



Team: 018R

ELSA MOOT COURT COMPETITION ON WTO LAW

2008-2009

Ecoland – Measures Relating to Biofuels made from Pine Cones

Forestland

(Complainant)

VS

Ecoland

(Respondent)

SUBMISSION FOR THE RESPONDENT

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List of Abbreviations

AB	Appellate Body
AJIL	American Journal of International Law
Art./ Arts.	Article/ Articles
BTA	Border Tax Adjustment
cf.	<i>confer</i> , compare
Doc.	Document
DSU	Dispute Settlement Understanding
<i>e.g.</i>	<i>exempli gratia</i> , for example
EC	European Communities
ECTR	The <i>Ecoland</i> Carbon Taxation Regulation
<i>ed./eds.</i>	Editor/Editors
EPA	Ecosystem Protection Act
<i>et seq.</i>	<i>et sequence</i> , and the following
FF	ForestFuel
FFC	ForestFuel Converter
FSC	Foreign Sales Corporation
GATT	General Agreement on Tariffs and Trade 1994
GWA	Global Warming Agreement
HS	Harmonized System
<i>i.e.</i>	<i>id est</i> , that is
ICTSD	International Centre for Trade and Sustainable Development
IEC	International Electrotechnical Commission
ILJ	International Law Journal
ILR	International Law Review
ISO	International Standardization Organisation
JCIL	Journal of Comparative & International Law
JIEL	Journal of International Economic Law
JIL	Journal of International Law
JILFA	Journal of International Law and Foreign Affairs
MEA	Multilateral Environmental Agreement
MFN	Most-Favoured-Nation

No.	Number
npr-PPM	Non product related process and production method
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PPF	Products produced with machinery using ForestFuel
'products'	Products which are produced with machinery using biofuels
PPM	Process and production method
PRF	Products produced with machinery using RecycloFuel
pr-PPM	Product related process and production method
RECIEL	Review of European Community & International Environmental Law
RF	RecycloFuel
SCM	Agreement on Subsidies and Countervailing Measures
Sec.	Section/Sections
TBT	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCLA	University of California, Los Angeles
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WTO	World Trade Organization

Statement of Facts

Ecoland, a developing country WTO Member, is one of two producers of the biofuel RF. Ecoland counts for 80% of the world production of RF, while Forestland counts for 50% of FF production. Forestland, a developed country, produces FF along with ten other WTO Members. There are significant differences between both fuels: FF is less expensive than RF in all markets. FF is brown, while RF is a golden colour. Their chemical structure differs in combination and number of hydrogen-, carbon- and oxygen-molecules. Furthermore, FF can be used as an organic fertilizer, while RF cannot. RF on the other hand is more volatile, thus burning more rapidly than FF and is compressible. Furthermore, in Ecoland's eight-digit tariff classification system FF and RF have different classification numbers. The most striking difference, however, is the production method. Ecolandian producers of RF use solar-energy to power their refineries without creating carbon emissions. Contrastingly, FF producers use hydroelectricity. The dams, which are used to produce hydroelectricity, have a negative impact on nature in FF producing countries. The plant material in the flooded areas increases carbon emissions through their decomposition under water. There is scientific evidence, comparing the carbon footprint of the RF production process to that of FF. Both parties to the dispute are signatories to the GWA. Under the GWA signatories have agreed to reduce their carbon emissions by 20% over 20 years. Ecoland fulfilled its duty to engage in good faith negotiations with the conclusion of the GWA. Ecoland has a large population of furry marmots, which are protected due endangered species under national environmental law as well as GAPIS, to which Ecoland is a signatory. Ecoland introduced regulations to fight the global warming. Climate change has had a negative impact on Ecoland's environment, e.g. the disruption of the furry marmot breeding cycle as well as the reduction of available ski slopes by 20% over the last 5 years. This has dramatically reduced the income of Ecoland. They introduced the ECTR and a regulation under the Ecosystem Protection Act. The ECTR taxes fuels on the basis of creating carbon emissions. The Ecolabeling certifies products produced with machinery that uses biofuels and fossil fuels. Certification is available in three different categories. Category 1 to products produced with machinery using biofuels refined without creating carbon emissions, Category 2 to products produced with machinery using biofuels refined in a manner creating carbon emissions and Category 3 to products produced with machinery using fossil fuels. These certifications are allocated transparently since the EEPA provides certification on the basis of the information provided by the suppliers and available scientific evidence regarding the emissions produced by biofuel refinement processes. Moreover, biofuel suppliers may request an on-site inspection of their production facilities. Parties affected by the decisions of the EEPA and any other Ecolandian government agency are entitled to seek judicial review in Ecoland. Additionally, Section 66.6 Ecoland Patent Act excludes the FFC from patentability, because it is an invention whose commercial exploitation would lead to serious prejudice to the environment.

Summary of Arguments

I. Ecoland Complies with its Obligations under Arts. III:2 and I GATT and Art. 3.1(b) SCM.

- The ECTR complies with Art. III:2, first sentence, since FF and RF are not like products. Due to their carbon footprint, the two biofuels cannot be held as like. Negating likeness based on production factors is legitimate, because categorizing PPM as non-related to a product is a misnomer and the inclusion of pr-PPM is not disputed. The 3% additional sales tax is an indirect tax. *However*, it cannot be in excess of the usual sales tax, because the taxed products are not like and thus not in the same comparative set.
- The second sentence of Art. III:2 is complied with, since FF and RF are not directly competitive or substitutable. *Even if* they are considered competitive and/or substitutable, both products are taxed similarly. FF and RF are both subject to the normative base line sales tax of 10%, the burden on FF is not more than *de minimis* and RF and FF are similarly taxed. *Furthermore*, the ECTR is not applied so as to afford protection to domestic production.
- The ECTR is consistent with Art. I:1. There are no facts supporting the claim since no third country receives more favourable treatment. FF and RF are not like and the ECTR is not discriminating against the biofuel from *Forestland*. *Furthermore*, there is no legal basis for a risk of discrimination being sufficient to violate Art. I. Broadening possibilities of violation of Art. I leads to increased susceptibility to arbitrariness. Only legislation mandating a violation of WTO obligations can be WTO inconsistent.
- *Even if Ecoland's* ECTR is found to infringe GATT provisions, it is justified under Art. XX. The *Ecolandian* measure is within the scope of Art. XX(b), (d) and (g) and fulfils the requirements of the Chapeau. The measure seeks to achieve legitimate objectives. *Furthermore*, it falls within the territorial and jurisdictional scope and is necessary to achieve *Ecoland's* goals, because it contributes to the fulfilment of vital goals and is the least trade restrictive alternative available to *Ecoland*. *Moreover*, the ECTR complies with the Chapeau of Art. XX, because it does not constitute arbitrary or unjustifiable discrimination.
- *Ecoland's* ECTR is not in violation of Art. 3.1(b), because the ECTR is no subsidy pursuant to Art. 1.1(a)(1) contingent upon the use of domestic over imported products. The non-application of the 3% additional sales tax is not a financial contribution pursuant to Art. 1.1(a)(1)(ii) and thus, no benefit is conferred. Applying the indirect benefits drawn from the sale or purchase of RF to the evaluation of whether a government subsidy has been constituted would contravene the wording of the definition of a subsidy. The mere possibility of a benefit cannot be enough to allege the existence of a subsidy. *Even if* the Panel considers the ECTR to constitute a subsidy, the use of RF is not a condition for exemption from the additional 3% sales tax. The tax regulation applies to the production process of the biofuels. The only condition is for a fuel to be produced in an environmentally friendly manner.

II. Ecoland Complies with its Obligations under Art. 27.1 TRIPS.

- The regulation issued under Sec. 66.6 *Ecoland* Patent Act does not violate Art. 27.1. The non-discrimination clause calls for patentability to be available to all inventions, without discrimination. Sec. 66.6 states that inventions are excluded from patentability simply on grounds of risks arising from their commercial exploitation and there are no other differentiation criteria. *Even if* the regulation is found to have discriminatory effects, it is decisive, that the regulatory purpose does not discriminate as to the place of invention, field of technology or as to support domestic production.
- *Even if* the Panel were to find that the regulation violates Art. 27.1 TRIPS, it is justified under Art. 27.2. The prevention of commercial exploitation of the FFC is necessary to achieve *Ecoland's* objective of protecting *ordre public*. The regulation issued under Sec. 66.6 contributes to the objective and there are no consistent or less inconsistent alternatives to the regulation. *Even if* there were such measures available, *Ecoland* could not be reasonably expected to apply them, because every alternative would be less effective and thus protection standards set by *Ecoland* would be seriously undermined.

III. Ecoland Complies with Art. 2.1, 2.2 and 2.4 TBT; as well as Art. III:4 and I GATT.

- The ecolabeling does not violate Art. 2.1. There is no less favourable treatment to PFF than to PRF. The products are only labeled according to their extent of environmental compliance. However, the ecolabeling itself does not reduce the opportunity for PFF to compete on equal grounds with PRF.
- Furthermore, the regulation under EPA does not violate Art. 2.2. The regulation is not more trade restrictive than necessary to achieve its legitimate objectives. PFF can still be freely imported into *Ecoland* and sold on *Ecolandian* markets. Thus, no obstacles to international trade are created.
- There is no violation of Art. 2.4 TBT occurring through the ecolabeling. The first part of Art. 2.4 requires that a WTO Member bases its technical regulations on the available standards. *However*, the second part allows for derogation from this obligation, if the standards are inappropriate. The applicable ISO series does not take into account specific needs of the developing country *Ecoland* and thus is an inappropriate basis.
- The ER is also in compliance with Art. III:4 and I:1 GATT. Since the design, the effects, purposes and objectives of the ER and the ECTR are sufficiently similar, the findings regarding the first claim can be applied analogous.
- *Even if Ecoland's* ER is found to infringe Art. III:4 and Art. I:1, it is justified under Art. XX. The evaluation established for the ECTR applies.

Identification of WTO Measures at Issue

GATT Art. III:2 prohibits discrimination among like products through taxation on the national treatment principle. **GATT Art. I** prohibits discrimination based on the MFN principle. **GATT Art. III:4** prohibits discrimination among like products on the national treatment principle. **GATT Art. XX (b), (d) and (g)** justify GATT possible violations. **SCM Art. 3.1(b)** together with **Art. 1.1 SCM** prohibits protectionist subsidies. **TRIPS Art. 27.1** requests for patentability to be available to all inventions without discrimination. **TRIPS Art. 27.2** grants *Ecoland* the right to exclude the FFC from patentability. **TBT Art. 2.1** prohibits less favorable treatment among like products. **TBT Art. 2.2** prohibits the creation of unnecessary obstacles to International Trade, unless the technical regulation is necessary to fulfill legitimate objectives. **TBT Art. 2.4** states that the technical regulation has to be based on international standards, if those are appropriate and effective.

Legal Pleadings

I. *Ecoland* Complies with its Obligations under Arts. III:2 and I GATT and Art. 3.1(b) SCM.

1. The First Sentence of Art. III:2 GATT is Complied with.

The ECTR does not violate Art. III:2, first sentence, since 1) FF and RF are not like products and 2) the imported product, namely FF, is not taxed 'in excess' of the domestic product, namely RF.

Ecoland submits that due to their differing carbon footprint, the two biofuels cannot be held as like. In line with consistent WTO jurisprudence, likeness can be assessed on the basis of three criteria.¹ These are products' properties, nature and quality, their end-uses and consumer tastes and habits regarding them. The properties, nature and quality of the products are not like. Both are different in their molecular structure, their colour and their volatility as well as their combustion. FF has a reduced pollutant emission compared to conventional fuels. However, the carbon emissions, resulting from its combustion are higher than RF's. Moreover, for the assessment of likeness the evaluation of tariff classification was added by subsequent Panels.² FF's tariff classification number differs from RF's in *Ecoland's* tariff classification. This reflects its physical properties. Furthermore, the end-uses of the products cannot be considered 'like'. Due to its different chemical structure FF can be used as an organic fertilizer. This applicability as fertilizer is a determinant difference in its end-uses from RF. Thus, the end-use differs substantially enough to render the criterion not fulfilled. Consumers distinguish between the two biofuels in dispute. They do take into account environmental aspects of a product.³ The stagnating sales figures of PFF evidence that

¹ *Japan-Alcohol*, AB Report, p. 20; *Canada-Periodicals*, AB Report, pp. 20, 21; *Border Tax Adjustments*, Working Party Report, BISD 18S/97, para. 18.

² Cf. see e.g. *Japan-Alcohol*, Panel Report, para. 5.6; *EC-Asbestos*, AB Report, para. 101.

³ *Charnovitz*, Yale JIL, 2002, Vol.27, p. 66.

environmental awareness of the production method of a product is a substantial decisive consumer consideration. Consequently, consumers also distinguish between the biofuels themselves because of their PPM. Furthermore, the criteria set out by the BTA working party are merely indicative and not exhaustive⁴. FF and RF differ in their PPMs. These are used to assure the functionality of the product, or to safeguard the consumer who uses the product. They are related to the product even though adherence to a particular process may not be directly detectable in the product.⁵ WTO jurisprudence explicitly allows Member states to distinguish products on the basis of such pr-PPMs.⁶ Furthermore, Art. 11 DSU provides that Panels must make an objective assessment of the facts presented. It thus has to take into account the scientific evidence presented by the Respondent, concerning the carbon footprint of FF. In contrast to RF, carbon emissions are produced during the manufacture of FF. Even if the Panel were to hold that the ECTR contains npr-PPMs, instead of pr-PPMs, it has to be noted that no PPM is employed without reference to some product, thus, categorizing it as 'unrelated' or 'non-related' is a misnomer.

Additionally, the indirectly applied internal tax on FF is not 'in excess'. Since FF and RF are not like they are not in the same comparative set and thus no tax 'in excess' exists. Even if the Panel holds the fuels to be like, the 3% additional tax is still no excess. The evaluation of whether a tax is 'in excess' has to take into account all relevant factors, including the economic impact on competitive opportunities for evaluation, since the purpose of Art. III:2 first sentence is to ensure equality of competitive conditions.⁷ Qualitatively there is no effect of the ECTR because post-ECTR, FF remains cheaper than RF and thus, market conditions for FF remain unaffected. Furthermore, domestic products produced in an environmentally unfriendly manner will also be subject to the ECTR.

2. The Second Sentence of Art. III:2 GATT is Complied with.

Ecoland complies with the second sentence of Art. III:2. FF and RF are not directly competitive or substitutable. It is 'appropriate' to consider the competitive conditions in the relevant market, as manifested in the cross-price elasticity.⁸ Studies of cross-price elasticity are an established means of examining a market.⁹ FF is cheaper than RF and cannot be a substitute for RF, since machines are typically set to run on one specific type of fuel. The decisive criterion in order to determine whether two products are directly

⁴ Cf. *Japan-Alcohol*, AB Report, p. 21; *Korea-Alcohol*, Panel Report, para. 10.50.

⁵ *Charnovitz*, Yale JIL, 2002, Vol.27, p. 64.

⁶ See e.g. *Japan-Alcohol*, Panel Report, para. 5.7; *EC-Asbestos*, AB Report, para 117.

⁷ *Argentina-Hides and Leather*, Panel Report, para. 11.182; cf. see also *Canada-Periodicals*, AB Report, p. 18.

⁸ *Japan - Alcohol*, AB Report, p. 25; *Korea-Alcohol*, AB Report, para. 134.

⁹ *Japan - Alcohol*, AB Report, p. 25; *Korea-Alcohol*, AB Report, para. 121.

competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.¹⁰ Most *Forestland* companies have for example chosen to use FF-based biofuels for their biofueled machinery. Thus, FF and RF are neither directly competitive nor substitutable.

Even if they are, both products are taxed similarly. The burden on imported products must be greater than *de minimis* in any given case.¹¹ FF and RF are both subject to the same normative base line sales tax of 10%, except for the 3% additional sales tax. Thus, the burden on FF is not more than *de minimis*.

Furthermore, the ECTR is not applied so as to afford protection to domestic production. This requirement has to be fulfilled because Art. III:1 'informs' Art. III and acts as a guide in interpreting the other paragraphs.¹² FF fulfils the requirements for being taxed, regardless of its origin. Neither the ECTR's facts nor wording conclusively establish that it is applied so as to afford protection to domestic production.

3. Ecoland's ECTR is Consistent with Art. I:1 GATT.

The ECTR complies with Art. I:1 as its requirements are met.

a. There is No Discrimination pursuant to Art. I:1 GATT.

There is no discrimination against FF. *Ecoland* produces 80% of the world's RF, thus, there are no rational economic grounds for a third country exports of RF into *Ecoland*. Even if there were to be a third country, there would still be no violation of Art. I:1. The ECTR does not discriminate against biofuel from *Forestland*. The ECTR does not mention the origin of the biofuels, so FF is not discriminated against *de jure*. All biofuels which are produced in a manner increasing carbon emissions are equally subject to the additional 3% sales tax. Even if the Panel concludes that there might be *de facto* discrimination, the object and purpose of Art. I:1 is to prohibit discrimination among like products originating in different countries.¹³ *De facto* all like products receive the same treatment. All FF producing countries are affected, not only *Forestland*.

b. Mere Risk of Non-Compliance with Art. I GATT is Insufficient for its Violation.

Even if the Panel were to conclude that there is a risk of discrimination, there is no basis for finding that mere risk of discrimination in itself is enough to violate Art. I. In consistent WTO jurisprudence¹⁴, the risk of discrimination was only assessed under Art. II and III, not under Art. I. Neither the wording nor jurisprudence provide legal basis for finding that the risk of discrimination is enough to violate Art. I:1. Even if the Panel were not to follow this reasoning, it must be noted that only legislation that mandates a violation

¹⁰ *Japan- Alcohol*, Panel Report, para. 6.22; *Japan- Alcohol*, AB Report, p. 25.

¹¹ *Korea – Alcohol*, AB Report, para. 118; *Japan –Alcohol*, AB Report, p. 27.

¹² *EC - Asbestos*, AB Report, para. 93; *cf.* see also *Japan- Alcohol*, AB Report, p. 18.

¹³ *Cf.* *Canada-Autos*, AB Report, para. 84.

¹⁴ *US-Section 301*, Panel Report, para. 783; *US-Tobacco*, Panel Report, para. 96.

of WTO obligations can be WTO-inconsistent¹⁵. The ECTR does not mandate *Ecoland's* authorities to act in violation of WTO. It simply sets out tax requirements on the basis of PPMs, not the origin. Furthermore, "WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations."¹⁶

4. Even if *Ecoland's* ECTR infringes GATT Provisions, it is Justified under Art. XX GATT.

Even if *Ecoland's* ECTR infringes the GATT, it is justified under Art. XX. Applying the two-tier test established by WTO jurisprudence for evaluation of an Art. XX justification¹⁷, *Ecoland* will evidence that 1) the ECTR is within the scope of Art. XX(b), (d) and (g) and 2) it fulfils the requirements of the Chapeau.

a. *Ecoland's* ECTR falls within the Scope of Art. XX(b) GATT.

The ECTR does fall under Art. XX(b) because 1) its policy goal is legitimate, 2) the measure falls into the jurisdictional and territorial scope of Art. XX(b), and 3) it is necessary to achieve the goal.

i. *Ecoland* has Legitimate Policy Goals.

The measure is designed to protect human health, animal and plant life. Through ongoing global warming animal and plant life within *Ecoland* are seriously threatened. With the ECTR *Ecoland* seeks to combat global warming, which constitutes a legitimate policy goal under Art. XX(b).

ii. Art. XX(b) GATT accords Territorial and Jurisdictional Scope to *Ecoland*.

The measure falls within the territorial and jurisdictional scope of Art. XX(b). The regulation has an incentivising effect on other countries without interfering with their domestic policies. However, should the Panel consider the ECTR to have an extra-jurisdictional ramification, it would still be within the scope of Art. XX(b). It has to be taken into account that *Ecoland* is a signatory to the GWA, a MEA. The fact that the substantive jurisdiction of the Panel is limited to claims under WTO covered agreements does not mean that the applicable law is limited to WTO covered agreements.¹⁸ Membership in a MEA provides a legal nexus, for a country implementing a measure without having a territorial connection.¹⁹ The GWA shows the contemporary concerns of the community of nations towards the protection and conservation of the environment. Furthermore, *Forestland's* PPM have a direct impact on *Ecolandian* territory. Foreign processes cannot be halted at the border.²⁰ With the polluted air originating out of *Forestlandian* refineries, global warming is exacerbated and *inter alia* the marmot suffers. Even if there were to be a territorial limitation, by

¹⁵ *US-Certain EC Products*, Panel Report, para. 7.123; *US-Section 301*, Panel Report, paras. 7.53-7-54.

¹⁶ *EC-Hormones*, AB Report, para. 9; cf. see also *Grossen*, *Droit International Public*, p. 60 *et seq.*

¹⁷ *US-Shrimp*, AB Report, para. 119; *US-Gasoline*, AB Report, p. 20; cf. see also *Van den Bossche*, WTO, p. 620.

¹⁸ *Pauwelyn*, *Conflict of Norms in Public International Law*, p. 460.

¹⁹ *Condon*, *Sovereignty*, p. 10.

²⁰ *Charnovitz*, *Yale JIL*, 2002, Vol.27, p. 66.

regulating the entry of a product into the territory of a state, the necessary basis for jurisdiction is given. It is the importing country's right to choose the level of protection they deem appropriate in any given case.²¹

iii. Ecoland's ECTR is Necessary to fulfil its Legitimate Policy Goal.

The ECTR is necessary. Every measure has to be individually proven as being necessary.²² An establishment of necessity involves a weighing and balancing of a series of factors, such as importance of the interest pursued, contribution to the pursued objective and the impact of the measure.²³ The regulation contributes to the achievement of protecting human, animal and plant life or health. The ECTR is not trade-restrictive. There is no impact on free trade between *Forestland* and *Ecoland*. FF can still be imported and sold on *Ecolandian* markets. Moreover, FF remains cheaper than RF and there is no evidence of there being a decrease in sales of FF. Furthermore, there is no alternative measure *in lieu* of *Ecoland's* ECTR, which is less trade restrictive and just as effective. Each country may set its own standards of protection.²⁴ A regulation not incorporating such an additional sales tax cannot be an alternative. The use of financial inducements encourages countries to adopt higher environmental standards.²⁵ This integral incentive-giving character of the regulation would be lost, diminishing the possibility for carbon emission reduction. Hereby, the protection standards *Ecoland* legitimately sets for itself would no longer be attainable. *Ecoland* cannot be reasonably expected to employ such measures. Another alternative could be to introduce furry marmots from other countries. However, *Ecoland* cannot be expected to do this as there is no evidence that these marmots would adapt to climate change better. An alternative cannot be considered reasonably available, if it substitutes one risk with another risk.²⁶ In particular *Ecoland*, as a developing country, cannot be expected to employ such measures, taking into account that the financial resources of a developing country are limited. However, *Ecoland's* national environmental law requires the preservation of furry marmot. *Ecoland* must be allowed more margin for discretion in the measures expected of it, taking into account that certain measures are not feasible for developing countries. The ECTR seeks to combat the furry marmot's endangerment at the core of the issue, which is global warming due to increasing air pollution by carbon emissions. Thus, it is indeed the least trade restrictive measure available.

²¹ *EC-Asbestos*, AB Report, para. 164; *Brazil-Tyres*, AB Report, para. 210.

²² *US-Section 337*, GATT Panel Report, para. 5.27; *Brazil-Tyres*, AB Report, para. 182.

²³ *Dominican-Cigarettes*, AB Report, para. 66; *Korea-Beef*, AB Report, para. 164; *Ortino*, Federico, GATT, p. 142.

²⁴ *Preamble to the Marrakesh Agreement*; Cf. *EC-Asbestos*, AB Report, para. 174; *Dominican-Cigarettes*, Panel Report, para. 7.228.

²⁵ *GATT Secretariat*, Study on Trade and Environment, GATT Doc. 1529.

²⁶ Cf. *Brazil-Retreaded Tyres*, AB Report, para. 211.

b. Ecoland's ECTR falls within the Scope of Art. XX(d) GATT.

The ECTR is within the scope of Art. XX(d) because 1) it is designed to secure compliance with laws or regulations and 2) it is necessary to secure this compliance. **First**, the ECTR secures compliance with laws or regulations that are not themselves inconsistent with GATT. The term 'laws or regulations' refers to rules that form part of the domestic legal system of a WTO Member.²⁷ *Ecolandian* environmental law requires the preservation of the endangered furry marmot, as it is listed in the GAPIS. This is an incorporation of *Ecoland's* GAPIS obligations into national law. **Second**, the ECTR is necessary to secure compliance with *the Ecolandian* environmental law. The necessity-test "must take into account the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the impact of the law or regulation on imports or exports"²⁸. The ECTR contributes to the enforcement of the national environmental law as it authorizes the enforcement of a measure that is based on facts and available scientific evidence. Due to global warming and carbon emissions, the breeding cycle of the furry marmot is disrupted and its population decrease causes significant damage on *Ecoland's* environment. The ECTR seeks to reduce carbon emissions based on scientific evidence available, stating that the production of FF increases carbon emissions. A measure is necessary if there is no alternative measure which could reasonably be expected to employ and which is not inconsistent with other GATT provisions.²⁹ As discussed above, there is no such measure.

c. Ecoland's ECTR falls within the Scope of Art. XX(g) GATT.

Furthermore, the ECTR is within the scope of Art. XX(g) because 1) its subject matter is an exhaustible resource, 2) the measure is related to the conservation of exhaustible natural resources, 3) there is a conjunction with domestic restrictions and 4) the regulation is within the territorial and jurisdictional scope.

i. Ecoland's ECTR is Integral to the Objective of Exhaustible Resources Conservation.

Clean air has to be recognized as an exhaustible natural resource³⁰, thus the ECTR is integral to a legitimate objective covered by Art. XX(g). The term 'relating to' has to be interpreted in the sense of requiring a close and genuine relationship of means and ends.³¹ *Ecoland* submits that there is such a relationship, as the tax is intended to motivate the purchase of products that do not cause climate change. The relationship of the ECTR's objective to the measure itself and its general design and structure determines its 'necessity'. There is

²⁷ *Mexico-Taxes on Soft Drinks*, AB Report, para. 70; *Condon*, JILFA, p. 148.

²⁸ *Dominican Republic-Cigarettes*, AB Report, para. 66; *Korea-Beef*, AB Report, paras. 161-162 and 164.

²⁹ *Dominican Republic-Cigarettes*, AB Report, para. 67; *US - Section 337*, GATT Panel Report, para. 5.26.

³⁰ *US-Gasoline*, Panel Report, para. 6.37; *cf. Condon*, JILFA, p. 144.

³¹ *US-Shrimp*, AB Report, para. 136; *cf. see also US-Gasoline*, AB Report, p. 19.

no available alternative measure which *Ecoland* could reasonably be expected to employ and which is not inconsistent with other GATT provisions. The ECTR is crucial to internalize the negative, environmental or health externalities into the price of the final product.

ii. Ecoland's ECTR is Made Effective in Conjunction with Domestic Restrictions.

The ECTR is made effective in conjunction with domestic restrictions. The term "'made effective' [...] may be seen to refer to such measure being 'operative', as 'in force' or as having 'come into effect.' [...] Similarly, the phrase 'in conjunction with' must be read as 'together with' or 'jointly with.'³² Domestic restrictions *Ecoland* places upon itself, are that *Ecolandian* producers producing fuels in an environmentally unfriendly manner are also subject to the 3% additional sales tax. It has to be emphasized that the 'in conjunction with' element requires a certain amount of 'even-handedness' of the treatment, but not complete identity.³³ The ECTR is applied to PPM, not the origin, of a product. Thus, the ECTR applies to all products equally.

iii. Ecoland's ECTR falls under the Territorial and Jurisdictional Scope of Art.XX(g) GATT.

The ECTR falls within the territorial and jurisdictional scope of Art. XX(g). The *Ecolandian* measure is the implementation of the GWA. This MEA provides a jurisdictional nexus for *Ecoland*, because the problem addressed is global. The existence of an MEA demonstrates international consensus regarding the importance of the environmental problem and evidences that the subject matter is global and thus a concern covered by Art. XX(g).³⁴ *Ecoland* seeks to reduce risk for its own population, since air pollution is a global problem. The air being polluted by refineries in *Forestland* does not stay within *Forestland*. Art. XX(g) applies to exhaustible resources within and without the state-territory, if there is a sufficient nexus between the combated problem and the state.³⁵ Thus, the tax regulation complies with Art. XX(g).

d. Ecoland's ECTR Fulfils the Requirements set out in the Chapeau.

The ECTR complies with the chapeau of Art. XX because it is not applied in an arbitrary or unjustifiable discriminatory manner. *Ecoland* introduced the ECTR in furtherance of the GWA goals, which indicates that the measure fulfils the requirements of the chapeau of Art. XX. **First**, the ECTR intends carbon emissions reduction from fossil fuels and biofuels. Thus, no discrimination against FF occurs. **Second**, *Ecoland* took part in negotiations under the GWA and attempted to introduce specific rules regarding the classification of biofuels according to their carbon footprint. The conclusion of MEA in itself fulfils the duty to engage in

³² *US-Gasoline*, AB Report, p. 20; *Charnovitz*, Yale JIL, 2002, Vol. 27, p. 102.

³³ *US-Gasoline*, AB Report, p. 21; cf. see also *US-Shrimp*, AB Report, paras. 143-145

³⁴ *Condon*, Sovereignty, p. 10; cf. see also *Howse*, American University ILR, 2003, Vol.18, pp. 1376-1377.

³⁵ *US-Shrimp*, AB Report, paras. 132-133.

good faith negotiations.³⁶ The subject matter, which is the reduction of carbon emissions, and the global acceptance of the GWA, support the justification of the ECTR under Art. XX. Arbitrariness would arise *inter alia* if the measure was applied in an inflexible manner³⁷, which the ECTR is not. It is open to a wide range of possible environmentally friendly alternatives. Furthermore, the ECTR is applied in a transparent manner, applying an additional 3% sales tax on biofuels which are produced in a manner creating carbon emissions, as provided by the wording of the ECTR. The application occurs, regardless of the origin of the product. Additionally, unlike the facts of *US-Shrimp*³⁸, *Ecoland* provides a system for judicial review for every decision taken by its agencies. Thus, there can be no arbitrarily discriminatory application of the ECTR.

5. Ecoland's ECTR does Not Violate Art. 3.1(b) SCM.

Ecoland's ECTR is not in violation of Art. 3.1(b), because the ECTR is no subsidy pursuant to Art. 1.1(a)(1) contingent upon the use of domestic over imported products.

a. The ECTR is No Subsidy pursuant to Art. 1.1(a)(1) SCM.

The ECTR is not a subsidy pursuant to Art. 1.1(a)(1). There is no financial contribution pursuant to Art. 1.1(a)(1)(ii). According to this provision, a financial contribution is made when government revenue foregone is otherwise due. However, *Ecoland* will prove that none of these criteria are fulfilled.

The 10% sales tax is government revenue. However, this does not evidence that Art. 3.1(b) SCM is violated. The collection of tax revenue itself is a vital interest, particularly for developing countries³⁹, like *Ecoland*. Notwithstanding that, the term 'foregone' indicates that *Ecoland* must have given up an entitlement to raise revenue that it could 'otherwise' have raised. The term 'otherwise' in the phrase 'foregoing of revenue otherwise due' should be referred to a 'normative benchmark' as established by the tax rules applied by the respective WTO Member. The normative benchmark in *Ecoland* is the 10% sales tax that the *Ecolandian* government is entitled to collect from every purchaser of biofuels. The 3% variance is merely a legitimate means of internalizing negative externalities that have not been accounted for in the product price. Thus, it is merely a discretionary surcharge. It is applied strictly in connection with the environmental impact the respective fuel has - which *Ecoland* has no influence on. Thus, there can be no revenue that is otherwise due. Moreover, since there is no direct financial contribution coming from the government, there can be no benefit conferred. A benefit is conferred when a recipient receives a "financial contribution on terms more

³⁶ Cf. *Condon*, Sovereignty, p. 11.

³⁷ *US-Shrimp*, AB Report, para. 177; cf. see also, *Matsushita/Schoenbaum/Mavroidis*, WTO, p. 801 *et seq.*

³⁸ Cf. *US-Shrimp*, AB Report, para. 180.

³⁹ *Dominican-Cigarettes*, Panel Report, para. 7.215.

favourable than those available [...] on the market.”⁴⁰ However, applying the indirect benefits drawn from the sale or purchase of RF to the evaluation of whether a government subsidy has been constituted would contravene the wording of the definition of a subsidy whereas a benefit has to be ‘*thereby conferred*’. This clearly indicates a direct benefit as a condition for a subsidy. Side-effects or hypothetical impact on the market-place arising out of the pursuit of a valid regulatory aim are not sufficiently proximate to the definition of a subsidy. Furthermore, the wording of Art. 1.1 that a benefit ‘*is conferred*’, implies that an actual effect must be present. Even after the application of the 3% additional sales tax, FF is still cheaper than RF. The mere risk of market conditions being influenced cannot be sufficient to constitute a benefit, since there are no actual effects.

b. Even if the Additional Sales Tax were to be a Subsidy, the Grant would Not be Contingent upon the Use of Domestic over Imported Goods.

The use of RF is not a condition for exemption from the additional 3% sales tax. The non-application of the additional 3% sales tax is not contingent *de jure* upon the use of RF over FF. For this criterion to be fulfilled there must be no “basis in the words of the relevant legislation, regulation or other legal instrument”⁴¹. Distinguishing the current case from *US-Subsidies on Cotton*, the ECTR does not explicitly require the use of domestically produced RF as a condition for a lower tax class. The tax regulation applies to the PPM of the biofuels. The only condition is for a fuel to be produced in an environmentally friendly manner. As such, there is no use, contingent ‘in law’, of domestic over imported products. The subsidy furthermore is not contingent *de facto* upon the use of RF over FF. The existence of a relationship of contingency must be “inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy”⁴². In the evaluation of such contingency footnote 4 to Art. 3.1(a) has to be taken into account. Parallels can be drawn between Arts. 3.1(a) and 3.1(b)⁴³. Thus, the same requirements for contingency under Art. 3.1(a), have to be fulfilled under Art. 3.1(b). Footnote 4 provides, that the granting must be tied to anticipation of the use of domestic over imported products. The ECTR requirements can be achieved in refineries all over the world. The Ecolandian government cannot anticipate the mere use of domestic products. Thus, using domestic goods cannot even in fact be a condition for receiving better treatment.

⁴⁰ *Canada-Aircraft Credits*, Panel Report, para. 7.144; *cf.* see also *US-Cotton*, Panel Report, para. 7.1118.

⁴¹ *Canada-Autos*, AB Report, para. 123; *cf.* see also *Canada-Civilian Aircraft*, AB Report, para. 167.

⁴² *Canada-Civilian Aircraft*, AB Report, para. 167.

⁴³ *Canada-Autos*, AB Report, paras. 138-143; *cf.* see also *EC-Bananas*, AB Report, para. 233.

II. Ecoland Complies with its Obligations under Art. 27.1 TRIPS.

The regulation issued under Sec. 66.6 of the *Ecoland* Patent Act does not violate Art. 27.1, which requires patentability to be available to all inventions, without discrimination.

1. Ecoland acts consistently with the Non-Discrimination Clause of Art. 27.1 TRIPS.

The FFC being an invention does not preclude the consistent application of the Non-Discrimination Clause. The burden of proof on this matter lies with *Forestland*. It is widely recognised in GATT/WTO jurisprudence that the party claiming breach of a legal provision bears the burden of proving the alleged infringement.⁴⁴ Nonetheless, *Ecoland* will evidence that it complies with this obligation. A violation of the Non-Discrimination Obligation could take place either *de jure* or *de facto*.⁴⁵ However, Sec. 66.6 *Ecoland* Patent Act states that inventions are excluded simply on grounds of risks arising from their commercial exploitation. *Expressis verbis* there is no differentiation on grounds other than this risk. There is also no implicit⁴⁶ *de jure* discrimination, because *Ecolandian* inventions also bear such a risk. Thus, it is clear that the regulation includes domestic inventions, domestically produced products and inventions from several fields of technology. Furthermore, *Forestland* cannot prove that there is a *de facto* discrimination. Such discrimination may only arise when a facially neutral measure produces disadvantageous effects due to differences in circumstances and is implied with discriminatory purpose.⁴⁷ The list in contention includes products other than the FFC. Thus, there is no discriminatory effect, since no producer is disadvantaged. Every inventor can bring his inventions into compliance with the set out obligations. Even if the regulation issued under Sec. 66.6 were to be discriminatory in effect, *Ecoland* did not act with discriminatory purpose. The regulatory purpose was to avoid risk to the named subjects of protection, not to discriminate as to place of invention, field of technology or to support domestic production.

2. Even if Ecoland violates Art. 27.1 TRIPS, it is Justified under Art. 27.2 TRIPS.

Even if the Panel were to find that the regulation violates Art. 27.1 TRIPS, this would be justified under Art. 27.2. WTO Member may, under certain circumstances refuse to grant a patent when it deems it necessary to protect higher public interests.⁴⁸ *Ecoland* will evidence 1) that the prevention of commercialisation of the FFC is necessary to protect *ordre public* and 2) the regulation is necessary to pursue its objectives.

⁴⁴ *US-Shirts and Blouses*, AB Report, p. 16; *US-Cotton Subsidies*, AB Report, para. 644 *et al.*

⁴⁵ See *Canada-Pharmaceuticals*, Panel Report, para. 7.94.

⁴⁶ On this concept please see: *Canada-Autos*, AB Report, paras. 100 - 104.

⁴⁷ *Canada-Pharmaceuticals*, Panel Report, para. 7.94 *et seq.*

⁴⁸ Cf. UNCTAD-ICTSD (eds.), *Resource Book on TRIPS and Development*, p. 375.

a. The Prevention of Commercial Exploitation of the FFC is Necessary.

The regulation prevents certain products from being patented, because their commercial exploitation poses a risk to *ordre public* or morality within a country. A patent is “a licence from a government [...] conferring for a set period the sole right to make, use, or sell some process or invention”⁴⁹, i.e. the right of commercial exploitation. The regulation seeks to limit this right in view of certain products. However, TRIPS does not require an actual ban on the commercialization as a condition for patent-exclusions; only the necessity of such a ban is required.⁵⁰ The FFC endangers *ordre public* in *Ecoland*. Its distribution would entail higher usage of FF and increase demand for FF and its production. Thus, even more carbon emissions would be produced further undermining *ordre public* in *Ecoland*. This contradicts the objectives set forth in Art. 27.2, which explicitly allows for measures to be taken against inventions posing a risk to *ordre public*.

b. Ecoland's Regulation is Necessary to pursue its Objectives.

Ecoland will evidence that the measure is necessary to pursue its legitimate objectives, since 1) the measure contributes to the achievement of its objectives, 2) there are no consistent or less inconsistent alternatives and 3) *Ecoland* could not be reasonably expected to employ the alternatives, if there were any.

It has to be noted that the interpretation of the necessity-requirement under Art. 27.2 should refer to the necessity within Art. XX(b) GATT, since both provisions use the same expression.⁵¹ The regulation issued under Sec. 66.6 contributes to the objective of protecting human health and the environment. A contribution is deemed to exist, if there is a close and genuine relationship between the measure at issue and the objectives pursued.⁵² Thus, the measure undertaken must at least help to protect *ordre public* or morality. When granted a patent the inventor can use his right to negotiate payment for others using the invention.⁵³ In the case of FFC, this is commercial exploitation of a product which facilitates environmentally unfriendly behaviour. The purpose of the regulation is to prevent the development of a technical invention that undermines *Ecoland's* environmental policies. By granting a patent, *Ecoland* would facilitate commerce in a sector that undermines *Ecoland's* environmental goals. The patent would then serve as an incentive for inventors. Thus, if the patent is removed, there would be less incentive for inventors to develop such environmentally harmful products. Furthermore, the FFC is already on the list of inventions excluded from patentability due to the risk emerging from it. This will serve as an incentive for other inventors to develop

⁴⁹ *Brown* (ed.), *The Shorter Oxford English Dictionary on Historical Principles*, p. 2121.

⁵⁰ *Cf. Correa*, *Intellectual Property Rights*, p. 63; *Ya Qin*, *Boston University International Law Journal*, p. 271.

⁵¹ *Cf. Gervais*, *The TRIPS Agreement*, p. 223.

⁵² *Brazil-Retreaded Tyres*, AB Report, para. 145; *cf. see also Brazil-Retreaded Tyres*, Panel Report, para. 7.125.

⁵³ *Siebert*, *Rules for Border-Crossing Factor Movement*, p. 12; *cf. see also* “Understanding WTO – TRIPS”.

converters for environmentally friendly fuels in order to be granted a patent.

Moreover, there are no less inconsistent alternatives to the regulation. In consistent WTO jurisprudence, alternatives have only been deemed to exist when the measure in dispute was a definite ban on a product⁵⁴. However, the regulation merely limits the marketing of FF. Banning FFC from *Ecolandian* markets would not be a less inconsistent alternative. The *Ecoland* measure leaves the option open to run cars on FF. The regulation simply averts further spread of the usage of an environmentally unfriendly product. Thus, no less inconsistent measures are available. Even if there were less inconsistent measures available, *Ecoland* could not be reasonably expected to apply them. Every alternative would be less effective and the protection standards set by *Ecoland* would no longer be attainable. As stated in *EC-Asbestos*⁵⁵ a country cannot be expected to apply such alternatives. A central principle of the WTO is that Members are entitled to set their own standard of protection and invoke measures necessary to achieve them⁵⁶. Thus, *Ecoland* cannot be expected to invoke measures which do not contribute to achieving its set goals.

III. Ecoland Complies with Arts. 21, 22 and 24 TBT; as well as Arts. III:4 and I GATT.

1. The Regulation under the EPA is a Technical Regulation.

The regulation under EPA is a technical regulation according to the definition in Annex 1:1 TBT. This provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". The ER deals with labeling requirements. The categorization of the labelled products is based on the production process of the biofuel. Even if the Panel is of the opinion that npr-PPMs exist, these have to be covered under TBT. Art. 31.1 VCLT, which is referred to in Art. 3.2 DSU, provides that the ordinary meaning of terms has to be taken into account. Pursuant to Annex 1:1 to the TBT a technical regulation must lay down "product characteristic or their *related* processes and production methods". The fact that the second sentence in the definition starts with the word 'also', meaning 'in addition to', and that the last term refers only to 'product, process and production methods' omitting the word 'related', includes npr-PPMs within the TBT⁵⁷, which the Ecolabeling Regulation legitimately takes into account. Furthermore, an eco-label is supposed to entail information about the entire life-cycle of a product and its grant should reflect a "careful assessment of the appropriate environmental criteria".⁵⁸ *Ecoland*, as a sovereign state, has the right to introduce technical regulations which comply with the TBT.

⁵⁴ See e.g. *Korea-Beef*, Panel Report, para. 672; *Canada-Wheat*, Panel Report, paras. 6.305 *et seq.*

⁵⁵ *EC-Asbestos*, AB Report, para.174; *cf.* see also *Korea- Beef*, AB Report, paras. 163 and 166.

⁵⁶ *Cf.* see e.g. Art. 1 TRIPSA; *EC-Asbestos*, AB Report, para. 168; *US-Shrimp*, Panel Report, para. 9.1.

⁵⁷ *Lopez-Hurtado*, JIEL, Vol. 5 No. 3, p. 737.

⁵⁸ *Appleton*, Environmental Labelling Programmes, p. 5.

2. The Ecolabeling does Not Violate Art. 2.1 TBT.

The Ecolabeling does not violate Art. 2.1. Different provisions constitute each other's context and should be given the same meaning to make their meanings harmonious.⁵⁹ Thus, Art. 2.1 must be interpreted in consistency with Art. III:4 GATT.⁶⁰

a. Imported Products produced with Machinery using FF (PFF) and Domestic Products produced with Machinery using RF (PRF) are Not 'Like Products'.

PFF and PRF are not 'like products'. The existence of a competitive relationship between the imported and domestic products is central to the determination of 'likeness'.⁶¹ A product which is produced with lower price inputs would have a more competitive market price than a product produced with higher price inputs. For the average rational consumer the price of a product is the determinant factor in his purchase decision. Only Ecolabeling allows for the internalizing of negative environmental externalities connected with the product. Due to the differences in price and the differences in chemical compositions of the two products, they cannot be considered like. In addition to the difference in the competitive relationship between PFF and PRF, they are different due to the PPMs. All labelling schemes fall within the scope of the TBT, regardless of whether the criteria by which labels are awarded is on the basis of PPM.⁶² Ecolabeling includes information about the entire life-cycle of a product, including PPMs.⁶³ The use of such PPMs allows consumers to determine which products were produced with the least environmental impact.⁶⁴

b. PFF are Not Subject to Less Favourable Treatment than Like domestic PRF.

Even if the Panel were to consider the described products 'like', it must be emphasized that there is no less favourable treatment of PFF than PRF. Whether or not imported products are treated 'less favourable' than like domestic products must be assessed by whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products instead of formal difference in treatment.⁶⁵ PFF and PRF are only labeled according to their extent of environmental compliance. The ecolabeling itself however does not necessarily reduce the opportunity for PFF to compete on equal grounds with PRF. Any

⁵⁹ *Argentina-Footwear*, AB Report, para. 81; *US-Gasoline*, AB Report, p. 23; *Japan-Alcohol*, AB Report, p. 12.

⁶⁰ *Ming Du*, Chinese JIL, 2007, Vol. 6 No. 2, p. 278; cf. see also *Green*, JIEL, Vol. 8 No. 1, p. 153, 160.

⁶¹ *Green*, JIEL, Vol. 8 No. 1, p. 158.

⁶² *Ward*, RECIEL, Vol. 6 No. 2, p. 143.

⁶³ *Packaging and Labelling*, Note by the Secretariat, GATT Doc. TRE/W/12, 14 June, 1993, para. 2.

⁶⁴ *Charnovitz*, Yale JIL, 2002, Vol. 27, p. 65; cf. see also *Polak*, *Ecolabeling and Trade*, para. 3.4.

⁶⁵ *Korea-Beef*, AB Report, paras. 137; cf. see also *US- Section 337*, Panel Report, para. 5.10.

difference which occurs is merely an incidental effect of ecolabeling with no decisive implications for modifying conditions of competition to the disadvantage of PFF. Different categorization according to ecolabeling in and of itself does not justify concluding that the treatment accorded to PFF is less favourable than the treatment accorded to PRF. The ecolabeling does not modify conditions of competition to disadvantage of PFF, since PFF still can be sold on the market, remaining fully available to consumers. Providing information on environmentally friendliness of a product is consistent with Art. 2.1.

3. Ecoland's Regulation under EPA does Not Violate Art. 2.2 TBT.

The Ecolabeling Regulation under EPA does not violate Art. 2.2. It is not more trade restrictive than necessary to achieve its legitimate objectives.

There are no unnecessary obstacles to international trade created by *Ecoland*. The regulation under EPA is the least trade restrictive measure available. There are no restrictions created by the regulation, which merely labels products. PFF can still be freely imported into *Ecoland* and sold on *Ecolandian* markets without limitations. The regulation still allows price-oriented consumers to make their purchase decision based on the price of the product, it merely provides the consumer with information on the environmental impact of products. Thus, it is already the least trade restrictive alternative available. *Ecoland* is entitled to set its own level of protection as set out in the Preamble of the TBT. Moreover, the regulation is necessary to fulfil legitimate objectives, as there are environmental, animal, plant and even human health issues. The more important the value, the more the deference accorded to the domestic regulation.⁶⁶ The ecolabeling contributes to environmental protection and since the increase in demand for the environmentally friendliest products also demonstrates its efficacy. Furthermore, since legitimate objectives under Art. 2.2 are not exhaustive, consumer information and labelling also fall under this list.⁶⁷ The regulation is crucial for public awareness combating climate change. It must be emphasized that the concept of necessity must take into account the effectiveness of possible 'alternatives'.⁶⁸ There are no reasonably available alternatives which are economically and technically feasible, fulfil the objective of protecting environment and are significantly less trade restrictive than ecolabeling. The only alternative would be for *Ecoland* to introduce a voluntary labelling. However, a reasonably available measure has to be as effective in achieving the set level of protection. *Ecoland* seeks to raise consumers awareness for environmental impacts of products. With voluntary labelling, only Category 1 products receive certification and in exceptional cases, Category 2 products would be labelled. Hence, consumers would get a distorted picture of environmental friendliness of products available to them. This is not a realisation of the goals *Ecoland* set for itself.

⁶⁶ *Ming Du*, Chinese JIL, Vol. 6 No. 2, p. 306; cf. see also *Korea-Beef*, AB Report, para. 164.

⁶⁷ *Tamiotti*, in: Wolfrum *et al.* (eds.), WTO – Technical Barriers, Article 2 TBT, para. 21.

⁶⁸ *EC-Asbestos*, AB Report, para. 169; cf. see also *Condon*, Tulsa JCIL, p.565.

4. The Regulation under EPA does Not Violate Art. 24 TBT.

Art. 24 TBT is not violated through the ecolabeling. There is no 'general rule-exception' between the first and the second parts of Article 24.⁶⁹ Thus, the burden of proof rests upon the Complainant.⁷⁰ *Forestland* must prove that 1) relevant international standards are available, 2) *Ecoland* did not use these as a basis for its ecolabeling and 3) that they were appropriate and effective. A *prima facie* case cannot be established that *Ecoland* does not comply with Principle 3 of ISO 14020. Pursuant to this, environmental labeling must be based on scientific methodology that is sufficiently thorough. *Ecoland* has scientific bases for the ecolabeling. Sovereign WTO Members "can be *presumed* to act in conformity with their WTO obligations."⁷¹

a. The available International Standards are Not an Appropriate Basis for the Ecolabeling.

Even if the Panel considers the international ISO standards as being relevant, it has to be emphasized that they were not appropriate to use as a basis for the ecolabeling. The first part of Art. 24 obligates a WTO Member to base technical regulations on available standards. However, the second part allows for derogation from this obligation, if the standards are inappropriate, meaning not suitable⁷², for the fulfilment of the objectives because of fundamental climatic or geographical factors. The ISO standards are inappropriate, because they do not contribute to achievement of legitimate policy goals. The environmental and economic impact of global warming in *Ecoland*, e.g. disruption of the furry marmot breeding cycle, loss of 20% of the ski slopes and the income affected by this must be considered. Therefore, as a sovereign state *Ecoland* is entitled to use the available evidence for its derogation from Art. 24.

b. The available International Standards are Not Effective.

Even if the ISO standards are appropriate, they are not effective. The term 'ineffective' refers to something which is not 'having the function of accomplishing' the legitimate objective pursued.⁷³ *Ecoland's* ER seeks to raise consumers' awareness of technologies used to produce products, fuels and biofuels in the international market. Implementing an ecolabeling, which distinguishes on factors such as technologies used for production, is necessary. However ISO 14020 is not effective, because Principle 6 of it does not take into account that most risks stem from production methods and not the products themselves. ISO 14000 does not establish specific standards for PPMs.⁷⁴ Thus, no industrial consumer who produces such products

⁶⁹ *EC-Sardines*, AB Report, para. 275; cf. see also *Condon*, *El Derecho*, p.564.

⁷⁰ *EC-Sardines*, AB Report, para. 282; cf. see also *Tamiotti*, *supra* note 687, at para. 30.

⁷¹ See *supra* note 17.

⁷² *EC-Sardines*, AB Report, para. 288; cf. see also *Tamiotti*, *supra* note 687, at para. 39.

⁷³ *EC-Sardines*, Panel Report, para. 7.116; cf. see also *Tamiotti*, *supra* note 687, at para. 40.

⁷⁴ Cf. *Tietje*, *Process-Related Measures*, p. 272.

would take technologies into consideration. Therefore, global warming would not be stopped.

5. Ecoland's Ecolabeling is also Consistent with Arts. III:4 and I:1 GATT.

a. Ecoland Complies with Art. III:4 GATT.

The ER does not violate Art. III:4. As will be evidenced, *Ecoland* legitimately treats *unlike* products differently and therefore does not accord more favourable treatment to domestic than like imported products.

i. PFF and PRF are Not 'Like products'.

PFF and PRF are not 'like products'. The AB in *EC-Asbestos* stated that the term 'like products' in Art. III:4 has to be interpreted in the context of the 'general principle' in Art. III:1. Even though the 'likeness' under Art. III:4 is broader than in the first sentence of Art. III:2, it is not broader than the combined two sentences of Art. III:2.⁷⁵ The unlikeness of PFF and PRF has been established above under I.1. Additionally the Panel in *US-Gasoline* found, that 'the situation of the parties dealing' must be taken into consideration: It noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable.⁷⁶ However, RF and FF are chemically not identical. PFF and PRF are not like, which is a consequence of their component ingredients.

ii. The Ecolabeling does Not accord less favourable Treatment.

Even if the two products are 'like', there is no 'less favourable treatment' to the group of 'imported like products' than to the 'like domestic products'. That two products are 'like' does not indicate any inconsistency with Art. III:4.⁷⁷ The ECTR and the ecolabeling both take npr-PPMs into account. As established, Art. 2.1 TBT and Art. III:4 GATT have to be interpreted in consistency with each other. Both Articles deal with 'less favourable treatment', thus the findings above under point III.2.b. must be applied.

b. Ecoland Complies with Art. I GATT.

The ER complies with Art. I, since 1) Art. I:1 is not applicable and 2) the requirements of Art. I:1 are met. A non-violation of Art. I has been established for the ECTR. The design of the ecolabeling is comparable to that of the ECTR and thus, the findings under point I.3. apply analogously.

c. Even if Ecoland's Regulation infringes GATT, it is Justified under Art. XX.

Even if *Ecoland's* regulation infringes Art. III:2 and Art. I:1, it is justified under Art. XX. *Ecoland's* objectives in enacting both the ECTR and the ecolabeling are the same, therefore the evaluation under Art. XX, established above in what regards the ECTR in the above submissions on point I.4. must apply.

⁷⁵ *EC-Asbestos*, AB Report, paras. 98-99; cf. see also *Ya Qin*, Boston University ILJ, p. 250.

⁷⁶ *US - Gasoline*, Panel Report, para. 6.9.

⁷⁷ *EC-Asbestos*, AB Report, para. 100; cf. see also *Polak*, *supra* note 65, para. 3.1.

Request for Findings

For the above stated reasons, *Ecoland* requests the Panel to:

- (i) Find that the ECTR is in compliance with Arts. III:2 and I of the GATT, 3.1(b) SCM Agreement, and even if this were not to be the case, they are fully justified under Art. XX GATT.
- (ii) Find that the regulation issued under Section 66.6 of the *Ecoland* Patent Act is consistent with Art. 27.1 of the TRIPS Agreement, taking into account the objectives and principles of TRIPS. And even if there were to be a violation it is fully justified under Art. 27.2 TRIPS.
- (iii) Find that the Ecolabeling Regulation is neither inconsistent with Arts. 2.1, 2.2, 2.4 of the TBT Agreement, nor, alternatively, with Arts. I and III:4 of the GATT, and that even if there were to be a violation it would be justified under Art. XX GATT.