

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

THE CASE

**ECOLAND - MEASURES RELATING TO BIOFUELS MADE
FROM PINE CONES**

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1. Ecoland, a developing country WTO Member, is the world's largest producer of biofuels made from recycled vegetable-based cooking oil ("RecycloFuel"). Ecoland's production accounts for 80% of world production. Only one other country (Enviroland) produces RecycloFuel.
2. Forestland, a developed country WTO Member is the world's largest producer of biofuels made from pine cones ("ForestFuel"), accounting for 50% of world production. Ten other WTO Members produce ForestFuel. Ecoland does not produce ForestFuel. Forestland does not produce RecycloFuel.
3. Ecoland and Forestland both export their biofuels to a number of countries, including to each other. ForestFuel is less expensive than RecycloFuel in all markets.
4. RecycloFuel and ForestFuel each produce 50% fewer carbon emissions when they are burned, compared to the carbon emissions of conventional fossil fuels. ForestFuel burns more rapidly than RecycloFuel. 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. The chemical composition of RecycloFuel is different from that of ForestFuel. 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. 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. ForestFuel can also be used as an organic fertilizer, whereas RecycloFuel cannot. Biofueled machines and vehicles are normally set to run on a specific type of biofuel.

5. Climate change has had a negative impact on Ecoland's environment and economy by reducing the amount of snow in Ecoland's mountains. Warmer temperatures over the last 5 years have shortened the ski season on Ecoland's ski slopes by 20%. Ecoland's ski resorts are an important source of income from tourism.
6. The warmer weather and the reduced snowfall in Ecoland's mountains have also disrupted the breeding cycle of the furry marmot (a large, cute rodent that lives in Ecoland's mountains and neighbouring mountainous countries, but not in Forestland). The Ecolandian Fir tree, which is the dominant species of tree in Ecoland, must have its seeds pass through the digestive system of the furry marmot in order to germinate. Thus, the reduction in the furry marmot population has reduced the amount of Ecolandian Fir forest. This forest is an important habitat for a variety of migratory bird species. The Ecolandian Fir tree also appears on the Ecolandian flag.
7. The furry marmots in other countries have adapted to warmer temperatures by changing their breeding cycle. Furry marmot scientists do not know why the furry marmots have not changed their breeding cycle in Ecoland. Since the furry marmot is not a migratory species, scientists in Ecoland have proposed to introduce furry marmots from other countries into Ecoland. They hope that the introduced marmots will be able to adapt to climate change better than the Ecoland marmots. All furry marmots are the same species.
8. Ecoland is a signatory to the Global Agreement for the Protection of Threatened Species (GAPTS), but Forestland is not. The GAPTS membership exceeds that of the WTO and includes all WTO Members, (with the exception of Forestland). The parties to GAPTS may take measures to restrict trade in threatened species. Ecoland and Forestland are both signatories to the Global Warming Agreement (GWA). Ninety percent of WTO Members, including Enviroland, and five of the WTO Members that produce ForestFuel, are signatories to the GWA. The GWA membership exceeds that of the WTO. The GWA entered into force 1 January 2005 for all signatories.

9. Under the GWA, signatories have agreed to reduce their carbon emissions by 20% over 20 years. The GWA specifies that countries are entitled to determine how to meet their emissions reductions, based on the available scientific evidence. During the GWA negotiations, Ecoland failed in its effort to negotiate specific rules regarding the classification of biofuels according to their carbon footprint. Forestland failed in its efforts to negotiate specific rules regarding the preservation of forests. However, the available scientific evidence shows that deforestation is responsible for 20% of the increase in carbon emissions.
10. Ecoland has introduced a series of measures in order to combat global warming, reduce its carbon emissions in accordance with its obligations under the GWA, and protect the environment and the health of its citizens.
11. The Ecoland Carbon Taxation Regulation (ECTR) seeks to reduce carbon emissions from both conventional fossil fuels and biofuels. Conventional gasoline is subject to a 20% sales tax. Biofuels that produce 50% fewer emissions than conventional fossil fuels are subject to a 10% sales tax. However, where such biofuels are produced in a manner that creates carbon emissions, they are subject to an additional 3% sales tax. ForestFuel is subject to this additional sales tax but RecycloFuel is not.
12. 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.
13. The available scientific evidence supports the view that substituting RecycloFuel or ForestFuel for conventional fossil fuels will reduce carbon dioxide emissions. However, there is no conclusive scientific evidence comparing the carbon footprint of the RecycloFuel production process to that of ForestFuel.

14. Ecoland's national environmental law requires the preservation of furry marmot habitat because it is a species that is threatened with extinction. The furry marmot is listed in the GAPTS as a species that is threatened with extinction.

15. As part of its efforts to comply with its obligations under the GWA, Ecoland has introduced under its Ecosystem Protection Act (2005) a regulation that provides for mandatory ecolabeling of products produced with machinery that uses biofuels (based on the production process of the biofuel) and fossil fuels. According to this regulation, products must be certified under three categories:
 - Category 1 products that have been produced with machinery that uses biofuels that have been refined in a manner that does not produce carbon emissions;

 - Category 2 products that have been produced with machinery that uses biofuels that have been refined in a manner that does produce carbon emissions; or

 - Category 3 products that have been produced with machinery that uses fossil fuels.

16. The Ecoland Ecosystem Protection Agency (EEPA) provides certification on the basis of the information provided by the suppliers and the available scientific evidence regarding the emissions produced by various biofuel refinement processes. Biofuel suppliers may request an on-site inspection of their production facilities. The EEPA publishes its certification decisions on its website (www.eepa.org).

If certification is granted in Category 1, the producers must use the "furry marmot friendly" label, which depicts a happy furry marmot family squatting in front of a healthy Ecolandian Fir tree.

If certification is granted in Category 2, the producers must use the "unhappy furry marmot" label, which depicts a lone, unhappy furry marmot.

If certification is granted in Category 3, the producers must use the "furry marmot unfriendly" label, which depicts a dead furry marmot hanging from a bare Ecolandian Fir tree.

17. Since the entry into force of the regulation in 2006, all products produced with machinery using RecycloFuel have been certified as Category 1 products by EEPA and now use the “furry marmot friendly” label. No products produced with machinery using biofuels other than RecycloFuel have obtained Category 1 certification. All products produced with machinery using ForestFuel have been certified as Category 2 products and now carry the image of an unhappy furry marmot. 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%.
18. Forestland has taken steps to reduce its carbon emissions and to meet its carbon reduction commitments under the GWA. Forestland introduced a regulation that requires 20% of all vehicles sold in Forestland to run on low-emission biofuels (the “Biofueled Vehicles Regulation” or BVR) and a tax incentive for Forestland companies to use machinery that run on low-emission biofuels (the “Biofueled Machinery Regulation” or BMR). Low-emission biofuels are defined as those that produce 50% fewer carbon emissions when they are burned, compared to the carbon emissions of conventional fossil fuels. Forestland has increased its production of ForestFuel in order to meet the increased demand for these biofuels. ForestFuel production creates an incentive to preserve Forestland’s vast expanses of pine trees in order to ensure a steady supply of pine cones. Forestland scientists have concluded that its pine forests absorb as much carbon dioxide as its dams produce. Moreover, the long-term reduction of emissions under the BVR and BMR will be greater than the short-term increase in carbon emissions caused by dams. Thus, Forestland’s ForestFuel production, together with the BVR and BMR, will help it to meet its GWA commitments.
19. Most Forestland companies have chosen to use ForestFuel-based biofuels for their biofueled machinery because it is cheaper than other biofuels in Forestland and because 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).
20. 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.

21. Forestland alleges that:
 - (1) The Ecoland Carbon Taxation Regulation (ECTR) is inconsistent with Articles I and III:2 of the GATT 1994 and Article 3.1(b) of the SCM Agreement;
 - (2) The regulation issued under Section 66.6 of the Ecoland Patent Act is inconsistent with Article 27.1 of the TRIPS Agreement;
 - (3) The ecolabeling regulation is inconsistent with Articles 2.1, 2.2, and 2.4 of the TBT Agreement; or, alternatively, Articles I and III:4 of the GATT 1994.

Indicative references to provisions

- *Marrakesh Agreement Establishing the WTO.*
- *General Agreement on Tariffs and Trade (GATT) 1994, Articles I, III, XX.*
- *Agreement on Subsidies and Countervailing Measures, Articles 1, 2, 3.*
- *Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 27.*
- *Agreement on Technical Barrier to Trade, Articles 1, 2, 4.*
- *WTO Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes.*
- *1969 Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/28, UNTS 58 (1980), 8 ILM 679.*

Indicative GATT/WTO Cases

- Canada – Autos (WT/DS139, WT/DS142)
- Canada – Salmon and Herring (GATT BISD 35S/98)
- Brazil – Retreaded Tyres (WT/DS332)
- EC – Asbestos (WT/DS135)
- EC – Hormones (WT/DS26, WT/DS48)
- EC – Sardines (WT/DS231)
- Indonesia – Autos (WT/DS54, WT/DS55, WT/DS59, WT/DS64)
- Thailand – Cigarettes (GATT BISD 37S/200)
- United States – Gambling (WT/DS285)
- United States – Gasoline (WT/DS2)
- United States – Shrimp (WT/DS58)
- United States – Shrimp (Article 21.5 – Malaysia) (WT/DS58)
- United States – Tuna (Mexico) (GATT BISD 39S/183, unadopted)

Selected References on WTO Law

- GATT Secretariat, *GATT Analytical Index: Guide to GATT Law and Practice* (1995) 6th edition.
- WTO Secretariat, *WTO Analytical Index: Guide to WTO Law and Practice*, www.wto.org.
- Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization: Law, Practice and Policy*, (2006) Oxford University Press, 2nd edition.
- Condon, *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (2006) Transnational Publishers.
- Condon, *El Derecho de la Organización Mundial de Comercio: Tratados, Jurisprudencia y Práctica* (2007) Cameron May.
- Marceau and Trachtman, “*The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*”, 36 *Journal of World Trade* 811-881 (2002).

Clarifications to the Case – EMC², 7th edition – 2008/2009

1. When did Forestland and Ecoland become Members of the WTO?

1 January 1995.

2. Is membership in the Global Warming Agreement open to all WTO Members?

Yes.

3. What does "no conclusive scientific evidence" mean as stated in para. 13 of the case?

It means that there is insufficient data to determine the scientific question with certainty.

4. Are the parties signatories to the International Convention of the Harmonized System?

Yes. Since 1990.

5. In Section 66.6 of the Ecoland Patent Act, is the term "order public" the miswriting of the term "ordre public" as prescribed in Article 27.2 of the TRIPS Agreement?

Yes.

6. Has the GAPTS entered into force?

Yes. 1 January 1985.

7. When did the Ecoland Patent Act enter into force?

1 January 1995. The regulation issued under Section 66.6 entered into force 1 January 2008.

8. Are there any internationally accepted standards applicable to estimation of carbon dioxide emissions?

No.

9. Do Recyclofuel and Forestfuel compete directly in Ecoland?

You need to make your own assessment of this if you think it is relevant to the case at hand.

10. Were consumers aware of which fuel was used to produce the products before the ecolabelling?

No.

11. Is there any exception under the Global Agreement for the Protection of Endangered Species (GAPTS) that allows countries to trade in endangered species?

Yes. There is an exception that permits trade in endangered species for the conservation of a species. This exception would allow the introduction of furry marmots from other countries into Ecoland, as described in paragraph 7 of the case.

12. When did the Ecoland Carbon Taxation Regulation (ECTR) enter into force?

1 January 2008.

13. Are there any conflicts clauses in Global Warming Agreement (GWA) or the Global Agreement for the Protection of Endangered Species (GAPTS)?

No. Neither agreement contains a conflicts clause.

14. Can the applicant country of the Ecoland Ecosystem Protection Agency (EEPA) have access to a procedure for review or any sort of appeal?

Yes. The parties affected by the decisions of the EEPA and any other Ecolandian government agency are entitled to seek judicial review in the Ecoland courts.

15. Are Ecoland and Forestland situated in close geographic proximity?

No. They are on different continents.