue that the policy goal of the ecolabelling regulation is to comply with its obligations under the GWA (Case, para. 15), combat global warming and protect the environment (Case, para. 10). The ecolabelling regulation seeks to reduce consumption of fuels whose production process produces higher carbon emissions to fuels whose production process produces lower carbon emissions through the economic incentives created by the ecolabels. The GWA serves as evidence that the reduction of carbon emissions relates to the conservation of the global climate (Case, para. 9). Since the differential labelling treatment of Forestfuel and Recyclofuel is based on the different carbon emissions resulting from their production processes (Case, para. 12), there is a close and genuine relationship between the general structure and design of the measure and the policy goal of reducing carbon emissions to conserve the global climate. In turn, the conservation of the global climate will contribute to the preservation of the furry marmot and the Ecolandian fir tree.

Forestland should argue that, while there is scientific evidence to support a shift from consumption of conventional fossil fuels to biofuels, the differential treatment of Forestfuel and Recyclofuel does not relate to the reduction of carbon emissions, since the available scientific evidence supports the view that substituting either biofuel for conventional fossil fuels will reduce carbon emissions and there is no conclusive scientific evidence comparing the carbon footprint of the Recyclofuel production process to that of Forestfuel (Case, para. 13).

Moreover, the structure and design of the measure is not based on any specific obligations in the GWA. There is no evidence in the case that the GWA contains specific rules regarding ecolabelling. The GWA requires that measures to reduce carbon emissions be based on the available scientific evidence (Case, para. 9). The available scientific evidence shows that deforestation is responsible for 20% of the increase in carbon emissions (Case, para. 9), but the ecolabelling regulation fails to recognize the steps that Forestland has taken to address climate change or the contribution of the Forestfuel industry to the preservation of forests (Case, para. 18). Thus, the GWA provides evidence that the ecolabelling regulation does not relate to the reduction of carbon emissions, but rather to preferential treatment for the domestically produced biofuel. The conservation of the global climate is unlikely to contribute to the preservation of the furry marmot, since its breeding cycle has already been disrupted and it is unlikely that the ecolabelling regulation will have a sufficient impact on climate change in sufficient time to reverse the effects on the furry marmot.

c. Made effective in conjunction with restrictions on domestic production or consumption

Article XX(g) requires that conservation measures be “made effective in conjunction with restrictions on domestic production or consumption”. **Ecoland must argue that** this requirement has been met, since the ecolabelling regulation has been in force since 2006 (Case para. 17) and applies to both imported and domestic products. Since this clause does not require identical treatment of domestic and imported products, and the differences in ecolabelling required can be justified by the differences in the carbon footprints of Recyclofuel and Forestfuel, this requirement has been met.

Forestland should argue that, while this clause does not require identical treatment of domestic and imported products, any differences in treatment must be justified by reference to the evidence regarding the reasons for the differential treatment. Since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel, the difference in treatment does not meet this requirement.

5. Article XX(b)

Article XX(b) applies to measures “necessary to protect human, animal or plant life or health”. **Ecoland must make a prima facie case that** the policy goal at issue falls within the range of policies designed to protect human, animal or plant life or health. Once it is established that the policy goal fits the exception, **Ecoland must demonstrate that** the ecolabelling regulation is “necessary” to achieve the policy goal, according to the same series of factors as for the ECTR, above.

a. Whether the policy goal at issue falls within the range of policies

Ecoland should argue that the policy goal of the ecolabelling regulation is to reduce carbon emissions in order to comply with its obligations under the GWA (Case, para. 15), combat global warming, to protect the environment (Case, para. 10) and to protect the furry marmot and the Ecolandian fir trees that depend on the furry marmot’s digestive system. Ecoland should cite *Brazil – Retreaded Tyres* to support its argument that the protection of the furry marmot through the reduction of carbon emissions, like the protection of monkeys in Brazil, falls within the range of policies covered by Article XX(b): the protection of animal life or health. In *Brazil – Retreaded Tyres*, the panel accepted that environmental protection falls within the range of policies covered by Article XX(b). Moreover, the protection of the Ecolandian fir trees falls under the category of “plant life or health”.

Forestland should concede that the protection of the furry marmot, the Ecolandian fir trees and the Ecolandian environment fall within the range of policies covered by Article XX(b), **unless Ecoland fails to make its case** on this issue. In that case, **Forestland should argue that** Ecoland has failed to meet its burden of proof.

However, **Forestland can argue that** Article XX(b) does not apply to transnational or global environmental concerns, citing Condon (2004). Thus, climate change does not fall within the range of policies covered by Article XX(b).

b. Whether the ecolabelling regulation is “necessary” to achieve the policy goal

(i) The importance of the interests or values

Ecoland should cite the finding of the Panel in *Brazil – Retreaded Tyres* that “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and that protecting the environment is no less important”. *Brazil – Retreaded Tyres* (Panel), para. 7.108. The AB agreed that protection of the environment is an important value. *Brazil – Retreaded Tyres* (AB), para. 179. **Forestland should concede** this point, unless Ecoland fails to make its case on this issue. In that case, Forestland should argue that Ecoland has failed to meet its burden of proof.

(ii) The extent to which the measure contributes to the end pursued

Ecoland should argue that the contribution of the ecolabelling regulation to addressing climate change and protecting the furry marmot should be considered in conjunction with the effects of the ECTR and its efforts to preserve furry marmot habitat. **Ecoland should argue that** a trade-restrictive measure, the contribution of which is not immediately observable, can be justified under Article XX(b) and cite the AB in *Brazil – Retreaded Tyres*, para. 151.

Forestland should argue that Ecoland must demonstrate that the ecolabelling regulation “is apt to produce a material contribution to the achievement of its objective”. *Brazil – Retreaded Tyres* (AB), para. 151. There is no evidence that the ecolabelling regulation will have any significant impact on climate change or the protection of the furry marmot. Alternatively, the ecolabelling regulation will only make “a marginal or insignificant contribution” to the reduction of carbon emissions and that is not enough for the ecolabelling regulation to be considered necessary. *Brazil – Retreaded Tyres* (AB), para. 150. **Ecoland should counter that** this test in *Brazil – Retreaded Tyres* referred to an import ban. Since the ecolabelling regulation does not restrict trade, or is far less trade-restrictive than an import ban, it should be subject to a lower threshold.

(iii) The trade impact of the challenged measure

Ecoland should argue that the trade impact of the ecolabelling regulation is minimal, since it does not prevent market access and leaves consumption decisions to the consumer.

Forestland should argue that the ecolabelling regulation has a significant impact on market share (Case, para. 17), which implies a significant impact on trade.

(iv) Whether alternative measures would achieve the same objectives as the ecolabelling regulation

Ecoland may point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is “necessary”. If Forestland raises a WTO-consistent alternative measure that, in its view, Ecoland should have taken, Ecoland will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not, in fact, “reasonably available”. If Ecoland demonstrates that the alternative is not “reasonably available”, in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary”. *US – Gambling* (AB), paras. 310-311.

Forestland should argue that the proposal of Ecoland’s scientists to introduce furry marmots from other countries into Ecoland (Case, para. 7) would achieve the same objectives as the ecolabelling regulation with respect to the protection of furry marmots. Indeed, introducing furry marmots that can adapt to climate change is likely to be more effective than the Ecolandian measures, whose impact on climate change is not likely to be felt for many years, if ever.

Ecoland should counter that Ecolandian scientists do not know why furry marmots have not adapted to climate change in the way that other furry marmots have (Case, para. 7). Thus, there is no evidence that this alternative would work.

Forestland should argue that a less WTO-inconsistent alternative to the mandatory ecolabelling regulation is a voluntary labelling program that recognizes Forestland’s efforts to combat climate change through the Biofueled Vehicles Regulation, the Biofueled Machinery Regulation and preservation of Forestland’s pine forests (Case, para. 18). Forestland should argue that, as in *Thailand – Cigarettes* (GATT Panel), the alternatives should be considered in the light of relevant international norms, such as the voluntary ecolabelling program of the ISO. Since the GWA requires countries to base their measures for carbon emission reductions on available scientific evidence and that evidence shows that the preservation of forests is an important factor in mitigating climate change (Case, para. 9), recognizing the effect of Forestland’s preservation of forests in a voluntary ecolabelling program is a reasonable alternative.

Ecoland should argue that the GWA does not provide any specific rules regarding the preservation of forests (Case, para. 9). Moreover, any alternative measures should be measures that Ecoland can take, rather than measures that are beyond its control and that would require consultations or negotiations with Forestland. *US – Gambling* (AB), paras. 316-318. Even if forest preservation is a reasonable alternative, Ecoland cannot preserve its own forests without protecting the furry marmot (Case, para. 6).

Ecoland should also argue that the mandatory labelling program is necessary to achieve its desired level of protection. On the issue of scientific evidence, Ecoland should rely on the following statement of the AB in *EC – Asbestos*: “In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion.” *EC – Asbestos* (AB), para. 178, citing *EC – Hormones* (AB), para. 194.

6. Article XX(d)

Two elements must be shown “[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX”. The first element is that “the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994”, and the second is that “the measure must be ‘necessary’ to secure such compliance.” *Korea – Beef* (AB), para. 157. The terms “to secure compliance with laws or regulations” in Article XX(d) do not encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member’s obligations under an international agreement. The terms “laws or regulations” refer to rules that form part of the domestic legal system of a WTO Member, which may have international law as their source. *Mexico – Taxes on soft drinks* (AB), paras. 68-69.

Ecoland may argue that the ecolabelling regulation can be justified as a measure that is necessary to ensure compliance with the GWA, under Article XX(d).

Forestland should respond that there is no evidence in the case that the GWA has been implemented in Ecoland as part of its domestic legal system. Thus, Ecoland has not met its burden of proof. It should also argue that laws or regulations to be secured compliance must be not inconsistent with the provisions of this Agreement.

7. Chapeau

Forestland must argue that the application of the ecolabelling regulation results in discrimination between Recyclofuel from Ecoland and Enviroland and Forestfuel from Forestland and ten other WTO Members. **Ecoland should concede** this point, but argue that any discrimination is neither arbitrary nor unjustifiable.

In *US - Shrimp*, the AB found that the American regulations were arbitrary or unjustifiable because the US: (1) required WTO members to adopt “essentially the same policy” as that applied in the United States without taking into account other policies and measures a country may have adopted that would have a comparable effect on sea turtle conservation; (2) applied the same standard without taking into consideration whether it was appropriate for the conditions prevailing in other countries; (3) failed to engage in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition”; and (4) failed to provide due process in the denial of certification compared to those who were granted certification. *US - Shrimp* (AB), paras. 163-166, 181.

Ecoland should argue that it meets the chapeau test because:

- (1) It engaged in “serious, across-the-board negotiations” with the objective of concluding a multilateral agreement on climate change (the GWA), negotiations which were also open in principle to Forestland, before enacting the ecolabelling regulation (Case, paras. 8,9);
- (2) Those negotiations addressed the issue of how biofuels should be classified and the role that forest preservation should have in mitigating climate change (Case, para. 9);
- (3) Membership in the GWA is open to all WTO Members (Clarifications, para. 2), including the Forestfuel five producers that chose not to sign the GWA (Case, para. 8);
- (4) The chapeau does not require that Ecoland succeed in its efforts to negotiate a multilateral solution to the classification of biofuels and credit for forest conservation in mitigating climate change (*US - Shrimp* (Article 21.5 - *Malaysia*));
- (5) The EEPA certification process is consistent with the due process and transparency criteria applied in *US - Shrimp* and *US - Shrimp* (Article 21.5 - *Malaysia*), since the EEPA bases its certification decisions on information provided by suppliers and available scientific evidence, biofuel suppliers may request on site inspection of their refinement facilities, the EEPA publishes its decisions (Case, para. 16), and the parties affected by the decisions of the EEPA are entitled to seek judicial review in the Ecoland courts (Clarifications, para. 14); and
- (6) The reason for the discrimination—the carbon footprints of the products—has a rational connection to the objective of reducing carbon emissions in order to mitigate climate change. Ecoland should also note that the EEPA certification process meets any due process and transparency requirements that may be implicit in the Article XX chapeau.

Forestland should argue that the ecolabelling regulation fails the chapeau test because:

- (1) Ecoland requires WTO members to adopt “essentially the same policy” as Ecoland to mitigate climate change without taking into account other policies and measures a country may have adopted that would have a comparable effect on climate change, specifically the steps that Forestland has taken to reduce its carbon emissions and to meet its carbon reduction commitments under the GWA (Case, para. 18); and
- (2) Ecoland applied the same standard for the power source of biofuel refineries without taking into consideration whether it was appropriate for the conditions prevailing in other countries, specifically whether solar power is a viable alternative to hydroelectric power in the Forestfuel producers. Ecoland bears the burden of proof under the chapeau and there is no evidence in the case that Ecoland took these issues into consideration. Ecoland also failed to engage in negotiations with five Forestfuel producers that are not signatories to the GWA and there is no evidence that those WTO Members were part of the GWA negotiations (Case, para. 8). The reason for the discrimination—the carbon footprints of the products—has no rational connection to the objective of reducing carbon emissions, since there is no conclusive scientific evidence comparing the carbon footprints of Recyclofuel and Forestfuel (Case, para. 13).

V. Conclusion

Forestland should conclude by seeking the following findings:

- (1) The Ecoland Carbon Taxation Regulation (ECTR) is inconsistent with SCM Agreement Article 3.1(b) and GATT Articles I:1, III:2 and is not justifiable under GATT Article XX;
- (2) The regulation under section 66.6 of the Ecoland Patent Act is inconsistent with Article 27.1 of the TRIPS Agreement and is not justifiable under 27.2 of the TRIPS Agreement; and
- (3) The Ecoland ecolabeling regulation is inconsistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement and GATT Articles I:1 and III:4 and is not justifiable under GATT Article XX.

Forestland should ask the panel to recommend that Ecoland bring these measures into conformity with its obligations under the SCM Agreement, the GATT 1994, the TBT Agreement and the TRIPS Agreement.

Ecoland should conclude by seeking the following findings:

- (1) The Ecoland Carbon Taxation Regulation (ECTR) is consistent with SCM Agreement Article 3.1(b) and GATT Articles I:1, III:2 or, alternatively, is justifiable under GATT Article XX;
- (2) The regulation under section 66.6 of the Ecoland Patent Act is consistent with Article 27.1 of the TRIPS Agreement or, alternatively, is justifiable under 27.2 of the TRIPS Agreement; and
- (3) The Ecoland ecolabeling regulation is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement and GATT Articles I:1 and III:4 or, alternatively, is justifiable under GATT Article XX.



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