emc² ELSA moot court competition

The European Law Students' Association

Team: 031R

ELSA MOOT COURT COMPETITION ON WTO LAW 2015/2016

Eriador – Measures Affecting the Electricity Sector

Borduria

(Complainant)

vs

Eriador

(Respondent)

SUBMISSION OF THE RESPONDENT

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LIST OF ABBREVIATIONS

AB	Appellate Body
ABR	Appellate Body Report
Art./Arts.	Article/Articles
ASR	ILC Articles on State Responsibility
BEC	Borduria Energy Corporation
DSU	Dispute Settlement Understanding
EB	Electricity Borduria
EC	European Communities
EEC	Eriadorian Electricity Corporation
FCPRE	Framework Convention on the Promotion of Renewable Energy
FE	Future Energy
FIT	Feed-in-Tariff
GATT	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System
"IFF"	"Innovation for the Future"
ILC	International Law Commission
LTPA	Long-term Purchase Agreement
MoU	Memorandum of Understanding
PPMs	Process and Production Methods
PR	Panel Report
RES	Renewable Energy Sources
SCM	Agreement on Subsidies and Countervailing Measures
UNCPC	United Nations Central Product Classification

US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

SUMMARY OF ARGUMENTS

Claim I:

The "Innovation for the Future" ("IFF") grant does not amount to a prohibited subsidy under the Agreement on Subsidies and Countervailing Measures (SCM).

- It does not amount to a subsidy under Art. 1 SCM, since it does not confer a benefit to Future Energy (FE).
- It is not prohibited under SCM, as it is not de facto contingent upon export performance under Art. 3.1 (a) SCM:
  - first, there is no export performance requirement in the allocation of funds under the "IFF" program;
  - second, the sales performance of FE was not skewed towards exportation;
  - finally, an assessment of the factual circumstances surrounding the awarding of the grant debars a contingency finding.

Claim II:

The Loan by Eribank and the "IFF" grant do not amount to actionable subsidies under the SCM Agreement.

- The Loan by Eribank is not a specific subsidy:
  - first, it is not a financial contribution under Art.1.1(a) SCM as its grantor, Eribank, is not a public body, neither a private body entrusted or directed by the government;
  - second, the benefit conferred to CleanTech, did not pass-through to FE;
  - finally, the Loan is neither de jure, nor de facto specific under Art.2 SCM.
- The "IFF" grant is not a specific subsidy:
  - first, it is not a subsidy, according to the analysis under Claim I, and
  - second, and in any event, it is not specific under Art.2 SCM.
- In any event, the Loan and the "IFF" grant do not cause serious prejudice in the form of lost sales to the interests of Borduria under Arts.5(c) and 6.3(c) SCM and Art. XVI:1 GATT:
  - first, the Fusilliscope and the solar panels do not compete in the same market and, *arguendo*, the phenomenon of lost sales does not occur therein;
  - second, the Loan and the grant are not genuinely and substantially linked with FE's 50% price discount, and further with the alleged lost sales.

Claim III:

The Long Term Purchase Agreement (LTPA), concluded pursuant to the Feed-in-Tariff (FIT) scheme, does not amount to actionable subsidies under the SCM Agreement.

- The LTPA is a purchase of goods that does not confer a benefit to FE, and thus it is not a subsidy under Art.1.1 SCM:
  - first, the relevant market for the benefit analysis under the guidance of Art.14(d) SCM is the separate cold fusion market created by the Eriadorian government;
  - second, the LTPA price was adequate remuneration compared to the new market benchmark (C);
  - third, in the alternative, complainant is estopped from challenging the adequacy of the remuneration provided by the LTPA.
- In any event, the LTPA is not a de jure or de facto specific subsidy under Art.2 SCM.
- In any event, the LTPA does not cause serious prejudice in the form of displacement or impedance to the interests of Borduria under Arts.5(c) and 6.3(a) SCM:
  - first, conventional and renewable electricity are not like products in the meaning of Art.6.3(a) SCM;
  - second, neither displacement nor impedance are the effect of the LTPA;
  - finally and in any event, a finding of displacement or impedance is precluded under Art.6.7(f) SCM.

Claim IV:

In any event, any alleged violation of the SCM Agreement would still be justified under Art.XX GATT.

- Art.XX GATT applies to SCM claims.
- The Loan by Eribank, the "IFF" grant and the LTPA are measures provisionally justified since they fall within the scope of exception (g) of Art.XX GATT.
- These measures also satisfy the requirements of the *chapeau* of Art.XX GATT, since:
  - they do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and
  - they do not constitute a disguised restriction on international trade.

STATEMENT OF FACTS

1. Eriador and Borduria are fully industrialised neighboring WTO Members. They are both parties to the Framework Convention on the Promotion of Renewable Energy (FCPRE), an international treaty reiterating that global energy markets are distorted due to the failure to internalize the full costs of carbon emissions in the price of energy. Art. 11 FCPRE requires each party to ensure, through every available measure, that at least half of its population energy needs are met by renewable energy sources until 2020. Accordingly, Eriadorian Electricity Corporation (EEC), the Eriadorian electricity distributor governmental agency, purchases electricity from private suppliers under a 30% mandated proportion RES.

2. CleanTech, an Eriadorian technology company, successfully completed a research on cold fusion, an innovative type of clean nuclear energy, and manufactured the necessary device, the Fusilliscope. In 2008, CleanTech obtained a commercial Loan from Eribank, a private entity. The decision to grant the Loan was taken by the independent board of Directors of Eribank, after a thorough examination of the investment's validity. In 2009, CleanTech sold at full market value the cold fusion division of business to FE.

3. FE afterwards won a grant by the Eriadorian government via its "IFF" program, which was open to all companies operating in Eriador and seeks to support any program that would promote general economic policies. In 2012, in conformity with the state's FCPRE obligations, a FIT scheme was introduced, under which long-term contracts were to be concluded between the EEC and cold fusion generators. No nationality restrictions were imposed. The remuneration given to suppliers was in accordance with a price formula that represented the true cost of electricity. FE signed an LTPA with EEC in 2012. In the next few years, the inherent advantages of Fussiliscope facilitated FE to expand in the domestic market, while increasing its export presence.

4. During this time, two energy suppliers exporting from Borduria complained about the non-renewal of some supply contracts and the diminution of their shares. In parallel, Elektrica, an energy supplier in the state of Carpathia, opened a commercial dialogue with FE instead of SolarTech, a bordurian solar panel exporter, convinced by the inherent advantages of the Fusilliscope.

IDENTIFICATION OF THE MEASURES

Measure 1: The Loan by Eribank awarded to CleanTech under commercial considerations.

Measure 2: The grant awarded to FE under the broadly available "IFF" program.

Measure 3: The LTPA between FE and EEC concluded under the FIT scheme.

LEGAL PLEADINGS

I. THE "IFF" GRANT IS CONSISTENT WITH ART.3.1(A) SCM

1. Pursuant to Art.3.1(a) SCM, non-agricultural subsidies are prohibited only when included in the Annex I SCM Illustrative List or "*contingent, in law or in fact[...], whether solely or as one of several other conditions, upon export performance*".[1] Footnote 4 SCM, attached to Article 3.1(a), notes that a subsidy "*in fact tied to actual or anticipated exportation or export earnings*" is *de facto* contingent upon exports. In our case, following the structure used by the AB in *Canada-Aircraft*,[2] Complainant fails to discharge its burden of proving that the "IFF" grant to FE allegedly constitutes a prohibited export subsidy under Article 3.1(a) SCM and footnote 4, since: first, a "*subsidy*" in the meaning of Art. 1 SCM has not been granted (**A**); nor is, in any event, any such alleged subsidy contingent in fact upon exports **(B)**. Hence, no room is left for any presumption of *specificity* under Art.2.3 SCM.[3]

A. The "IFF" grant does not amount to a "*subsidy*" under Art.1 SCM

2. According to Art.1.1 SCM, a "*subsidy*" entails two separate and yet cumulative elements, namely a "*financial contribution made by a government*" and the conferral of a "*benefit*".[4] The "IFF" grant did not confer a benefit, and thus fails to qualify as a subsidy.[5] The term "*benefit*" has been interpreted in WTO jurisprudence as the *trade-distorting potential* of a financial contribution making the recipient "*better off*".[6] Thus, the grant would confer a benefit only if it created a distortive curve to the market equilibrium to FE's advantage *vis-a-vis* its energy equipment competitors.[7] Yet, the "IFF" program equitably affected the renewable energy sector by transferring funds based on commercial considerations weighting each applicant's bargaining strength.[8] Ergo, absent an *objective of curtailing trade distortion*, no benefit was conferred.[9]

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[1] *Adamantopoulos & Akritidis* (2008), 478; *Cai* (2009), 870; *Coppens* (2014), 117.
[2] ABR, *Canada-Aircraft* [162-180] ; PR, *Canada-Aircraft II* [7.16].
[3] PR, *Indonesia-Autos* [14.155]; PR, *US-Cotton Subsidies* [7.1153]; *Coppens* (2014), 101.
[4] ABR, *Brazil-Aircraft* [157]; ABR, *US - Lumber CVDs Final* [51].
[5] ABR, *Canada-Aircraft* [154]; PR, *US-Lead Bars* [4.113].
[6] ABR, *Canada-Aircraft* [157]; PR, *Korea-Commercial Vessels* [7.427]; ABR, *Japan-DRAMS* [225]; ABR, *US-Aircraft* [662].
[7] PR, *Canada-Aircraft* [9.112]; ABR, *EC-Aircraft* [705]; *Rutherford* (2002), 370; *Francois* (2009), 105.
[8] ABR, *US-Aircraft* [646]; EMC[2] Case [10]; Clarification 22, 36.
[9] PR, *EC-DRAMS* [7.175].

B. Even if the "IFF" were to allegedly constitute a "subsidy", it would not be a "prohibited" subsidy under Art. 3.1(a) SCM

3. The "IFF" grant is not *contingent* upon export, as a total configuration of the facts decisively corrodes any allegation that it is "*tied to actual or anticipated exportation or export earnings"*.[10] The term "*tied to*" amounts to a relationship of *conditionality* far exceeding a stagnant demonstration of anticipated exports.[11] Accordingly, Borduria's claim of in fact export contingency is decomposed under the three following considerations: the granting *was not limited to exporters* **(1)**; FE's *sales performance was not skewed* towards exportation **(2)**; while, *factual circumstances* further confute any finding of contingency **(3)**.[12]

1. There was no export performance requirement for the allocation of funds

4. The necessary element of conditionality for export contingency must be objectively observable through the *"design and structure"* of the measure, as a *limitation or restriction* favoring exporters.[13] Such was the case in *Canada-Aircraft*, where the TPC programme was found contingent due to the promotion of export oriented objectives through the inclusion of specific exportation criteria.[14] In stark contrast, the "IFF" program does not opt to fund exclusively export related producers, as it contemplates general commercial considerations.[15]

5. Nevertheless, a mere assessment of general sales performance does not *per se* reflect export contingency; for, it would take an incentive to promote exports, namely an export sales performance target for such a conclusion.[16] Indicatively, Howe in *Australia-Leather* had to continue and even increase its export sales so as to reach the targets set and thus gain the rest of the governmental funding.[17] Contrary, such a clear incentive is missing in our case.[18]

2. FE's sales performance was not skewed towards exportation

6. The required standard of conditionality is not met when a subsidy is simply designed to boost the recipient's production, even if export oriented. Rather, the measure must skew the existing ratio of exports to domestic sales in a way not likely to occur under normal market conditions, thus favoring exports.[19] In the case at hand, FE's ratio of exports and domestic sales is and will always be steady. There is no domestic market for Fusilliscope, as FE does

[10] Footnote 4 to Art.3.1(a) SCM; ABR, *Canada-Aircraft* [167-170]; ABR, *EC-Aircraft* [1.043-1.046]; *Mavroidis et al.* (2008), 416; *Van den Bossche (2013)*, 771.
[11] ABR, *Canada-Aircraft* [166, 171]; *Mavroidis et al.* (2008), 419; *Adamantopoulos & Akritidis* (2008), 480.
[12] PR, *Australia-Leather* [9.41, 9.56-9.57]; ABR, *EC-Aircraft* [1046-1047, 1051, 1086, 1094].
[13] ABR, *EC-Aircraft* [1045-1046, 1051]; ABR, *Canada-Aircraft* [171].
[14] PR, *Canada-Aircraft* [9.340].
[15] EMC^2 Case [10]; Clarifications 22, 29.
[16] PR, *Canada-Aircraft (21.5)* [5.29, 5.33, 5.34]; ABR, *EC-Aircraft* [1037-1039, 1044, 1094];
[17] PR, *Australia-Leather(21.5)* [9.67]; *Mavroidis et al.* (2008), 418; *Coppens* (2014), 123.
[18] EMC^2 Case [10]; Clarifications 22, 29.
[19] ABR, *EC-Aircraft* [1045, 1047, 1053, 1062, 1063]; *Coppens* (2014), 121.

not sell any device domestically.[20] Thus, any potential rise of exports in absolute numbers would not alter the ratio already existing; for, the domestic rate would always be zero.

3. An assessment of the factual circumstances debars a contingency finding

7. An objective assessment of the Eriadorian market, as Art.11 DSU dictates, refutes any assumption of export contingency.[21] In *Canada-Aircraft*, the Canadian aerospace sector exported a large proportion of its output, due to the small size of the Canadian domestic market.[22] Contrary, the RES sector in the highly diversified economy of Eriador is blooming and expected to further expand. This is due to the fact that Respondent is obliged under Art.11 FCPRE to ensure access to renewable energy for 50% of its population by 2020. Thus, the domestic absorption of FE's production was *far beyond the shadow of a doubt*.[23]

8. Furthermore, the distance between the granting of the subsidy and the actual or expected export sales decreases analogously the possibility of export contingency. And this distance is indeed vast in our case, since *even if* FE's plan to construct a second production facility was decisive for the granting, the awarded funds only facilitate the production *per se*.[24]

II. THE LOAN BY ERIBANK AND THE "IFF" GRANT DO NOT AMOUNT TO ACTIONABLE SUBSIDIES UNDER ARTS. 5(C) AND 6.3 (C) OF THE SCM AGREEMENT IN CONJUNCTION WITH XVI GATT

9. Pursuant to Art.5(c) SCM, subsidies under Art.1.1 & 2 SCM are not actionable unless they cause *"adverse effects to the interests of other Members i.e.{...} serious prejudice to the interests of another Member*" in the sense of Art.XVI:1 GATT. Art.6.3(c) SCM stipulates that serious prejudice *"may arise where {...} the effect of the subsidy is lost sales in the same market"*. In the present case, the Loan by Eribank and the "IFF" grant fail to meet the threshold of "*specific subsidy*" encapsulated in the chapeau of Art.5(c) SCM **(A)**, and, even *arguendo*, still do not cause serious prejudice in the form of lost sales **(B)**.[25]

A. Threshold issues

1. The Loan by Eribank does not amount to a "specific subsidy"

10. Borduria fails to discharge its burden of proving that the Loan was a *direct* government action under Art. 1.1(a)(1)(i) or an act of *entrustment or direction* under Art.1.1(a)(1)(iv) **(a)**, that any alleged *benefit* was conferred to FE **(b)**, and in any event, that the *specificity*

[20] EMC[2] Case [8, 10]; Clarifications 22, 26, 29, 130.
[21] PR, *Australia-Leather* [9.57].
[22] PR, *Canada-Aircraft* [9.340].
[23] PR, *Canada-Aircraft II* [7.372]; EMC[2] Case [1,3,10]; Clarifications 22, 31.
[24] ABR,*Canada-Aircraft* [174]; *Adamantopoulos & Akritidis (2008),* 481; Clarification 39; EMC[2] Case [12].
[25] PR, *US -Offset Act (Byrd Amendment)* [7.106]; PR,*US-Cotton Subsidies* [7.1392-7.1395].

requirement is not satisfied **(c)**.[26]

(a) The Loan by Eribank does not amount to a "subsidy" under Art.1 SCM

i. Eribank is not a public body providing financial contribution

11. It is the *vestment with governmental authority* that establishes an entity as a public body under Art.1.1(a) SCM.[27] Yet, absent sufficient evidence of *governmental functions* under the government's *meaningful control*, a finding of governmental authority is precluded.[28] Eribank functions as a private body, since it lacks *the effective power to regulate individuals* and particularly to direct private bodies under Art.1.1(iv) SCM.[29] For, it is a bank that, despite being majority owned by the government, performs *prima facie private* actions, namely commercial transactions by awarding private loans.[30] Emphasizing on this conclusion, the Korean government's *extensive control* over KEXIM constitutes a textbook example of the necessary degree of *meaningful control*. Particularly, the former *approved* and *regulated* KEXIM's operations. In stark contradistinction, Eriador through its Ministries merely consults Eribank, giving always a leeway to its director's discretion.[31]

ii. Eribank is neither a private body entrusted or directed by the government

12. Eribank is indeed a private body; yet, it is not one that the government *entrusted* with the responsibility, or *directed* to, exercise governmental authority, as a proxy under Art.1.1(a)(1)(iv) SCM.[32] Entrustment or direction connotes a *requisite link* between the government and the measure in question beyond *mere encouragement*, resulting to *threat or inducement*.[33] In this case, Eriador under its broad regulatory powers, falling outside the narrow scope of Art.1.1(a)(1)(iv), offers policy oriented consultations upon request to Eribank.[34] Withal, Eriador's majority ownership of Eribank is not tantamount to *actual exercise of shareholding power*, thus precluding a finding under Art.1.1(a)(iv) SCM.[35]

(b) Any benefit deriving from the Loan did not pass-through to FE

13. Even if accepting the doubtful premise that the Loan is a governmental financial contribution, still, any purported benefit is extinguished.[36] Since, the *finite useful life* of a

[26] *Clarke and Horlick* (2005), 689.
[27] ABR, *US-AD & CVD (China)* [317]; ABR, *US-Carbon Steel* [4.2]; *Ding* (2014), 176.
[28] ABR, *US-AD & CVD (China)* [317]; *Coppens* (2014), 52; *Ding* (2014), 176.
[29] ABR, *Canada-Dairy* [97]; ABR, *US-AD & CVD (China)* [290-292]; ABR, *US-Carbon Steel* [4.18].
[30] ABR, *US – DRAMS* [footnote 179 to 112]; ABR, *US-AD & CVD (China)* [318]; *Ding* (2014), 174; EMC^2 Case [6]; Clarification 71.
[31] PR, *Korea-Commercial Vessels* [7.53]; EMC^2 Case [6].
[32] ABR, *US-DRAMS* [116]; *Hagermeyer* (2014) 270.
[33] ABR, *US-DRAMS* [116]; ABR, *US-AD & CVD (China)* [114, 318]; *Ding* (2014), 170.
[34] ABR, *US-DRAMS* [115, 116]; EMC^2 Case [6]; Clarification 71.
[35] PR, *EC-DRAMS* [7.119-7.120].
[36] EMC^2 Case [15]; Clarification 82, 152.

non-recurring financial contribution may be terminated due to the intervening event of a change in ownership.[37] Two conditions are necessary: *first*, the complete transfer of ownership and control and *second,* an arm's length transaction of the company's assets in full market value.[38] This principle of *benefit extinction*, initially introduced in privatization cases as a rebuttable presumption,[39] is transposed to *private-to-private sales* and even considered absolute, given the reasonable competitive relationships created therein.[40] CleanTech's Fusilliscope division of business, including production facility, IP rights and the loan as a unit of wealth embodied in its financial assets,[41] changed ownership, and complete control was transferred to FE after a purchase on full market value.[42] Therefore any benefit deriving from the Loan is in fact amortized.

(c) In any event, the Loan by Eribank does constitute a "specific" subsidy under Art.2 SCM

14. Complainant bears the burden to bring in positive evidence for establishing specificity; in the present case, it is apparent that the Loan is neither *de jure* nor *de facto* specific,[43] as there was neither limited nor predominant or disproportionate use of Eribank's funds.[44] *First*, Eribank's decision to award CleanTech the Loan did not expressly exclude other possible beneficiaries from *eligibility*, while the interference of *neutral* and *economic in nature* criteria of the firm project's commercial viability and prospect advantages signify availability.[45] *Second*, the surrounding facts indicate that the Loan to CleanTech constitutes merely a strand of any commercial bank's actions, namely loans on either standard or flexible terms.[46]

2. The "IFF" grant does not amount to a "specific subsidy"

(a) The "IFF" grant does not amount to a "subsidy" under Art.1 SCM

15. The Respondent wishes to adhere to its aforementioned argumentation under section I, concerning the lack of benefit for FE deriving from the "IFF" grant.

(b) The "IFF" grant is not a "specific" subsidy under Art.2 SCM

16. The *non-specificity* of the grant is established by virtue of the general "IFF" Program, namely a regulatory mechanism offering grants to enterprises for the overarching purpose of

[37] ABR; *US-CVDs on EC products* [84]; ABR, *EC-Aircraft* [707, 708, 710].
[38] ABR, *US-Lead Bars* [62]; ABR; *US-CVDs on EC products* [127]; ABR, *EC-Aircraft* [726(b), 729]; *Wu* (2008), 141.
[39] ABR, *US-CVDs on EC products* [126]; *Van den Bossche/Zdouc* (2013), 763.
[40] ABR, *US-CVDs on EC products* [124]; ABR, *EC-Aircraft* [59, 733]; *Coppens* (2014), footnote 78 to 472.
[41] *Rutherford* (2002), 43.
[42] ABR, *US-CVDs on EC products* [122]; EMC^2 Case [7].
[43] Art.2.4 SCM; PR, *EC-DRAMS* [7.226, 7.272]; *Evtimov* (2008), 68.
[44] PR, *US - Lumber CVDs Final* (2004), [7.124], *Van den Bossche & Zdouc* (2013), 768.
[45] Footnote 2 to Art.2.1(b) SCM; ABR, *US - AD & CVD (China)* [368, 372]; ABR, *EC-Aircraft* [951, 952]; *Van den Bossche & Zdouc* (2013), 764; EMC^2 Case [6].
[46] ABR, *US - AD & CVD (China)*[366-371].Clarifications 71, 101.

the state's global economic integration and sustainability.[47] *In casu*, any specificity allegation is meritless. The "*group of industries"* threshold stemming from the *chapeau* of Art.2 SCM and mirroring the *ratio* that only discriminatory government intervention falls under the disciplines of the Agreement, is not met *in casu*. In fact, 90% of the Program funds were disbursed to the renewable energy sector.[48] Yet, the *renewable energy sector* includes a variety of industry groups operating in the branches of equipment production, development of clean technologies, as well as services for the generation, collection or transmission of energy from renewable sources.[49] Hence, an equation of the quantitatively superior renewable energy sector with a single group of industries would lead to an inequitable enlargement of the member-states ability to take actions against subsidies.[50]

B. In any event, the Loan by Eribank and the "IFF" grant do not cause serious prejudice under Art.5(c) and 6.3(c) SCM in conjunction with XVI GATT

17. According to Art.5(c) SCM in conjunction with XVI GATT,[51] specific subsidies that do not cause adverse effects, as defined in Art.6.3 SCM, shall not be deemed to be actionable.[52] A rebuttal of Complainant's allegations of serious prejudice in the form of lost sales under Art.6.3(c) SCM requires a twofold inquiry: a demonstration that *lost sales* in the relevant Carpathian *market* did not occur **(1)** and, in any event, a display that lost sales are not the "*effect of*" the Loan and the grant **(2)**.[53]

1. The market phenomenon did not occur

(a) Fussiliscope device and solar panels do not compete in "the same market"

18. "*Lost sales*" must be located in the same market, as a forum of competition, no geographical restrictions attached.[54] Yet, there is no competitive relationship between Solar PVs' and Fusilliscopes', as indicated by the lack of *demand and supply-side substitutability*.[55] Concerning *demand-side*, the two device-products are used in completely different technologies and types of renewable energy production processes. Thus, they cannot be substituted by their buyers, namely electricity distributors, without refocusing their whole investment planning.[56] On top of that, solar PVs and nuclear generation equipment are not

[47] PR, *EC-Aircraft* [7.1566]; ABR, *US-Aircraft* [752]; EMC^2 Case [10]; Clarification 22.
[48] ABR, *US - AD & CVD (China)* [367]; ABR, *EC-Aircraft* [943]; EMC^2 Case [2, 10].
[49] UNDoc.ST/ESA/STAT/M/4/Rev.4, 166; UNCTAD/DITC/2003/, 368-369; *Bougette & Charlier* (2014), 3.
[50] *Guzman & Sykes* (2007), 22; *Windon* (2010), 214; *Van den Bossche & Zdouc* (2013), 764.
[51] Footnote 13 to Art.5 SCM.
[52] *Van den Bossche & Zdouc* (2013) 786.
[53] ABR, *EC-Aircraft* [1220]; *Durling* (2008), 8.
[54] ABR, *US-Cotton Subsidies* [406]; *Pierola* (2008), 513-514; *Van den Bossche & Zdouc* (2013), 787.
[55] ABR, *US-Cotton Subsidies* [407]; ABR, *EC-Aircraft* [1120].
[56] EMC^2 Case [14]; ABR, *US-Aircraft* [1.121].

supply-side competitive, as *first* nuclear electricity is steady while electricity produced by solar PV is intermittent, and *second* Fusilliscope, contrary to solar PVs, has high dispatchability and flexibility in providing base-, intermediate- and peak-load electricity.[57]

(b) SolarTech did not incur "loss of sales"

19. Pursuant to 6.3(c), sales that one firm *failed to obtain* account for "lost" if *won instead* by the subsidy recipient.[58] However, electricity equipment sales were never won by FE instead of SolarTech. *First*, FE merely opened a commercial dialogue with Elektrica, and made a price offer for its products.[59] *Second*, SolarTech was never to obtain the sales *instead*. Since, it only signed an MoU with Elektrica, which is considered a "*noncommittal writing not meant to be binding or hinder the parties from bargaining with a third party"*.[60]

2. The alleged "*lost sales*" are not the "*effect of*" the Loan and the "IFF" grant

20. The "effect of" requirement of Art.6.3 SCM encapsulates Complainant's burden to furnish a *genuine and substantial* causal relationship between the two challenged measures and the phenomenon.[61] Under 6.3(c) SCM, such a relationship cannot be established when the alleged subsidy does not affect the recipient's commercial behaviour, namely *price reduction* capability, and when the latter cannot explain the loss of sales. In the present case, SolarTech's alleged lost sales are not "the effect" of the Loan by Eribank and the "IFF" grant, as these alleged "subsidies" cannot be cumulatively assessed (**a**), and neither the Loan by itself (**b**) nor the "IFF" grant (**c**), triggered the price reduction. In any case, Respondent submits that the price reduction was not decisive for FE's asserted successful sales (**d**).[62]

(a) Complainant's attempt to bundle the Loan and the "IFF" grant is inapposite

21. Individual subsidies interacting with the product in question under distinct causal mechanisms, in light of the relevant circumstances, should not be cumulative assessed.[63] Similarly to R&TD and LA/MSF in *EC-Aircraft*, the Loan opted to the quicker development of the pre-competitive Fusilliscope technology, while the grant operated for the sake of cold fusion's commercial expansion in the Eriadorian economy;[64] hence, it is not appropriate to cumulatively assess them as alleged subsidies.

(b) The Loan by Eribank is not genuinely linked to the 50% price reduction

[57] PR, *Canada-Renewable Energy*, [7.323]; ABR, *Canada-Renewable Energy* [4.3]; Clarifications 94, 100.
[58] ABR, *EC-Aircraft* [1214, 1217, 1220]; ABR, *US-Aircraft* [243]; *Coppens* (2014), 161.
[59].EMC^2 Case [14].
[60] *Black's Law* [988].
[61] ABR, *US-Cotton Subsidies* [372, 374].
[62] ABR,*US-Aircraft* [1260].
[63] ABR,*US-Aircraft* [1285, 1291, 1298]; *Van den Bossche* & *Zdouc* (2013) 807.
[64] ABR, *EC-Aircraft* [1407]; EMC^2 Case [6, 10].

22. Complainant must grapple with establishing the necessary causal relationship, as a counterfactual storytelling only denotes that the link between the Loan and FE's subsequent choice to drop prices in the Carpathian market is too *remote* and *diluted* by intervening events.[65] *First*, the passage five years from the disbursement of the Loan to the occurrence of the alleged lost sales, advocates for remoteness. *Second*, CleanTech is a purely technology company, while SolarTech produces and sells solar PVs. *Ergo*, there is conceptual distance between CleanTech and SolarTech's activities, so that the causal link is severely diluted.[66]

(c) The "IFF" grant is not substantially linked to the 50% price reduction

23. In the same vein, a *non-attribution* analysis, as Art.15.5 SCM dictates, in fact evidences that the chain of causation between the price reduction and the "IFF" grant is deeply corroded.[67] The intermediate ring, namely the second production facility, can be *merely correlated* to the 50% discount.[68] For, even if the grant is considered to have substantially led to the creation of the second production facility, a rise of production is not followed by an equal cost reduction, as demanded by the *law of diminishing returns*. The doubled Fussilliscope production is not followed by an equal ability of FE to offer a reduced price, due to the significant rise of the variable costs of the various components of the product.[69]

(d) In any event, Elektrica choosing FE cannot be explained by the 50% price reduction

24. Some sales campaigns are shaped by substantial non-price factors, thus being less sensitive to price changes.[70] Regarding electricity equipment trade, generation peculiarities of each equipment and developments in technology constitute the core of the relevant markets, which are consequently inherently inelastic.[71] The decision of Elektrica was based on Fusilliscope's high dispatchability, flexibility, lower operational costs and the lack of a need for a privileged location like solar panel arrays.[72] For, price reduction is used to promote a comparatively disadvantaged product; yet, given Fusilliscope's advantages, the 50% reduction was, in Poker terms', the "9" in a "4 to 8" straight flush.[73]

III. THE LONG TERM PURCHASE AGREEMENT PURSUANT TO THE FIT SCHEME DOES NOT AMOUNT TO AN ACTIONABLE SUBSIDY UNDER ARTS. 5(C) AND 6.3 (A) OF THE SCM

[65] ABR,*EC-Aircraft* [713, 1233].
[66] PR, *Korea-Commercial Vessels* [7.560]; EMC^2 Case, [4, 5, 6, 7, 14].
[67] ABR, *US-Cotton Subsidies* [438]; ABR, *US-Cotton Subsidies (21.5)* [372].
[68] ABR, *US-Cotton Subsidies* [436, 451]; Clarification 6.
[69] *Mankiw* (2004), 275, 539; EMC^2 Case [13]; Clarification 114.
[70] ABR,*US-Aircraft* [1266-1267, 1539-1540]; ABR, *US-Hot Rolled Steel* [222]; PR, *Thailand- Steel* [7.223]; PR, *EC-Salmon (Norway)* [7.660]; *Ahn & Moon* (2010) 1033.
[71] PR,*Canada-Renewable Energy* [7.202]; *Keppler et al.* (2007), 51; *Mavroidis et al.* (2008) 124.
[72] ABR, *US-Cotton Subsidies* [440]; Clarifications 10, 94, 94, 137, 115, 121.
[73] ABR,*US-Aircraft* [1258].

AGREEMENT IN CONJUNCTION WITH XVI:1 GATT

25. Pursuant to Arts.5(c) and 6.3(a) SCM, in conjunction with Art.XVI:1 GATT, "*serious prejudice*", as a form of adverse effects, *"may arise where {...} the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member"*. However, the LTPA is not an actionable subsidy which falls under the *chapeau* of Art.5(c) SCM, since it is a purchase of goods that neither confers a benefit **(A)**, nor qualifies as specific subsidy **(B)**; and, in any event, it does not cause serious prejudice to Borduria's interests in the form of displacement or impedance **(C)**.[74]

A. The LTPA does not amount to a "*subsidy*" under Art.1 SCM

26. Eriador in 2012 introduced the FIT Scheme and concluded the LPTA with FE.[75] Yet, even if *arguendo* the LTPA is a "*financial contribution"* in the form of a purchase of goods under Art.1.1(a)(iii) SCM,[76] still it does not *in and of itself* amount to a subsidy,[77] since no benefit is conferred to FE.[78] A "*benefit*" assessment as a trade distorting potential,[79] enshrines market considerations,[80] regarding competitiveness and substitutability.[81] Particularly, a benefit flowing from a purchase of goods by a government must be *more than adequate* compared to an appropriate benchmark reflecting the *relevant market's* prevailing conditions.[82]

1. The relevant market for the benefit analysis is the newly government created cold fusion generated electricity market

27. In a context similar to this case, the AB in *Canada-Renewable Energy* found that Ontario's FIT Scheme and contracts defined the government's supply-mix and led to *the creation of two new separate markets*: the wind and solar PV markets. Drawing from the supply side, the AB decided on the predominance of supply side differences, such as costs and characteristics, in the assessment of the *relevant market* under Art.1.1(b) SCM. [83] The AB set the *axiom* that a policy driven supply-mix not only precludes substitutability between

[74] PR, *US -Offset Act (Byrd Amendment)* [7.106]; PR, *Indonesia - Autos* [14.254-14.255].
[75] EMC^2 Case [2, 11]; Clarification 69.
[76] ABR, *Canada-Renewable Energy* [5.128]; *Charnovitz & Fischer* (2014), 19.
[77] *Peat* (2012), 56.
[78] PR, *US-Export Restraints* [8.63]; ABR, *Canada-Aircraft* [154]; ABR, *Brazil-Aircraft* [157]; ABR, *EC–Aircraft* [972-975]; ABR, *Canada-Renewable Energy* [5.165].
[79] ABR, *Canada-Aircraft* [157]; *Wilke* (2011), 9.
[80] PR, *Brazil-Aircraft* [7.427]; ABR, *Canada-Aircraft* [157-158]; PR, *Korea-Commercial Vessels* [7.427]; ABR, *Japan-DRAMS* [225]; PR, *EC-DRAMS* [2.225]; ABR, *EC-Aircraft* [705]; PR, *US-Aircraft* [7.475]; *Genest* (2014), 251.
[81] ABR, *Korea-Alcohol* [114]; ABR, *US-Cotton Subsidies* [407]; ABR, *EC-Aircraft* [1120].
[82] Art.14(d) SCM; ABR, *Brazil-Aircraft* [7.24]; ABR, *Canada-Aircraft* [154-157]; PR, *Korea-Commercial Vessels* [7.427]; ABR, *EC-Aircraft* [705].
[83] ABR, *Canada-Renewable* [5.174]; *Genest* (2014), 249; *Pal* (2014), 128.

differently generated electricity products, but also *leads the way for market creation*.[84] In Eriador, the government has a long-standing supply-mix, while the relevant *in casu* cold fusion electricity has high capital and low variable costs, and also high dispatchability, thus being instrinsicly different from electricity generating through different sources.[85]

28. Further down the line, the AB in *Canada-Renewable Energy* substantiated its position on *market creation* when stating that a supply-mix followed by a financial contribution (in the form of a government purchase of goods) to a high-cost product with positive environmental externalities, unable to combat competition in the market, is what shapes a new market within the territory of the subsidizing state.[86] Contrary to Complainant's tenuous allegations, this is exactly what happened in Eriador. For, *first*, cold fusion electricity from its commercialization has been facing severe competitive constraints, thus facing a shaky marketing future; and *second*, in 2012 the government chose to define the supply-mix through the implementation of the FIT Scheme and the concomitant conclusion of the LTPA with FE for its cold fusion generated electricity.[87] Therefore, the relevant market for the benefit analysis is the *Eriadorian cold fusion generated electricity market*.

2. The remuneration provided by the LTPA was adequate compared to the market benchmark (C) found in the new market

29. The search for adequacy should be conducted within the contours of the newborn market, encompassing *what a hypothetical market would yield*.[88] Presently, the appropriate benchmark price is that calculated by the State of Eriador, namely (C).[89] The AB in *US-Carbon Steel* affirmed the usage of government related prices as benchmarks, albeit excluding the government price for the supported good in question.[90] Yet, in the novelty circumstances relating to creation of new markets, it is the government intervention that defines the parameters of the market; thus (C) being the appropriate benchmark.[91] In the same vein, FE received no advantage, given that, under the new market context the setting of prices by a government does not *ipso facto* confer a benefit.[92]

3. In any event, Borduria is estopped from alleging that the remuneration provided by

[84] ABR, *Canada-Renewable* [5.174, 5.175]; *Charnovitz & Fischer* (2014), 2; *Xing* (2014), 39.
[85] EMC^2 Case, [1, 2, 11, 13]; Clarifications 3, 94.
[86] ABR, *Canada-Renewable* [5.175, 5.189]; *Coppens* (2014), 457; *Pal* (2014), 136.
[87] EMC^2 Case, [2, 11, 13]; Clarifications 3, 21, 51, 55, 58, 60, 61, 64, 65, 69.
[88] ABR, *Canada-Renewable Energy* [5.190, 5.228, 5.234]; *Coppens* (2014), 454; *Rubini* (2014), 15; *Charnovitz & Fischer* (2014), 22.
[89] EMC^2 Case [11].
[90] ABR, *US-Carbon Steel* [4.168].
[91] ABR, *Canada-Renewable Energy* [5.189]; *Rubini* (2014), 14.
[92] ABR, *Canada-Renewable Energy* [5.228]; *Xing* (2014), 39.

the LTPA is more than adequate

30. Even if the wholesale electricity market is deemed *relevant* for the benefit analysis, the remuneration received by FE was adequate by virtue of the methodology used for the calculation of price (C),[93] relying on two coefficients: (M) and (X*Y).

(a) The coefficient (M)

31. (M) stands for the average daily electricity price in Eriador and thus offers a pricing outcome comparable with prices of unregulated market conditions.[94] Thus, since adequacy is to be determined by virtue of the prevailing market conditions,[95] any allegations of (C) surpassing the adequacy level, should be based on the return provided to FE through the estimation of the social costs of carbon.

(b) The coefficient (X*Y)

32. (X*Y) is an adder that stands for the social costs of carbon emitted in the production of electricity. Accordingly, it materializes Eriador's environmental policy choice of *internalizing the full costs of carbon*, encapsulated as undistortive government intervention in the Preamble to the FCPRE, to which Complainant is a state party.[96] Accordingly, it is Respondent's submission that Borduria is estopped from challenging FE's returns from the LTPA as a trade-distorting potential. Estoppel, as a general principle of international law, may find application in the present case, so as to guarantee the satisfactory settlement of WTO disputes.[97] Borduria's ratification of the FCPRE is a *clear and unambiguous statement* of consent to be bound thereby.[98] As a result, Eriador acted in *good faith reliance* and concluded the LTPA.[99] Yet, Borduria, challenging the measure as distortive, blows hot and cold to Eriador's *detriment*, possibly forcing it to withdraw or modify the measure at bar.[100]

33. In any event, Respondent further submits that Borduria's authoritative and valid consent firmly precludes any alleged inconsistency of the LTPA with SCM. To be sure, Respondent does not request this Panel to use Arts.20 and 45 ASR as *interpretative tools* under Art.31(3)(c) VCLT - the AB in *Peru-Agricultural Products* recently discarded such attempts.[101] Rather the customary principle of consent enshrined in Arts.20 and 45 ASR

[93] ABR, *Canada-Renewable Energy* [5.228].
[94] ABR, *US-AD & CVD (China)* [10.186]; ABR, *Canada-Renewable Energy* [5.233]; *Couture et al.* (2010), 66.
[95] ABR, *US-Lumber CVDs Final* [89]; ABR, *US-AD & CVD (China)* [10.186].
[96] EMC^2 Case [1,11]; Clarifications 17, 18, 19, 20, 21, 54, 59, 103
[97] Arts.3.4, 3.7 DSU; *Mitchell* (2008), 93; *Pauwelyn* (2003), 207-212; *Gourgourinis* (2015), 129-133.
[98] *Dörr* (2012), 185; *Mitchell* (2008), 117.
[99] PR, *Argentina-Poultry* [7.38-9]; PR, *Guatemala-Cement II* [8.23]; PR, *EC-Asbestos* [8.60]; *Mavroidis* (2008), 20.
[100] Art.7 SCM.
[101] ABR, *Peru-Agricultural Products* [5.101-5.105].

should be directly *applied* here as general international law,[102] since the WTO agreements, including the DSU, the SCM and the GATT, do not explicitly contract out from it.[103]

B. In any event, the LTPA does not amount to a "*specific subsidy*" under Art.2 SCM

34. Notwithstanding Complainant's burden of proof under Art.2.4 SCM, Respondent will demonstrate that the LTPA is non-specific, since both *de jure* and *de facto* specificity are not met.[104] EEC's contractual arrangements, namely financial contributions as the LTPA, awarded through different legal instruments are part of its broader regulatory contractual framework,[105] as they all serve the overarching purpose of the Eriadorian grid's stability and efficiency.[106] Thus, the overall framework is the basis for the present analysis.[107] *First*, there is no eligibility limitation on entering the electricity market, while the competitive processes employed qualify as economic and horizontally applied conditions.[108] *Second*, EEC's contractual procedures are widely open to all suppliers; have been resulting in a diversified allocation of the energy sectors market shares; and are driven by a competitive tendering mechanism.[109] Thus, absent explicit limitations, predominant use and disproportionate and discretionary granting, the LTPA does not satisfy the element of specificity.

C. Even if the Panel finds otherwise, the LTPA does not cause "*serious prejudice*" under Art.5(c) and 6.3(a) SCM in conjunction with XVI:1 GATT

35. Pursuant to Art.6.3(a) SCM, in order for displacement or impedance to result in serious prejudice, the products in question must be *"like products"* **(1)** and the occurrence of displacement and impedance as the "*effect of"* the alleged subsidy needs to be established **(2)**.[110] Yet, under an objective assessment of the facts the necessary causal link is manifestly absent.[111] In any event, Respondent submits that any alleged finding is precluded under Art.6.7(f) **(3)** .[112]

1. Conventional electricity and renewable electricity are not "*like products*"

36. Under Art.6.3(a) displacement or impedance refers to "like products", identical or closely

[102] *Gaja* (1981), 293; *Thirlway* (1995), footnote 18 to 73; ILC Commentary (2001), 163; *Abass* (2004), 213.
[103] PR, *Korea-Procurement* [7.96]; PR, *Canada – Continued Suspension* [7.336]; PR, *US – Continued Suspension* [7.336]; *Gourgourinis* (2015), 63-71.
[104] Art.2.4 SCM; PR, *EC-DRAMS* [7.226, 7.272]; *Evtimov* (2008), 68.
[105] PR, *EC-Aircraft* [7.1566]; ABR, *US-Aircraft* [752]; EMC^2 Case [3]; Clarification 53.
[106] ABR, *US-Aircraft* [752]; *Coppens* (2014), 103; EMC^2 Case [2].
[107] *Coppens* (2014), 104.
[108] ABR, *US-AD & CVD (China)* [372]; ABR, *US-Aircraft* [757]; EMC^2 Case [3].
[109] ABR, *US-AD & CVDs (China)* [371]; PR, *EC-Aircraft* [7.993]; PR, *US-Aircraft* [7.773]; ABR, *US-Aircraft* [878, 879]; *Van den Bossche & Zdouc* (2013), 767; EMC^2 Case [3, 13].
[110] PR, *Indonesia-Autos* [8.316]; ABR, *EC-Aircraft* [1160]; *Pierola* (2008), 510, 516.
[111] Art.11 DSU; PR, *Korea-Commercial Vessels* [7.560]; ABR, *US-Cotton Subsidies* [372, 374].
[112] PR, *EC-Aircraft* [7.1696].

resembling,[113] examined within the contours of the relevant market.[114] Regardless of electricity's physical similarities,[115] weight should be placed on consumers' preferences as reflected in competition,[116] seeing that the latter is not static in contemporary markets.[117] Presently, EEC's preferences at the wholesale level determined by the supply-mix advocate that RES and non-RES electricity products are not like. This is due to the fact that the agency distinguishes electricity products on the basis of each generation process' environmental impact.[118] This distinction is advocated by an interpretation of the term "like products",[119] in view of the WTO Agreement's object and purpose of sustainable development.[120] Cold fusion is a renewable energy source with almost zero carbon emissions based on nuclear reaction discharged by toxic by-products.[121] Thus, no allegation of adverse effects may stand.

2. No displacement or impedance as the "*the effect of*" the LTPA exists

37. "Displacement" and "impedance" encompass substitution as *the effect of* the asserted subsidy.[122] A decline in markets shares is only a preliminary assessment, as an affirmative conclusion requires a causality analysis.[123] The non-renewal of BEC's and EB's contracts (**a**) and the diminution of their market shares (**b**) do meet this standard.

(a) The non-renewal of the contracts does not qualify as impedance

38. EB and BEC's non-renewal of contracts does not qualify as impedance, since *counterfactually* these contracts would still not be renewed. Indeed, absent the FIT scheme, EEC, bound by the state's commitment to increase access to RES energy and ensure the stability and efficiency of the grid, would choose FE all over again.[124] As the advantages of the carbon-free, highly dispatchable cold fusion generation optimized under a long-term contract with high fixed prices expressly serves the pursuit of these objectives.[125]

(b) The diminution of Borduria's market shares does not qualify as displacement

39. No displacement can be identified in the contractual level, as the LTPA did not replace existing Bordurians' contracts, for no termination of contracts arised.[126] Any decline of EB

[113] Footnote 46 to Art. 15.1 SCM; ABR, *Japan-Alcohol* [22]; PR, *Indonesia-Autos* [14.175, 14.176].
[114] ABR, *EC-Aircraft* [1.118].
[115] ABR, *Canada-Renewable Energy* [5.170].
[116] ABR, *EC-Asbestos* [103, 117]; ABR, *Korea-Alcohol* [137]; ABR, *Japan-Alcohol*, 25; *Voigt* (2009), 220.
[117] *Condon* (2009), 13.
[118] ABR, *Canada-Renewable Energy* [5.176]; EMC^2 Case [2].
[119] VCLT Art.31,.1(a); DSU Art.3.2; ABR, *US-Gasoline*, 17; ABR, *Japan-Alcohol*, 34; *Voigt* (2009), 217, 220.
[120] ABR, *US-Gasoline*, 30; ABR, *US-Shrimp* [129-131]; ABR, *Brazil-Tyres* [156].
[121] EMC^2 Case [5].
[122] ABR, *US-Cotton Subsidies (21.5)* [372].
[123] ABR, *EC- Aircraft* [1109, 1120-1121, 1.134, 1.160, 1.162].
[124] ABR, *EC- Aircraft* [1.163]; EMC^2 Case [1, 3]; Clarification 92, 94.
[125] *Belyaev* (2011), 55; *Mäntysaari* (2015), 464-466.
[126] ABR, *EC-Aircraft* [1119].

and BEC's market shares is attached to their performance in the contractless spot market. FE is excluded from bidding processes operating therein, and accordingly, the mere temporal correlation of the market shares' decline and FE's performance in the wholesale market cannot level up to substitution.[127] Notably, it was the other spot market operators that preserved their shares at the expense of Bordurians. This can only be properly attributed to the traditional coal-fired generators' inherent disadvantage in spot market performance,[128] namely, the failure to follow the *development in technology*.[129]

3. In any case, a displacement or impedance finding is precluded under Art.6.7(f) SCM

40. An importing Member's failure to conform to standards and regulatory requirements in the importing country precludes, under Art.6.7(f), a finding of displacement or impedance.[130] The term "standards" should be interpreted in light of Art.31.1 VCLT as *a criterion of quality*.[131] Accordingly, a decline in the overall volume of market shares of the complaining Member, when the latter has disregarded the set standard of imports employed by the responding Member, serves for the rebuttal of serious prejudice.[132] *In casu*, the trend of employing various electricity generation technologies in Eriador and the government's supply-mix mandate with 30% RES proportion set the qualitative character to electricity imports. This is further underscored by the Eriadorian energy policy after FCPRE'S ratification.[133] Hence, Borduria's volume decline cannot be attributed to the LTPA.[134]

IV. IN ANY EVENT, ANY ALLEGED VIOLATION OF THE SCM AGREEMENT WOULD STILL BE JUSTIFIED UNDER ART.XX GATT

41. Even under the doubtful premise that Respondent did not comply with its WTO obligations, the measures at stake, implemented by virtue of its *inherent power to regulate*, would still be justified under the general exception of Art.XX(g) GATT. Accordingly, Respondent, *first*, submits in this regard that the General Exceptions of Art.XX GATT in principle apply to SCM claims (**1**). *Second*, and pursuant to the Art.XX's two-tiered analysis, the measures at issue fall under subparagraph (g), being "*related to*" the conservation of an "*exhaustible natural resource*" and implemented in parallel with *restrictions on domestic* producers in the energy sector (**2**). *Third*, Respondent acted in conformity with the

[127] EMC^2 Case [2, 3, 13]; Clarification 53.
[128] PR, *Canada-Renewable Energy* [7.16].
[129] PR, *Thailand- Steel* [7.223]; ABR, *US-Hot Rolled Steel* [222]; PR, *EC-Salmon (Norway)* [7.660]; *Ahn & Moon* (2010) 1033.
[130] PR, *EC-Aircraft* [7.1696, 7.1701]; PR, *US-Cotton Subsidies* [footnote 1503 to 7.1405].
[131] *Black's Law* (2004), 1535.
[132] PR, *Indonesia-Autos* [14.203]; PR, *Korea-Commercial Vessels* [7.586].
[133] EMC^2 Case [1, 2]; Clarification 3, 103, 122, 150.
[134] PR, *EC-Aircraft* [7.1697]; *Coppens* (2014), EMC^2 Case [11, 13]; Clarification 102.

requirements of the *chapeau* of Art.XX(g) GATT (**3**).

A. Art. XX GATT 1994 applies to SCM claims

42. The WTO covered agreements, GATT and SCM included, constitute a *single undertaking* of cumulative rights and obligations.[135] Arts.10 and 32.1 SCM do corroborate that specific action against subsidies can only be taken in conjunction with the GATT, Art.VI in specific;[136] and Complainant itself brings forth claims of alleged violations of Art. XVI:1 GATT.[137] Hence, following the AB's reasoning in *China-Audiovisual*, a "*discernable, objective link*" exists between the SCM claims brought forth here and Art.XX GATT.[138] In fact, any interpretation excluding recourse to Art.XX GATT in SCM claims would lead to a partial redundancy of Arts.10 and 32.1 SCM, contrary to the interpretative principle of *effet utile*;[139] it would significantly upset the balance of WTO Members' rights and obligations by denying them their right to subsidize environmental policies – an outcome that was not the intention of the drafters of the SCM; and, it would yield the *absurd* result that more trade restrictive measures, such as quotas, would enjoy a "safe harbor", while environmental subsidies would not.[140]

B. The measures in question fall under Art.XX(g) GATT

43. The Loan, the "IFF" grant and the LTPA aim at the conservation of clean air, as an "*exhaustible natural resource"*.[141] Furthermore, the Eriadorian measures are "*related to*" the aforementioned objective,[142] as a close and genuine relationship of *means and ends* arises from their design and structure. This is so, since the Loan and the grant primarily aimed to the development of Fusilliscope and the LTPA to the increase of the electricity supply through cold fusion, thus promoting RES energy and its positive externalities, as depicted also in Respondent obligations under the FCPRE.[143] Finally, the measures under examination were "*made effective in conjunction"* with the domestic restriction of the non-RES sector implemented by the government's supply-mix and the yearly mandate of RES electricity proportions, which is highlighted by the non-RES generators' market shares decline.[144]

C.The measures in question meet the requirements of the *chapeau* of Article XX GATT

[135] ABR, *Brazil- Coconut*, 12-13; ABR, *Korea-Dairy* [74, 75].
[136] ABR, *Brazil- Coconut*, 16; ABR, *US-Offset Act* [273].
[137] EMC^2 Case [16].
[138] ABR, *China-Audiovisual* [353].
[139] ABR, *US-Gasoline*, 23; ABR, *US-Offset Act* [271]; ABR,*Brazil-Tyres* [215]; *Lester* (2011), 367.
[140] ABR, *Japan-Alcohol*, 12; *Green* (2006), 408
[141] PR,*US-Gasoline* [6.37]; *Pauwelyn* (2008), 35; *Condon* (2009), 144; *Tran* (2010), 351.
[142] ABR, *US-Gasoline* [19]; ABR, *US-Shrimp* [136]; *Wolfrum* (2008) 462.
[143] ABR,*US-Shrimp* [135-137, 143-145]; ABR, *China-Raw Materials* [355]; ABR, *China-Rare Earths* [5.112].
[144] ABR, *US-Gasoline* [20-21]; *Van Den Bossche & Zdouc* (2013) 567; EMC^2 Case [1].

44. The examination of the challenged measures compliance with the "*horizontal conditions*" of the *chapeau,* as a prong of the two-tiered analysis stemming from Art.XX GATT, seen as a whole, supplements a finding of the measures' conformity with the specific conditions of the subparagraphs.[145] The measures at stake do not perturb the "*line of equilibrium*" required by the *chapeau*,[146] as they not discriminate, arbitrarily or unjustifiably between countries where the same conditions prevail (**a**)**;** nor do they constitute a disguised restriction on trade **(b)**.[147]

1. The measures do not constitute arbitrary or unjustifiable discrimination

45. The measures at stake comply with the non-discrimination requirement of the *chapeau*, as *no discrimination* between countries were the same conditions prevail arises.[148] They promote the State's policy of enhancing its population's access to RES energy and do not result to differentiating awarding of funds, to and among foreign actors. Particularly, the Loan was materialized under commercial considerations and without any formal eligibility requirements, as all the loans provided by Eribank. Likewise, the "IFF" grant was available to a highly differentiated applicant's pool, on no nationality basis, while the conclusion of a FIT contract was open to all cold fusion electricity generators.[149] In the same vein, the measures are not *"rigid and inflexible"*; thus debarring an allegation of arbitrariness.[150]

46. Moreover, the measures are justifiable, as they are rationally connected to the environmental objective pursued.[151] Further, the element of *good faith negotiations* regarding the conservation of clean air through the promotion of RES energy is fulfilled.[152] Borduria participated in the conclusion of the FCPRE in 2010, which crystallized both disputing parties' long-lasting intention to promote the positive externalities of renewable energy.

2. The measures do not constitute a disguised restriction on international trade

47. The justification of the challenged measures under Art.XX GATT in no way leads to an abuse of the general exception.[153] Since they are neither designed nor do they indeed raise barriers to trade.[154] This evidently provided by their design, architecture and structure, which reflects the state's widely known environmental objectives, enshrined in the FCPRE.[155]

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[145] ABR, *EC-Seal Products* [5.298]; *Bartels* (2014), 2-7.
[146] ABR, *US-Gasoline*, 22; ABR, *US-Shrimp,* [159]; *Bermann & Mavroidi*s (2006), 26.
[147] ABR, *EC- Seal Products* [5.296].
[148] ABR, *US-Shrimp(21.5)* [149]; ABR, *US-Tuna II (21.5)* [7.307-7.308]; *Bartels* (2014); 13.
[149] EMC[2] Case [6,10, 11]; Clarification 20, 22, 71, 101, 126.
[150] ABR,*US-Shrimp* [136].
[151] ABR, *Brazil-Tyres* [229].
[152] *Condon* (2004), 11.
[153] ABR, *US – Gasoline,* [25].
[154] PR, *US – Shrimp* (*21.5)* [5.142]; ABR, *Korea-Beef* [158]; PR, *Brazil–Tyres* [7.332].
[155] ABR, *Japan-Alcohol,* 121; PR, *EC-Asbestos* [8.236]; PR, *Brazil-Tyres* [7.330].

REQUEST FOR FINDINGS

For the above reasons, Eriador respectfully asks this Panel to find:

1. The "IFF" grant is neither a prohibited subsidy contingent in fact upon the export by FE of the Fusilliscope within the meaning of Art.3.1(a) SCM Agreement in conjunction with Article XVI:1 GATT, nor an actionable subsidy as it does not cause serious prejudice to the interests of Borduria in the sense of Article 5(c) SCM Agreement and Article XVI:1 GATT in the form of lost sales of solar panels in the Carpathian market for energy generation equipment within the meaning of Article 6.3(c) SCM Agreement

and

2. The Loan by Eribank is not an actionable subsidy as it does not cause serious prejudice to the interests of Borduria in the sense of Article 5(c) SCM Agreement and Article XVI:1 GATT 1994 in the form of lost sales of solar panels in the Carpathian market for energy generation equipment under Article 6.3(c) SCM Agreement

and

3. The LTPA between FE and EEC, concluded pursuant to the FIT Scheme Eribank is not an actionable subsidy as it does not cause serious prejudice to the interests of Borduria in the sense of Article 5(c) SCM Agreement and Article XVI:1 GATT in the form of displacement or impedance of imports of electricity from Borduria into Eriador under Article 6.3(a) SCM Agreement

and, in any event,

4. That any alleged inconsistency of the "IFF" grant, the Loan by Eribank and the LTPA are justified pursuant to Article XX(g) GATT and consistent with the prerequisites of the *chapeau* of Article XX GATT.

Therefore, Eriador requests the Panel to make no recommendation to the Dispute Settlement Body, as Respondent is in full conformity with its WTO obligations.